

United Food and Commercial Workers Union Local No. 367, Chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC (Quality Food Centers, Inc.) and Cinnabon, Inc. Case 19–CC–1950

April 4, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

The issue presented in this case is whether the Respondent Union¹ violated Section 8(b)(4)(ii)(B) of the Act by filing a grievance and demanding arbitration against Quality Food Centers, Inc. (QFC), with an unlawful secondary objective of forcing QFC to cease doing business with Cinnabon, Inc. (Cinnabon). Unlike our dissenting colleague, we agree with the judge’s analysis and find that the Respondent’s conduct was directed at a neutral party, QFC, and was tactically calculated to achieve union objectives vis-à-vis Cinnabon and outside the Respondent’s contractual relationship with QFC.²

The Board has considered the exceptions in light of the record and briefs and has decided to affirm the judge’s rulings,³ findings,⁴ and conclusions and to adopt the recommended Order as modified.⁵

The facts are fully set forth in the judge’s decision and briefly summarized here. QFC operates retail grocery stores in the Seattle, Washington area. In March 1995, QFC purchased from another grocery retailer the Gig Harbor store involved in this proceeding. QFC agreed to apply the terms of the existing collective-bargaining agreement between the previous owner and the Respondent. QFC and the Respondent thereafter executed a contract effective from April 30, 1995, to May 3, 1998,

pursuant to which the Respondent represents a bargaining unit of employees at QFC’s two locations (Gig Harbor and Northshore) in Pierce County, Washington.⁶

Cinnabon operates a self-contained retail store within QFC’s Gig Harbor location pursuant to a sublease (hereafter lease) entered into with QFC in September 1995. On December 14, 1995, the Respondent filed a grievance against QFC demanding assurances that the handling of bakery merchandise will be performed only by bargaining unit employees in the future. The Respondent thereafter sought to arbitrate the grievance. The “bakery merchandise” work sought by the Respondent refers to the following work currently performed by Cinnabon employees within the leased space: the preparation, production, packaging, and selling of Cinnabon’s proprietary baked goods, as well as proprietary coffee drinks and other beverage products. No party disputes the judge’s finding that the Cinnabon store is a completely separate entity from QFC.⁷

We agree with the judge’s conclusion that the Respondent has failed to present a colorable contractual claim to the work in controversy. The collective-bargaining provision set forth above implicitly excludes from the bargaining unit concessions not “under the direct control of” QFC. Indeed, the Respondent concedes in its brief that it is “correct to conclude that concessions not under QFC’s direct control are excluded from the bargaining unit by implication.” And it further conceded at the hearing that Cinnabon is not under the direct control of QFC. Given these concessions from the Respondent, we find that the only reasonable interpretation of the next sentence of the

⁶ The collective-bargaining agreement provides:

ARTICLE 1—RECOGNITION AND BARGAINING UNIT

1.1 Quality Food Center, d/b/a QFC hereby recognizes United Food and Commercial Workers Union Local No. 367 as the sole and exclusive Collective Bargaining Agency for a unit consisting of all employees employed in the Employer’s present and future grocery stores, including concessions under the direct control of the Employer party to this Agreement, located in Pierce County, State of Washington, with respect to rates of pay, hours, and other conditions of employment except and excluding employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended. Subject to the preceding exclusions and the terms of Section 15.1 of Article 15, all work of handling and selling of merchandise in such retail stores covered by this Agreement shall be performed only by employees of the Employer within the unit referred to above for which United Food and Commercial Workers Union Local No. 367 is recognized as the sole Collective Bargaining Agency by the Employers.

⁷ We disavow the judge’s statement, at fn. 11 of his decision, that the Respondent had made no claim to work performed by other concessionaires of QFC. The record shows that the Respondent’s grievance also made a claim for the work performed by the Chinese Kitchen concession in the store.

¹ United Food and Commercial Workers Union Local No. 367, Chartered By United Food and Commercial Workers International Union, AFL–CIO, CLC (Respondent or Union).

² On March 11, 1998, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and QFC each filed an answering brief, to which the Respondent filed separate reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

³ We grant the General Counsel’s unopposed motion to correct inadvertent typographical errors in the judge’s decision.

⁴ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁵ We shall modify the judge’s recommended Order to comport with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

contract, which preserves certain work for unit employees “[s]ubject to the preceding exclusions,” is that the work performed by Cinnabon employees is excluded, i.e., because the Cinnabon employees constitute one of the “preceding exclusions,” any work they perform is plainly outside the scope of the work preservation clause.⁸ Thus, the judge correctly concluded that, because the Respondent cannot seek to preserve work that is specifically excluded from the work preservation clause,⁹ the contract interpretation sought by the Respondent “would illegally extend the contract to reach outside the contractual bargaining unit.” *Service Employees Local 32B–32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995), *enfg.* in relevant part 313 NLRB 392 (1993) (condemning union’s grievance filing as an unfair labor practice because of this illegal objective).¹⁰

We further agree with the judge, for the reasons set forth by him, that the work in controversy is not fairly claimable by the Respondent. The record shows that unit employees, during the entire tenure of the relationship between QFC and the Respondent at the Pierce County locations covered by the contract, have *never* performed baking duties similar to those performed by Cinnabon employees. The only exception was for a brief transition period when QFC purchased the Gig Harbor store. The judge correctly observed that such a temporary period is insufficient to establish that the Cinnabon work is fairly claimable. *Id.*, 68 F.3d at 494. Further, as the judge correctly highlighted, there is a clear distinction between unit work and the work in controversy in that unit employees do not perform actual bake-off duties, as do Cinnabon employees.¹¹ The record indeed shows that the QFC Gig Harbor store is not even equipped with bake-off ovens outside of the equipment in the leased space and under the exclusive control and ownership of Cinnabon. The work performed by Cinnabon employees is

sufficiently different from that of unit employees to preclude a finding that it is fairly claimable.¹²

To be sure, the Respondent’s work preservation defense must be analyzed in light of the “traditional scope of the bargaining unit’s work as evidenced by the contractual recognition clause and the history of the parties’ conduct under it.” *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990). Here, however, the contractual recognition clause excludes from unit work concessions, such as Cinnabon, not under the direct control of QFC, and unit employees have never meaningfully performed at the QFC Gig Harbor store the type of work in controversy.

To establish a work preservation defense, a union must show that the employer had the right to control the assignment of the work. Here, however, because the Respondent has failed to show that the work is fairly claimable, QFC’s right to control the work is irrelevant. The right to control test resolves—after the work has been found to be fairly claimable—whether the union exerted pressure on the proper (primary) employer.¹³

In any event, assuming *arguendo* that it is necessary to reach the right to control test, we agree with the judge that it is not satisfied in this case. The record evidence fully supports the judge’s finding that QFC has no power or authority, under the terms of the lease, to assign to its employees the work in controversy. This is not, moreover, a case in which the employer has improperly surrendered control to avoid its contractual obligations to the union. QFC has *never* had the authority to perform or assign the disputed work involving handling and selling of Cinnabon’s proprietary products, and thus it had no control to surrender.¹⁴ We emphasize that the parties’ collective-bargaining agreement exempts from the bargaining unit concessions not under QFC’s direct control. By entering into the lease, QFC has not circumvented in some manner the collective-bargaining agreement. In-

⁸ We disagree with our colleague’s contention that our interpretation of the work preservation clause allows QFC to assign “any and all unit work” to nonunit employees. Our interpretation of the clause is addressed to the particular circumstances of this case where, as discussed *infra*, there has been no diminution of unit work as a result of QFC’s concession agreement with Cinnabon and where the work is clearly different from that performed by unit employees.

