

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

**GARRETT'S MARKETS, INC. d/b/a  
GARRETT'S IGA**

and

**Cases 28-CA-18727  
28-CA-18887**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 99, AFL-CIO**

*Sandra L. Lyons, Esq.*, Phoenix, AZ for  
the General Counsel.

*William P. Allen, Esq.*, Phoenix, AZ for  
the Respondent.

**DECISION**

**Statement of the Case**

**Gregory Z. Meyerson, Administrative Law Judge.** Pursuant to notice, I heard this case in Phoenix, Arizona, on November 4, 2003. United Food and Commercial Workers Union, Local 99, AFL-CIO (the Union or the Charging Party), filed unfair labor practice charges in cases 28-CA-18727 and 28-CA-18887 on May 14 and July 29, 2003, respectively. Based on those charges, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint on October 15, 2003.<sup>1</sup> The complaint alleges that Garrett's Markets, Inc. d/b/a Garrett's IGA (the Respondent or the Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,<sup>2</sup> I now make the following findings of fact and conclusions of law.

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<sup>1</sup> All dates are in 2003 unless otherwise indicated.

<sup>2</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

## Findings of Fact

### I. Jurisdiction

5           The complaint alleges, the answer admits, and I find that the Respondent is an Arizona corporation, with offices and places of business in and about Tucson, Arizona (herein called the Respondent's facilities), where it has been engaged in the business of operating retail grocery stores. Further, I find that during the 12-month period ending May 14, 2003, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of  
10 \$500,000; and that during the same period, the Respondent purchased and received at its facilities located within the State of Arizona goods valued in excess of \$50,000 directly from points located outside the State of Arizona.

15           Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. Labor Organization

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

### III. Alleged Unfair Labor Practices

#### A. The Issues

25           In substance, the complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act when it failed to notify the Union of the closure of one of its stores (the Broadway store), and to bargain with the Union over the effects of that closure. Further, it is alleged that  
30 the Respondent continued to violate the Act by bypassing the Union and dealing directly with the employees from the Broadway store by offering them transfers to the Respondent's other stores. Additionally, the complaint alleges that the Respondent violated the same provisions of the Act by refusing to provide necessary and relevant requested information to the Union regarding two of the Respondent's stores (the River store and the Grant store), and by failing to  
35 provide the information in a timely manner. Finally, by the terms of the complaint, the General Counsel seeks a *Transmarine*<sup>3</sup> remedy, including a minimum of two weeks backpay for the employees from the Broadway store.

40           While the Respondent denies the commission of any unfair labor practices, counsel takes the position in his post-hearing brief that any alleged violation of the Act because of a failure to notify the Union or bargain over the effects of the closure of the Broadway store "is of a technical, non-substantive and isolated nature." Counsel contends that any technical violation of the statute is "so insignificant" as to be "rendered meaningless by the Respondent's subsequent action." The Respondent takes the position that under the facts of this case, a  
45 *Transmarine* remedy is totally inappropriate, as the employees from the Broadway store suffered no economic harm by the Respondent's actions. It contends that such a remedy would merely be punitive and, thus, not provided for under the Act. Further, it denies any failure to timely furnish the Union with requested information for the River and Grant stores. The Respondent argues that the complaint should be dismissed in its entirety.

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<sup>3</sup> *Transmarine Navigation Corporation*, 170 NLRB 389 (1968).

## B. Background Facts

5 The facts in this case are, for the most part, not in dispute. The Respondent operates retail grocery stores in and around Tucson, Arizona. Ray Garrett is the owner and President of the Respondent. In 2001, the Respondent acquired six retail grocery stores from Fleming, a major food wholesaler, which stores had been operating under the ABCO name.<sup>4</sup> At the time of the acquisition, the Union had a collective-bargaining relationship with ABCO, and represented the employees in the six grocery stores in two separate bargaining units. These units are referred to in the complaint as the clerk unit and the meat department unit.<sup>5</sup> Subsequent to its acquisition of the six stores, the Respondent recognized the Union as the collective-bargaining agent for its employees in the clerk and meat department units at these stores. The Respondent retained most of the employees working in these two units. The parties executed a formal recognition agreement on May 18, 2001. (G.C. Exh. 2.) Thereafter, the Respondent and the Union met a number of times in an effort to negotiate a collective-bargaining agreement. However, as of the date of the hearing, the parties had not yet agreed on the terms of a contract. In any event, Paul Rubin, the Union's Southern Arizona Director, represented the Union at these negotiations. The Respondent was represented at the negotiations by its legal counsel, principally Robert J. Deeny. Ray Garrett did not personally attend any of the negotiation sessions. In fact, Rubin testified that he never met with Garrett to discuss any issues between the Union and the Respondent, as the Respondent's counsel handled all such matters.