⁹ Any ambiguity in the contractual work preservation language perceived by the dissent is thus irrelevant, because it is only bargaining unit work that may be preserved. In view of the plain meaning of the contract provision, extrinsic evidence to be adduced at an arbitral proceeding is unnecessary.

¹⁰ Notwithstanding the dissent’s attempt to distinguish *Local 32B–32J*, it clearly supports our finding that the pursuit of such a grievance can indeed violate Section 8(b)(4) of the Act.

¹¹ Cinnabon is considered to be engaged in a “bake-off” operation because its employees do not produce bakery products from scratch dough, but rather “bake off” dough that is shipped to Cinnabon by another company.

¹² See *Retail Wholesale Union Local 324 (Ralph’s Grocery Co.)*, 235 NLRB 711, 712 (1978) (work performed in self-contained leased photography specialty shop requiring active and specialized sales and photographic customer assistance, not fairly claimable where unit employees merely handled and sold film and flashcubes); *Local 282, Teamsters (Fortunato, Inc.)*, 197 NLRB 673, 678 (1972) (driving work performed by unit employees considerably more limited than driving duties sought and thus not fairly claimable).

¹³ *Service Employees Local 32B–32J*, *supra*, 68 F.3d at 495 fn. 5 (the right to control doctrine developed in cases where it was undisputed that the work in question had been traditionally performed by bargaining unit members).

¹⁴ On this basis, *Pipefitters Local 120 (Mechanical Contractors’ Assn.)*, 168 NLRB 991, 992 (1967), cited by the dissent, is distinguishable. In that case, the employer was given control of the work in issue, but voluntarily withheld the work from the union. By contrast, in the instant case, as stated above, QFC never had control over the assignment of the Cinnabon work.

deed, there is no contention that the contract prohibits QFC from entering into lease agreements. Accordingly, in agreement with the judge, we find that examination of all the circumstances surrounding the Cinnabon work in controversy establishes that the right to control test has not been satisfied. *NLRB v. Pipefitters*, 429 U.S. 507, 524 (1977).¹⁵

Finally, the record is devoid of evidence indicating any diminution of unit work. We agree with the judge in these circumstances that the Respondent has engaged in activity not as a shield to preserve unit members' jobs, but to reach out to monopolize jobs when their own unit jobs are not threatened. *NLRB v. Longshoremen*, 473 U.S. 61, 75–76 (1985); *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 630 (1967). The “commonsense inference” to be drawn from all the record evidence is that, because QFC has no power to assign the work in controversy, the Respondent’s grievance-arbitration was not addressed to the labor relations of the contracting Employer QFC vis-à-vis its own employees, but was calculated to satisfy union objectives elsewhere vis-à-vis Cinnabon.¹⁶ *NLRB v. Pipefitters*, supra, 429 U.S. at 531.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Food and Commercial Workers Union Local No. 367, chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC, Tacoma, Washington, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 19,

¹⁵ “The rationale of the [right to control] test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the [union’s conduct] has a secondary objective, that is, to influence whoever does have such power over the work.” *NLRB v. Longshoremen*, 447 U.S. 490, 504–505 (1980). The judge cited various bases, including, inter alia, credited evidence, to support his finding of an unlawful secondary objective. The dissent takes issue with some of these findings. It is not necessary to find that the sole object of the union’s conduct was secondary in order to find a violation of Sec. 8(b)(4)(ii)(B), however, so long as one of the union’s objectives is to exert improper influence on secondary or neutral parties. *NLRB v. Pipefitters*, supra at 530 fn. 17; *Service Employees Local 32B-32J (Nevins Realty)*, supra, 313 NLRB at 397.

¹⁶ We agree with the judge’s recommended remedy that the Respondent reimburse QFC for all reasonable expenses and legal fees, with interest, incurred in defending against the grievance-arbitration. *Service Employees v. NLRB*, supra, 68 F.3d at 496 (court enforced Board’s reimbursement remedy for unlawful arbitration).

after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.”

2. Substitute the following for paragraph 2(e).

“(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, concurring.

I agree with the majority opinion. However, I wish to make certain additional points. They are set forth below.

Article I of the contract contains a recognition clause (first sentence) and an alleged work preservation clause (second sentence). The recognition clause sets forth the unit. The unit includes “concessions under the direct control of the Employer.” The unit thereby implicitly excludes concessions that are *not* under the direct control of the Employer. It is clear, and the dissent concedes, that Cinnabon is a concession that is not under the direct control of the Employer. Thus, these employees are excluded from the unit. The unit also expressly excludes employees of the Employer in four departments.

The alleged work preservation clause begins with the word, “subject to the preceding exclusions.” The dissent says that the phrase “preceding exclusions” refers to the Employer’s employees in the four departments. I agree that the phrase can be read that way. However, it does not follow that the alleged work preservation clause covers concessions that are not under the direct control of the Employer. For, as discussed supra, they are not unit employees, and not even employees of the Employer. In short, the phrase “subject to the preceding exclusions” was necessary to make it clear that certain work of employees of the Employer was excluded from the work preservation clause. It was not necessary to state the obvious, i.e., that nonunit work performed by employees of a different employer, and not controlled by the Employer, is not preserved by the unit work preservation clause. The dissent’s reading of the clause is anomalous. Under that reading, nonunit work performed by employees of the Employer is not preserved but nonunit work performed by a different employer (and not even controlled by the Employer) would be preserved.

The dissent quarrels with my statement of the obvious proposition that the work of the Cinnabon employees is

nonunit work. As discussed above, the contract excludes concessions that are not under the direct control of the Employer, and the dissent concedes that Cinnabon is such a concession. Thus, the work is not unit work.

Of course, that does not end the inquiry. Work that is not unit work, but which is “fairly claimable” by the Union, can be the lawful subject of a work preservation clause. I conclude that the Cinnabon work is not fairly claimable.

In addition, quite apart from my interpretation of the clause, it is clear, under Section 8(e), that the parties to an agreement cannot use the agreement to reach out to capture work that is not fairly claimable work. As the majority opinion makes clear, the Cinnabon work is not fairly claimable unit work. It is wholly different from the bakery work that was once briefly performed by unit employees.

Further, even if the work was once fairly claimable because unit employees once performed bakery work, the Employer lacks control of the Cinnabon work. The dissent claims that the Employer had the power not to enter into the lease with Cinnabon, and that it had control in that sense. However, the lease was not attacked as unlawful, and the Union, in the 1995 contract, agreed that work that is not under the Employer’s control is not unit work.

Finally, the dissent says that the Union has a colorable contractual claim and should be permitted to pursue it. However, under Section 8(e), if the contractual claim is for an award that is unlawful under Section 8(e), the claim is unlawful. That is the situation here. That is, if the contract is construed as the Union wishes, the result would be to regulate the work assignment of Cinnabon, a separate company over whom the Employer has no control.

MEMBER LIEBMAN, dissenting.

I cannot agree with my colleagues that the Respondent violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act merely by filing a grievance alleging that the Employer Quality Food Centers, Inc. violated the work preservation clause of the parties’ collective-bargaining agreement. The Respondent is entitled to a ruling by an arbitrator on its contract claim that nonunit employees employed by Cinnabon may not handle and sell merchandise at the Employer’s Gig Harbor, Washington, grocery store. Accordingly, I dissent.

I.

It is undisputed that the contractual work preservation clause is lawful on its face.¹ Nor can it be questioned

¹ This case involves a work preservation clause, not an “alleged” work preservation clause, as my concurring colleague claims. Preser-

vation of unit work for unit employees is “[a]mong the primary purposes protected by the Act.” *NLRB v. Longshoremens*, 447 U.S. 490, 504 (1980).

that our national labor policy encourages resort to the grievance-arbitration procedure as the preferred method of resolving labor-management disputes. Congressional intent in clearly set forth in Section 203(d) of the Act, which states:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Citing Section 203(d), the Supreme Court has stated that Federal labor policy “reflect[s] a decided preference for private settlement of labor disputes without the intervention of government.” *Paperworkers v. Misco*, 484 U.S. 29, 37 (1987).

In light of the strong Congressional policy favoring the private settlement of disputes through the grievance-arbitration machinery, the Board generally does not declare the mere filing of a contractual grievance to be prohibited by the Act. My colleagues, however, seek to invoke a limited exception to that general rule. Under *Bill Johnson’s Restaurants*² and its progeny,³ the Board may find the filing of a grievance to constitute an unfair labor practice if the union is seeking an illegal interpretation of the contract. According to my colleagues, the Union’s grievance did not have the lawful objective of seeking to preserve bargaining unit work for bargaining unit members. Rather, the majority holds that by invoking the work preservation clause, the Union was actually seeking to illegally extend the contract beyond the bargaining unit and acquire work to which the Union had no legitimate claim. Close examination of the record, however, reveals that the majority’s analysis suffers from three fatal flaws. First, the majority erroneously finds that the work claimed by the Respondent is specifically excluded from the work preservation clause. My colleagues’ second error is their finding that the work in controversy is not fairly claimable by the Respondent. The majority’s final faulty finding is that the Employer lacks the power to assign the work in question to its employees.

As a result of these three analytical flaws, the majority condemns the mere filing of a grievance. In reaching this incongruous result, the majority relies on a section of the Act (8(b)(4)) that the Supreme Court has cautioned is

variation of unit work for unit employees is “[a]mong the primary purposes protected by the Act.” *NLRB v. Longshoremens*, 447 U.S. 490, 504 (1980).

² *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983).

³ E.g., *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 495 (D.C. Cir. 1995).

to be construed narrowly.⁴ In effect, the Board today stands the Act on its head and holds that conduct the statute broadly protects is outlawed under a narrowly drawn prohibition against secondary activity.

A.

My colleagues' first error is their finding that the work claimed by the Respondent is specifically excluded from the work preservation clause.⁵ Article 1, the contract provision in issue, is set forth in full in the majority's opinion and consists of two sentences. The first sentence defines the bargaining unit as consisting of all employees employed in the Employer's grocery stores, "including concessions under the direct control of the Employer," but "excluding employees whose work is performed within a meat, culinary, prescription, or bakery production department location of a retail establishment." The second sentence is the work preservation clause and reads in pertinent part as follows: "Subject to the preceding exclusions . . . all work of handling and selling of merchandise in such retail stores covered by this Agreement shall be performed only by employees of the Employer within the unit."

It is undisputed that the Cinnabon operation is not "under the direct control of the Employer" and, therefore, the Cinnabon employees are an implied exclusion from the bargaining unit defined in the first sentence. Unfortunately, my colleagues leap from that correct premise to the wholly erroneous conclusion that the Cinnabon employees necessarily fall within the "subject to the preceding exclusions" clause in the second sentence and are therefore permitted to perform the unit work of "handling and selling of merchandise in [the] retail store."

As the Respondent convincingly argues in its brief, Article 1 is clearly susceptible to another interpretation. Indeed, I find the Respondent's interpretation of Article 1 to be logical and reasonable. Under its construction, the key phrase in the work preservation clause ("subject to the preceding exclusions") refers only to the four employee groups specifically and expressly mentioned in the preceding sentence (i.e., those performing work "within a meat, culinary, prescription, or bakery production department"); the phrase does not cover the Cinnabon employees whose exclusion from the unit is implied, not expressly stated. Under the majority's reading of the contract, the "previous exclusions" language would, in effect, cover all employees excluded from the unit, whether expressly or by implication. Thus, the Em-

ployer would be permitted to assign any and all unit work to nonunit employees on the ground that because such employees are excluded from the unit, they necessarily fall within the "subject to the preceding exclusions" clause. In other words, the majority reads the work preservation clause not as preserving unit work for unit members, but as permitting the Employer to assign unit work to nonunit employees. In short, the majority transforms a unit work preservation clause into a unit work obliteration clause.⁶

By contrast, under the Respondent's interpretation, Article 1 means that unit work must be assigned to unit employees or employees working in the four specifically listed exclusions, namely, "meat, culinary, prescription, or bakery production department." Because the Cinnabon employees do not fall within one of these four specifically listed exclusions, the Respondent contends that the Employer may not permit them to perform the handling and selling of merchandise in its grocery stores.

In sum, the Respondent's claim that the Employer violated the work preservation clause is reasonably based on the language of the collective-bargaining agreement. The majority's finding to the contrary is clearly erroneous and affords no valid ground for barring the Respondent from presenting its contract arguments to an arbitrator. The majority needlessly overreaches to outlaw a mere attempt to test a contract claim.

B.

The second glaring error in my colleagues' decision is their finding that by filing its grievance and invoking article 1 of the contract, the Respondent sought not to preserve unit work, but to acquire new work. The applicable legal principles are not in dispute. It is well settled that the Act "does not outlaw . . . conduct which seeks to preserve for employees in the bargaining unit work which they have traditionally performed."⁷ Nor does the Act proscribe "conduct aimed at recapturing or reclaiming for unit employees work which they previously performed or which otherwise constitutes 'fairly claimable' work."⁸ "Fairly claimable" work has been defined as

⁴ See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988).

⁵ That work may be fairly defined as the baking, handling, and selling of Cinnabon products within the leased space at the Gig Harbor store.

⁶ My concurring colleague adds that it is "obvious" that "non-unit work performed by employees of a different employer, and not controlled by the Employer, is not preserved by the unit work preservation clause." The flaw in his approach is that by terming the work performed by the Cinnabon employees "non-unit work," he has assumed the very point in issue. What this entire case is about is the Respondent's claim that the work performed by the nonunit Cinnabon employees is unit work and is preserved to bargaining unit members by the work preservation clause. To state that it is "obvious" that the work performed by the Cinnabon employees is "non-unit work" may be convenient, but hardly constitutes reasoned analysis.

⁷ *Teamsters Local 282 (D. Fortunato)*, 197 NLRB 673, 677 (1972).

⁸ *Id.*

work that is “identical to or very similar to that already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform.”⁹ Evaluated by these standards, it is clear that the Respondent’s grievance had solely a lawful objective.

First, the “surrounding circumstances” strongly support the Respondent’s claim of a work preservation object.¹⁰ Thus, the record shows that in March 1995, when the Employer purchased the Gig Harbor store, a bakery department that produced baked goods on premises was in operation. For several months after the Employer’s purchase of the store, employees represented by the Respondent performed “bake-off” work for the Employer. It was during this time period when the unit employees were performing “bake-off” work that the parties entered into their collective-bargaining agreement requiring, with limited exceptions, that “all work of handling and selling of merchandise” be assigned to unit employees. In this context, where the union-represented employees were performing that work at the time this contract language was agreed to, the Respondent’s claim that the “work of handling and selling of merchandise” includes the “bake-off” work is certainly not unreasonable, let alone illegal.

In September 1995, the Employer subleased space within its Gig Harbor store to Cinnabon for the operation of a retail store. In December 1995, the Respondent filed its grievance, claiming that the Employer violated the collective-bargaining agreement by permitting Cinnabon employees to handle bakery merchandise in the store.¹¹ In the grievance and subsequent correspondence, the Respondent emphasized that its sole objective was to preserve traditional bargaining unit work and not to represent the Cinnabon employees. For example, in a March 1996 letter to the Employer’s president, the Respondent’s president stated that “the issue is not the 15 employees that are working within Cinnabon in Gig Harbor but rather the contracting out of the work that belongs to members of Local 367 who need hours and the benefits . . . of our contract.” The letter explained the Respondent’s concern that unless it proceeded to arbitration with its grievance, unit work would be gradually

⁹ *Newspaper & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990). There is no contention that the bargaining unit employees lack the necessary skill to perform the work claimed by the Respondent.

¹⁰ *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 644 (1967) (the Board has always analyzed “whether under all the surrounding circumstances the union’s objective was work preservation”).

¹¹ The grievance also encompassed work performed by the employees of “Chinese Kitchen,” another leased operation in the store.

eroded by a series of sublease agreements.¹² In sum, the “surrounding circumstances” here all demonstrate that the Union’s object was work preservation. They are far removed from those of *Nevins*,¹³ cited by the majority, in which the union’s grievance claimed work that for 25 years had never been performed by members of the bargaining unit.

Second, although the Employer phased out the “bake-off” work in 1995, employees represented by the Respondent have at all material times handled and sold merchandise very similar to that handled and sold by Cinnabon employees. For example, unit employees currently ice baked goods, as do Cinnabon employees. In addition, unit employees handle and sell, from the Employer’s bakery sales department, cinnamon rolls (two types), coffee drinks, and beverage products. Similarly, Cinnabon employees handle and sell cinnamon rolls, coffee drinks, and other beverage products. The only distinction between the products unit employees handle and sell and the products the Cinnabon employees handle and sell are the brand names, a factor not entitled to determinative weight.¹⁴

Third, the work claimed by the Respondent “overlaps in practice” with what is undisputedly unit work.¹⁵ Unit employees at the checkstands handle and sell Cinnabon products that have been baked and packaged by Cinnabon employees. Indeed, these sales represent 64 percent of the overall sales of Cinnabon products at the Employer’s store. In my view, it is arbitrary and illogical to hold, as my colleagues do, that while the unit employees may legitimately perform 64 percent of the “handling and selling” of Cinnabon merchandise, the remaining 36 percent may not be fairly claimed by them.

In light of the close connection between the work claimed by the Respondent and the work traditionally performed by the bargaining unit, it is clear to me that by filing its grievance and invoking Article 1 of the contract, the Respondent sought only to preserve those work opportunities that the Respondent had a right to protect for

¹² Under Board precedent, the Respondent was not required to wait until unit work was actually eliminated before filing its grievance; it is sufficient that the Respondent was reacting to an anticipated threat to its work jurisdiction. *Painters District Council 51 (Manganaro Corp)*, 321 NLRB 158, 166 fn. 27 (1996).

¹³ *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392 (1993), enfd. in pertinent part 68 F.3d 490 (D.C. Cir. 1995).

¹⁴ *Canada Dry Corp. v. NLRB*, 421 F.2d 907, 910 (6th Cir. 1970) (“We agree with the Board’s finding . . . that it is unrealistic to define the area of the [unit employees’] legitimate job protection efforts according to brand name or supplier.”), affg. 174 NLRB 424 (1969).

¹⁵ See *Service Employees Local 32B-32J*, supra, 68 F.3d at 494-495 fn. 4 (work fairly claimable if it “overlap[s] in practice with bargaining unit work”).

bargaining unit employees.¹⁶ At a minimum, the Respondent should be permitted to test its claim before an arbitrator.

C.

My colleagues' final error is their wooden and mechanical application of the right-of-control test of *Pipefitters*¹⁷ under which the union violates Section 8(b)(4)(B) when it coerces an employer in order to obtain work that the employer has no power to assign. It is true, as the majority points out, that the Employer had no power to assign the work in issue to its employees *after* it entered into the sublease with Cinnabon. Under *Pipefitters*, however, the Board must analyze "all of the surrounding circumstances," including the Employer's right to control the work *before* it entered into the sublease.¹⁸ In this connection, the Respondent argues and the record supports that the Employer was capable of entering into an agreement with Cinnabon that would not have violated the work preservation clause of the collective-bargaining agreement.¹⁹ Specifically, the Employer and Cinnabon could have entered into a franchise agreement or licensing arrangement that would have permitted the Employer to prepare and sell Cinnabon products using employees represented by the Respondent to perform the work. There is no evidence that Cinnabon insisted on the sublease agreement as a condition precedent to doing business with the Employer. Thus, so far as the record shows, the Employer had the potential for control over the work in issue, but by its voluntary action, forfeited that potential. In sum, the "surrounding circumstances" here justify a finding that the Employer is not a neutral entitled to be shielded under the right-of-control doctrine

¹⁶ In finding that the Union's grievance activity had a secondary objective, the judge erroneously relied on the likely *effects* of the grievance. This aspect of the judge's decision is contrary to Supreme Court precedent, and my colleagues wisely distance themselves from it. See, e.g., *NLRB v. Longshoremens ILA*, 473 U.S. 61, 76 fn. 16 (1985) (so long as the right to control test is satisfied, Sec. 8(b)(4)(B) normally not violated by union activity "for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing businesses with another employer").

¹⁷ *NLRB v. Enterprise Assn. of Steam Pipefitters*, 429 U.S. 507, 523 fn. 11 (1977) (Board's right-of-control analysis "has not [been] nor will it ever be a mechanical one").

¹⁸ *Id.* (Board examines "not only the situation the pressured employer finds himself in but also how he came to be in that situation").

¹⁹ The majority cites the absence of any contention that the contract prohibits QFC from entering into lease agreements. This is a nonsequitur. The gist of the Union's grievance is not that the contract broadly prohibits QFC from entering into all lease agreements, but that QFC violated the work preservation clause of the collective-bargaining agreement by entering into the lease agreement permitting the assignment of the work at issue in this proceeding to nonunit employees.

from the Respondent's efforts to enforce the valid work preservation clause.²⁰

II.

For all these reasons, I would dismiss the unfair labor practice complaint and permit the Respondent's grievance to be considered by an arbitrator in accordance with the fundamental federal policy favoring the private resolution of labor-management disputes. At a minimum, the Respondent should be allowed to advance its work preservation claims before an arbitrator.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT seek to enforce or apply, through grievance or arbitration, any collective-bargaining agreement we have with Quality Food Centers, Inc., where an object thereof is to force or require Quality Food Centers, Inc. to cease doing business with Cinnabon, Inc.

WE WILL withdraw the grievance, and subsequent demand for arbitration, we filed against Quality Food Centers, Inc. and WE WILL reimburse Quality Food Centers, Inc. for all reasonable expenses and legal fees, with interest, incurred by it in defending against the grievance and arbitration demand.

FOOD & COMMERCIAL WORKERS LOCAL 367 (QUALITY FOOD CENTERS)

John Fawley, Esq., for the General Counsel.

Mark E. Brennan, Esq. (Webster Mraak & Blumberg), of Seattle, Washington, for the Respondent.

Bruce E. Heller, Esq. (Reed McClure) of Seattle, Washington, for the Charging Party.

David W. Croysdale, Esq. (Michael Best & Friedrich), of Milwaukee, Wisconsin, for Quality Food Centers, Inc.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Seattle, Washington, on June 26, 1997,

²⁰ See *Pipefitters Local 120 (Mechanical Contractors' Assn. of Cleveland)*, 168 NLRB 991, 992 (1967) (notwithstanding work preservation clause in collective-bargaining agreement, employer "contract[ed] away" performance of bargaining unit work in the absence of any demand that it do so by the project owner; because loss of control over assignment of work was the "result of [the employer's] own conduct," the Board held that the employer was not a neutral).

and is based on a charge filed by Cinnabon, Inc. (Cinnabon), on September 26, 1996, alleging generally that United Food and Commercial Workers Union Local No. 367, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC (Respondent), committed certain violations of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (29 U.S.C. §151 et seq.), the Act. On October 23, 1996, the Acting Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(b)(4)(ii)(B) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.¹

All parties² appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and Counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint, as amended, alleges, and Respondent's answer, as amended at trial, admits that Cinnabon is a Delaware corporation, with an office and place of business in Gig Harbor, Washington, where it is engaged in the production and retail sale of cinnamon rolls and nonalcoholic beverages; that during the 12 months preceding issuance of the complaint herein, a representative period, in the course and conduct of its business operations, it had gross sales of goods and services valued in excess of \$500,000; that during the same 12 months it, in the course of its business operations, sold and shipped goods or provided services from its facilities within the State of Washington to customers outside the State, or sold and shipped goods, or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000.

Additionally, the complaint alleges, and Respondent admits, that QFC is a State of Washington corporation, with offices and place of business in Gig Harbor, Washington, where it is engaged in the business of the operation of a retail grocery store;

¹ Additionally, Respondent asserts that the complaint here is time barred. However, it is well established that the 10(b) period commences only when the charging party receives clear and unequivocal notice—actual or constructive—of the unfair labor practice. *Nursing Center of Vineland*, 318 NLRB 337, 338 (1995). Thus, I must find this defense to be without merit, as the Charging Party's district manager, McDougall, credibly testified that it had no knowledge of Respondent's grievance, which forms the basis for the complaint, until August 1996. August of course, is the very month preceding the filing of the charge. Further, I find that Respondent's action in maintaining its grievance constitutes a continuing violation. Compare, for example, *Electrical Workers IBEW Local 6 (San Francisco Contractors)*, 318 NLRB 109, 126 (1995). Accordingly, Respondent's efforts to obtain dismissal of the charge on this basis is denied.

² Additionally, Quality Food Centers, Inc. (QFC or the Employer) appeared at the hearing, and was allowed to fully participate.

that during the 12 months preceding the issuance of the complaint herein, a representative period, QFC, in the course of its business operations, had gross sales of goods and services valued in excess of \$500,000; that during the same period, it sold and shipped goods or provided services from its facilities within the State of Washington to customers outside the State, or sold and shipped goods, or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000; and that, during the same period, QFC purchased, and caused to be transferred and delivered to its facilities within the State of Washington, goods and materials valued in excess of \$50,000 directly from sources outside the State, or from suppliers within the State which, in turn, obtained such goods and materials directly from sources outside the State.

Accordingly, I find and conclude that both Cinnabon and QFC are now, and at all times material herein have been, employers, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Respondent is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issue

The complaint alleges Respondent pursued a grievance claim and an arbitration demand against QFC with the object of forcing QFC to cease doing business with Cinnabon, in violation of Section 8(b)(4)(ii)(B) of the Act. As its defense, Respondent asserts a work preservation motive for its conduct.

B. Background and Labor Relations History

QFC is a supermarket chain that operates approximately 90 retail grocery stores in the Seattle/Tacoma metropolitan area.

Respondent represents many grocery employees throughout Southwest Washington. Most such employees are represented through agreements it reaches with Allied Employers, Inc., a management multiemployer bargaining association. QFC, though operating in the same area, is not a member of Allied, and is not a party to those agreements between Allied and other area grocers. However, QFC has historically adopted the Allied contracts without material change or substantive negotiations.

Respondent represents a collective-bargaining unit which, at all times material, consists of QFC employees employed at QFC's two Pierce County stores (Gig Harbor and Northshore) in the following classifications:

All employees employed in (QFC's) present and future grocery stores, *including concessions under the direct control of (QFC)* . . . , located in Pierce County, . . . Washington, . . . except and excluding employees whose work is performed within a meat, culinary, prescription or bakery production de-

partment location of the retail establishment, supervisory employees.³

QFC built the Northshore store from the ground up in 1993. The Gig Harbor store, however, was purchased from the Hogan family in March 1995, briefly continued in operation as a Bag-N-Save grocery store, and converted to a QFC store over the summer of 1995. The building in which QFC operates the Gig Harbor store is still owned by the Hogan family. On acquiring the store from the Hogan family, QFC agreed to apply the terms of the then existing collective-bargaining agreement between Respondent and the Allied multiemployer group. Prior to this acquisition, employees of the Hogan family's Bag-N-Save had performed a certain amount of production bakery operations within the store, i.e., producing bakery goods from scratch dough. Respondent concedes that such operations gradually ceased, as the bakery became what it terms "a bakeoff department."⁴

QFC and the Respondent have entered into a series of collective-bargaining agreements which, for all times material, contain the following work jurisdiction language in section 1.1:

Subject to the preceding exclusions and Section 15.1 of Article 15, all work of handling and selling of merchandise in such retail stores covered by this Agreement [QFC's Gig Harbor and Northshore stores] shall be performed only by employees of the Employer within the unit referred to above.⁵

Section 15.1 permits nonemployee demonstrators to perform work not relevant to this proceeding.

However, its most significant "exclusion" is for employees of concessions *not under the direct control of (QFC)*.

Other "exclusions" are also provided, to wit:

... employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, supervisory employees . . .

³ The following classifications, if any, in the Gig Harbor and Northshore stores were added to the collective-bargaining unit by Addenda:

all Snack Bar, Take-Out Food, and Deli Department employees employed by (QFC), all Bake-Off/Deli Department employees employed by (QFC), all Bake-Off Department employees employed by (QFC) . . .

The classifications added by Addenda exclude "Meat Department employees, janitors, professional employees, confidential employees, office and clerical employees, guards, watchmen and supervisors, . . ."

⁴ Insofar as it is argued by Respondent that the small amount of bakery work which continued for about two months while the bakery was being remodeled is demonstrative that Respondent ever represented employees of QFC at the Gig Harbor store doing work now fairly claimable by it, I reject the argument. Mike Huse credibly testified that the work was temporary and of an emergency nature. See *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 494 (D.C. Cir. 1995).

⁵ Respondent contends that it filed its grievance because QFC violated this contractual language by letting products be sold by someone other than its own employees. In sum, Respondent contends that the language of the contract requires that "all handling and selling" of products in the store must be performed by bargaining unit employees, and that it has merely been engaged in legitimately seeking adherence to the contract's terms.

C. The Facts

Cinnabon operates a store within QFC's Gig Harbor store pursuant to a sublease with QFC which was entered into in September 1995. The Cinnabon store is a self-contained structure occupying approximately 427 square feet with its own walls, service counter, and exclusive space.⁶

The Cinnabon store includes baking ovens, bakery racks, separate lighting, display racks, stools for customer seating, and counterspace. The only facilities of QFC used by Cinnabon are some storage space and additional seating for customers to consume Cinnabon products.

The Cinnabon store is identified by some distinctive signs, using Cinnabon's logo and colors. Cinnabon employees are similarly distinguished by distinctive caps, aprons, and name tags.

The primary activity within the Cinnabon store is the production and sale of "Cinnabon World Famous Cinnamon Rolls." In the words of its proud district manager, David McDougall:

Cinnabons are not like most cinnamon rolls. These are made with the highest-quality ingredients that you can buy in the world, the best cinnamon, and they're a handmade product, baked on the half hour, and very unique, have a very good flavor and taste. And the one thing that we like to think in Cinnabon is that, being that it is so unique, it's an indulgence, and that's not just a cinnamon roll, it is a *Cinnabon* cinnamon roll.

No other bakery products are sold in the Cinnabon store.

Accordingly, Cinnabon employees do not "handle or sell" any products controlled by QFC.⁷

Cinnabon also sells proprietary nonalcoholic beverages including Mochalatta Chill, Vareva juices, and Rubymoon Coffee. Sale of nonproprietary products by Cinnabon is negligible.

Cinnabon is proscribed by the sublease from selling:

... any additional products which . . . compete directly with a product then being sold by QFC or one of its other subtenants to the extent that Cinnabon's sales of the product can reasonably be expected to have a significant impact on the sales of the items then being sold by QFC or its subtenant.

Other than nominal sales of nonproprietary products, Cinnabon does not sell products in its store which are sold by QFC in any of the departments of QFC's store.

⁶ QFC also subleases space within its Gig Harbor store to a bank and to a Chinese restaurant. They each operate there entirely independently from QFC.

⁷ Respondent argues that, by the sublease agreement, QFC "authorized" Cinnabon to prepare and sell cinnamon rolls, together with numerous other products defined in the sublease agreement. I, however, cannot agree that the terms of the sublease rise to the level of an "authorization," in the sense that QFC ever exerted control over the operations of Cinnabon. Indeed, to the extent that Respondent may be arguing that the terms of the sublease, which proscribes certain terms (such as the minimum number of hours that Cinnabon shall operate its concession with the QFC store), I find that the sublease language does not satisfy the "right-to-control" test needed for it to validly assert a work preservation defense herein.

“Cinnabon World Famous Cinnamon Rolls” is trademarked and processes for producing these gourmet rolls are protected by various proprietary agreements. The parties stipulated that no one can:

produce, handle, or sell any of the products without the express permission of Cinnabon . . .

The protected products include:

Mochalatta Chill, Vareva orange juice [and other juices and drinks listed in Exhibit E to the Sublease], all promotional material including soda mugs, Rubymoon coffee, Rubymoon mugs, . . . Cinnabon and Minibon, Makara Cinnabon [rolls]

The recipe for Cinnabon dough is protected through a proprietary agreement with Pillsbury.

The in-store processes of Cinnabon are protected by a “Proprietary Information Agreement” which each Cinnabon store employee is required to sign as a condition of employment.⁸ This agreement prohibits any Cinnabon employee from using any Cinnabon “proprietary information” during or after employment with Cinnabon.

Cinnabon hires and fires its own employees; determines the wages, benefits and other terms and conditions of employment of these employees; conducts specialized training; provides distinctive cap, apron, and name tags; provides all work direction and work assignments; and in all other respects maintains control over its own employees. Conversely, QFC exercises no management control over Cinnabon employees.

Sublease section 3.9.1 provides:

Employees of QFC are not nor will they be deemed to be employees of Cinnabon, and employees of Cinnabon are not nor will they be deemed to be employees of QFC.

There is no interchange between QFC and Cinnabon employees. Cinnabon employees do not perform work in the QFC store and QFC employees do not perform work in the Cinnabon store.

QFC’s employees at the store do not perform bakery production or bake-off duties. Instead, they merely handle and sell baked goods that are produced by bakeries away from QFC’s grocery store, and which are delivered to the store.

Cinnabon’s employees are not former QFC employees, nor do Cinnabon employees fill vacancies or openings in the QFC store. QFC and Cinnabon each operate their stores independent from the other.

It is undisputed that QFC has not and does not assign work to Cinnabon employees nor does Cinnabon assign work to QFC employees. All work performed within the Cinnabon store is controlled by and assigned by Cinnabon. QFC has no authority respecting these work assignments.

In addition to sales within its own store, Cinnabon prepares prepackaged product which is placed on display racks on Cinnabon store premises for pickup by customers. This product is then handled and sold through QFC checkstands by QFC employees represented by Respondent.

⁸ It was stipulated that no QFC employee represented by Respondent is required to sign any similar agreement.

District Manager McDougall credibly testified that approximately 64 percent of the Cinnabon store sales are sales of prepackaged product which is handled and sold through QFC checkstands. The remaining Cinnabon sales are over the counter sales within the Cinnabon store of ready-to-eat gourmet Cinnabon cinnamon rolls and proprietary nonalcoholic beverages.

Cinnabon operates 16 stores at supermarket sites within the Washington area where the supermarket employees are represented by a labor organization. None of the Cinnabon employees are represented by a labor organization, including the employees at Cinnabon’s Gig Harbor store.

Cinnabon is an independent company producing and selling “Cinnabon World Famous Cinnamon Rolls” and other proprietary products at Cinnabon stores throughout the United States. QFC is an independent company operating approximately 90 grocery stores in the northwest Washington area. Neither company has any financial control of the other.

Cinnabon is solely responsible for determining what prices it will charge for products sold within its stores, including the one within QFC’s Gig Harbor grocery.

Both QFC and Cinnabon maintain their own accounting, payroll, and administrative systems for all operations at the Gig Harbor store. Neither provides administrative assistance to the other.

Cinnabon hires and fires its own managers and does not utilize any management services from QFC. Likewise, QFC maintains a management staff independent from Cinnabon. Neither provides managerial services to the other. Cinnabon determines its own prices without any approval or control by QFC.

The only contractual relationship between the parties is the sublease. There is no other business relationship between Cinnabon and QFC except that created by the sublease.

Cinnabon and QFC each has its own employee work force. There is no interchange between QFC and Cinnabon employees. Each, as shown above, maintains control over its own employees.

Respondent claims the work performed by Cinnabon employees within the Cinnabon store. This work relates to Cinnabon’s proprietary gourmet Cinnabon cinnamon rolls and proprietary nonalcoholic beverages and consists of:

Taking out dough to thaw, rolling the dough out, putting the dough into the proofer, . . . place those rolls in the oven for baking, . . . mix frosting . . . remove baked goods from the oven, . . . frost the baked goods, . . . place them on the display case for thirty minutes, then . . . package them and box them up in a box if they’re unsold after - thirty minutes after refrosting them, . . . make coffee drinks and other non-alcoholic beverages, . . . perform cashier duties and what are termed as centerfield duties (assisting the cashier in performance of selling).

It is undisputed that employees represented by Respondent in stores other than those involved in the instant case regularly perform work which is quite similar to, or perhaps even identical to, the work performed in this case by Cinnabon. Beyond doubt, Respondent represents employees in many locations

throughout its geographical jurisdiction who bake and ice cinnamon rolls, and other bakery products.

Cinnabon products displayed on racks for customer pickup are handled and sold through QFC checkstands by QFC employees represented by Respondent. This work is performed within the QFC store and is not in dispute.

Union President Ronald Hayes testified:

Q. So your dispute is solely with the work being performed by Cinnabon employees within that leased area that Cinnabon operates?

A. Yes.

Q. So it's just—it's that area, it's the Cinnabon employee work we're talking about?

A. That's correct.⁹

Respondent's only dispute is with the work performed by Cinnabon employees within the confines of the Cinnabon store.

At no time have Cinnabon and Respondent had a collective-bargaining relationship.

Respondent filed a grievance against QFC on December 14, 1995, demanding QFC's "assurances that the handling of Bakery . . . merchandise will be performed only by bargaining unit employees in the future." The reference to "Bakery merchandise" is a reference, not to any work performed by QFC employees, but to Cinnabon's production and sale of its gourmet Cinnabon cinnamon rolls in Cinnabon's Gig Harbor store. There is no showing that Cinnabon was given notice of the pendency of this grievance claim.

Respondent sought to arbitrate the grievance. Following correspondence over the summer months of 1996 led to the selection of an arbitrator and September 24, 1996, was initially selected as the date for arbitration hearing.

However, late in August 1996, Cinnabon representatives learned for the first time that Respondent claimed work performed by Cinnabon employees within the Cinnabon Gig Harbor store. Cinnabon's legal counsel verified the claim with QFC's legal counsel, where Cinnabon made demand on Respondent to drop its grievance claim. When Respondent refused, Cinnabon filed the instant charge.

Sales of baked goods and nonalcoholic beverages have increased at QFC's store since QFC entered into its sublease with Cinnabon. Since that time, no union-represented employee has been discharged or laid off because of declining sales. Prior to the sublease, Cinnabon products were never produced, handled, or sold within any QFC grocery store.

D. Discussion and Conclusions

Under Section 8(4)(ii)(B) it is an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is: (B) forcing or requiring any person . . . to cease doing business with any other person."

On the one hand, the congressional objective is to preserve the right of unions to bring pressure on offending employers in primary labor disputes, while on the other hand, also shielding unoffending employers from pressures in controversies not

their own. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

A violation is established if *an* unlawful object is shown, even if there also exists another and lawful object of the union's threat and coercion. *Id.* at 689; *Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 397 (1993).

The proscription is to be "viewed pragmatically and is intended to reach any form of economic pressure of a restraining or compelling nature." *Longshoremen Local 1291 (Holt Cargo Systems)*, 309 NLRB 1283, 1284 (1992).

The proscription has been held to include such pressure as the filing of a grievance or resort to arbitration, where the object of doing so is to coerce a cessation of business. *Nevins Realty*, *supra.*; *Holt Cargo*, *supra.*; *Teamsters Local 25 (Boston Deliveries)*, 282 NLRB 910 (1987).

Thus, the initial question is whether or not Respondent, in filing its grievance alleging a violation of section 1.1 of its contract with QFC, had an unlawful secondary object because it, . . . the grievance, . . . was designed to acquire new work for bargaining unit employees represented by it.

In answering this, I first note that, by the terms of the grievance, the disputed work includes the preparation, production, packaging, and selling of Cinnabon's proprietary products at QFC's store in Gig Harbor. As also noted, this work is and has been performed solely by Cinnabon's employees within that store.

Next, I note that no relationship, contractual or otherwise, exists, (or ever has), between Respondent and Cinnabon. Nor was there any dispute of any sort between Respondent and QFC or Cinnabon until Cinnabon began producing and selling its products in QFC's store at Gig Harbor.

Neither is it, nor could it be, even claimed that the contract between Cinnabon and QFC is a subterfuge by which QFC evades and avoids any obligation it owes to Respondent, or the employees which it represents. Beyond dispute, the record, in my opinion, establishes that there is no commonality in the management or financial control of QFC and Cinnabon. They clearly are neither a single employer nor joint employers. There is simply no evidence to support any conclusion that the sublease between QFC and Cinnabon was not genuine or made at arms length. Thus, I find no basis to conclude that QFC is involved in a "primary" dispute with Respondent.

Yet, by its grievance, Respondent makes claim, under its contract with QFC, to work being performed solely by Cinnabon's employees, solely within Cinnabon's Gig Harbor store.

Yet, throughout this procedure, Respondent has refused to specify what QFC should do to remedy the alleged contractual violation. At trial, Respondent's witnesses, Hayes and McGuiness, while generally denying that Respondent had any desire to organize Cinnabon's employees, seemed disingenuous, incredibly so, in their refusal to state just what should or could be done to resolve the dispute.

I infer that their reluctance flowed from their recognition that it would not serve their purposes in this proceeding to admit that Respondent would be satisfied only when either QFC forced Cinnabon to assign the work of Cinnabon's employees to Respondent or QFC ceased doing business with Cinnabon. It is not enough to coyly disavow an intent to organize Cin-

⁹ Tr. 182-183.

nabon's employees, or to have QFC cease doing business with Cinnabon, while, at the same time, maintaining a grievance which can apparently lead to no other resolution.

Thus, I find and conclude that the requisite "cease doing business" objective for Respondent's grievance, and demand for arbitration, has been established by counsel for the General Counsel. In turn, this result brings this case squarely within the ambit of Section 8(b)(4)(ii)(B). For, the foreseeable result of Respondent's action is to pressure a neutral employer, QFC, to, in turn, pressure the primary disputant, Cinnabon, either to reassign disputed work to Respondent, or to terminate its business relationship with Cinnabon.

This result is not without support elsewhere. In February 1996, Respondent's president, Hayes, wrote QFC a letter, in which he proposed that the grievance be settled on terms prohibiting departments, leased or otherwise, in newly opened or purchased stores, from selling or handling merchandise sold at QFC retail stores per article 1 of the parties Pierce County Grocery agreement. Quite obviously, such a settlement would require either a reassignment of the disputed work to Respondent's members, or a cessation of business between QFC and Cinnabon.

Finally, there is evidence of a cease doing business objective in a telephone conversation between Respondent's attorney, McGuinness, and the attorney for QFC, Croysdale. The conversation, discussing generally what Respondent wanted, occurred on September 10, 1996. According to Croysdale, after McGuinness denied any intent or desire to organize or represent Cinnabon's employees, Croysdale commented that the only remedy would be to have QFC terminate Cinnabon's lease, since there had been no loss of hours to QFC's employees. Croysdale testified credibly that McGuinness replied that, "if that's the case, that's the case. If that's what happens, that's what happens."¹⁰ Based on my credibility resolution, I find and conclude that McGuinness' comments to Croysdale buttress counsel for the General Counsel's prima facie case that Respondent's true objective throughout its processing of its grievance has been to compel QFC to cease doing business with Cinnabon.

I so find and conclude.

Accordingly, the next inquiry must be whether or not Respondent has established a valid defense of "work preservation."

This is so because a union may defend an action such as this by showing that, under all the circumstances, its objective was the preservation of work for bargaining unit employees, and that the grievance was not tactically calculated to satisfy union objectives elsewhere. *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612 (1967).

To establish this defense, a union must meet two tests. First, the union must show that its grievance seeks to preserve work traditionally performed by its unit employees, which is "fairly claimable" as bargaining unit work. *NLRB v. Longshoremen ILA*, 447 U.S. 490 (1980). Second, it must show that QFC had

the right to control the assignment of the disputed work. *NLRB v. Plumbers Local 638*, 429 U.S. 507 (1977).

Here, Respondent correctly points out that employees represented by it have traditionally done such work as baking, and, to be fair, all the attendant duties thereto. Yet, it is a fact that Respondent's constituent employees have never performed any such work for Cinnabon. I also regard it as established that the entry of Cinnabon on the scene at QFC's Gig Harbor store has not resulted in any loss of work for Respondent's constituents. The record shows that QFC's sales of baked good and non-alcoholic beverages have, to the contrary, increased since Cinnabon came on the scene. Thus, I regard it as established that no work traditionally performed by Respondent's constituents has been taken over by Cinnabon or its employees. Nor has any member or employee represented by Respondent ever produced, handled, or sold Cinnabon products at QFC's Gig Harbor store, prior to or since Cinnabon entered into its sublease with QFC. Instead, it would appear that Respondent's grievance seeks to acquire jobs, when the jobs of its members have not been threatened or harmed. This, of course, is illegal. *NLRB v. Longshoremen ILA*, 473 U.S. 61, 75-76 (1985).

I, therefore, find and conclude that Respondent has failed to establish the first part of the "work preservation" defense.

This conclusion is supported by the fact that in this case I note that Section 1.1 of the contractual recognition clause between QFC and Respondent contains language which specifically excludes work performed by concessions which are not under the direct control of QFC, as is the case here. Indeed, Respondent has conceded that this is the case here.

It follows that Respondent cannot be allowed to attempt to "preserve" work which it has specifically agreed to exclude from the definition of bargaining unit work.¹¹

Nor has Respondent shown that the work performed by Cinnabon's employees is more than facially similar to that performed by QFC's employees. In my opinion, the record establishes that Cinnabon's employees work on products which they actually produce on the premises. QFC's employees, on the other hand, work on products which are produced elsewhere. While both may be said to work on "baked goods," I regard the difference between those who actually produce such goods and those who merely move such good around as substantial. If Respondent had wished otherwise, it should never have agreed to the definition of the bargaining unit which it did with QFC.

In sum, I regard the record established by Respondent here as insufficient to establish that the work at issue constituted work traditionally performed by Respondent's members.

Regarding the question of the "right to control," Respondent argues that QFC does have the right and the power to assign the work in question to QFC employees represented by Respondent. Its argument is ultimately premised on the basis that:

QFC and Respondent had an extant collective bargaining agreement prior the time that QFC entered into the sublease with Cinnabon; and, that agreement required QFC to assign

¹⁰ I credit Croysdale's version of this conversation over that of McGuinness. McGuinness seemed less than forthcoming in his testimony, to the point of seeming evasive.

¹¹ Indeed, Respondent has made no claim to work performed by other concessionaires of QFC at the Gig Harbor store, such as the bank or the Chinese restaurant which maintain stores within QFC's Gig Harbor store.

all of its selling and handling work to Respondent's constituents.

I disagree with Respondent that such facts require a finding in its favor.

Instead, I note that the Cinnabon store is a completely separate entity from QFC. Respondent has never been entitled to have its members perform the work done by Cinnabon's employees. Only Cinnabon has the legal power to produce and sell Cinnabon products, or otherwise use its proprietary items or trademark. As noted earlier herein, the fact that Respondent's constituent employees perform similar work under contracts with other employers in the area cannot change the contractual rights of Cinnabon to manufacture and sell its own products in space leased by it, and over which QFC has no right of control.

Finally, Respondent has consistently claimed that its collective-bargaining agreement with QFC makes its claim to the work done by Cinnabon's employees reasonable. I disagree. For Respondent ignores that the language of the agreement provides a number of exclusions from the definition of bargaining work. One such exclusion, clearly spelled out, is concessions that are not under the direct control of QFC. As succinctly stated in *Nevins*, supra at 399-400, "It is unit work, not union work, that may be preserved."

Summarizing, I find and conclude that counsel for the General Counsel has established that Respondent has coerced and threatened QFC with an object of forcing it to cease doing business with Cinnabon, and that Respondent has failed to establish the defense of work preservation or right of control.

Accordingly, I find and conclude that by filing and maintaining its grievance against QFC, and by demanding arbitration, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

CONCLUSIONS OF LAW

1. QFC and Cinnabon are persons and employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) and Section 8(b)(4)(ii)(B) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By resorting to filing a grievance and demanding arbitration against QFC where an object thereof is to force or require QFC to cease doing business with Cinnabon, Respondent has threatened, coerced, and restrained QFC in violation of Section 8(b)(4)(ii)(B) of the Act, which conduct and activity affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it cease and desist therefrom, as well as take certain affirmative action designed to effectuate the purposes of the Act. Respondent shall be required to withdraw the grievance and arbitration demand

giving rise to this case and reimburse QFC for all reasonable expenses and legal fees, with interest, incurred in defending against them, see *Rite Aid Corp.*, 305 NLRB 832, 835 fn. 10 (1991). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In light of the fact that there has been no claim that Respondent is a recidivist violator, I shall provide for a narrow order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, United Food and Commercial Workers Union Local No. 367, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC, its officers, agents, and representatives, shall

1. Cease and desist from seeking to enforce or apply, through grievance or arbitration, any collective agreement with Quality Food Centers, Inc., a person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Quality Food Centers, Inc. to cease doing business with Cinnabon, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the grievance filed on or about December 14, 1995, and the subsequent demand for arbitration.

(b) Reimburse Quality Food Centers, Inc. for all reasonable expenses and legal fees, with interest, incurred in defending against the grievance and arbitration demand.

(c) Post at its business office copies of the attached notice, marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 19 signed copies of such notice for posting by Quality Food Centers, Inc., if willing, at its premises.

(e) Notify the Regional Director in writing within 20 days from the date of the Order what steps the Respondent has taken to comply.

¹² All outstanding motions, if any, inconsistent with the terms of this Order are overruled. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."