25 According to the testimony of Garrett, when the Respondent acquired the six ABCO stores, it signed sublease agreements with Fleming. (G.C. Exh. 14.) The Respondent had acquired the six businesses, but clearly not the property. Garrett testified that sometime in January 2003, he became aware that Fleming was attempting to terminate the sublease on the store located on East Broadway Road. As a result of Fleming's action, the owner of the property, George Larsen, decided to exercise his contractual right to terminate the master lease. Following various legal efforts by Garrett, the Respondent entered into an agreement with Fleming (ABCO Realty Corp.) dated March 11, 2003, in which the Respondent agreed to a termination of the sublease effective April 14, 2003, in return for the payment of a specific sum of money. (G.C. Exh. 16.) By subsequent agreement between the Respondent and the owner of the property, the Respondent was permitted to operate until April 19, at which time the Broadway store closed.

35 Garrett testified that in mid-March 2003, the manager of the Broadway store was informed that the store was to be closed in approximately 30 days. The manager in turn posted a notice on a bulletin board advising the employees of the pending closure of the store. According to Garrett, several weeks before the closure, he held a managers' meeting with the managers of his various stores where they discussed the respective needs of each store and whether they could absorb transferees from the Broadway store. At that particular period, the Respondent was in need of additional employees at its stores, as a competitor had recently been hiring a number of its employees. Therefore, Garrett was able to direct his store managers to accept transferees from the Broadway store, laying off if necessary only probationary employees.

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<sup>4</sup> I will take administrative notice that ABCO was the name of a retail grocery store chain that operated in the State of Arizona for a number of years.

50 <sup>5</sup> In its answer to the complaint, the Respondent admits that the two units specified in the complaint are appropriate for the purposes of collective-bargaining, within the meaning of Section 9(b) of the Act.

5 According to Garrett, there were 25 to 30 employees employed at the Broadway store prior to its closure. Every employee was offered a transfer to a position in one of the Respondent's remaining six stores in the Tucson area.<sup>6</sup> All but three employees accepted the transfers. Garrett was unaware of the reasons why the three employees declined the transfer offers. He testified that no additional benefits were provided to those employees who agreed to the transfers, such as compensation for the extra travel they might incur in commuting to their new stores. Garrett indicated it was his belief that there was no reduction in the hours worked of either the employees transferred, or the employees of those stores receiving the transferees. He did acknowledge that one employee was transferred to a non-union store, but this individual had been on maternity leave at the time the Broadway store was closed and was only transferred after she returned from leave.

15 It is undisputed that the Respondent never notified the Union that the lease for the Broadway store was being terminated and that the store was to be closed. Further, the Respondent made transfer offers directly to the employees of the Broadway store without any notification to, or consultation with, the Union. Prior to the closure of the store, the Respondent made no effort to notify the Union about this matter. Garrett testified that he was unaware that the Respondent was required to notify the Union of the planned closure of the Broadway store.

20 Garrett appeared to suggest that he did not think to notify the Union, because in the approximately two-year period prior to the closure, he had no contact with the Union. He testified that during this period he was not aware of any union representative being present in any of his various stores, and that no grievances were filed by the Union on behalf of the employees in either bargaining unit.<sup>7</sup>

25 Paul Rubin had been the union official involved in the prior collective-bargaining negotiations with the Respondent's legal counsel. He testified that sometime in May 2003, he was informed by union representative Jay Haubert that Haubert had been driving by the Respondent's Broadway store location and noticed that the store was closed. Rubin testified that this was the first time that the Union learned of the closure. On cross-examination, Rubin was shown an article from The Arizona Daily Star<sup>8</sup> dated March 29, 2003, which reported that the Respondent's Broadway store was going to be closed the following month. (Res. Exh. 2.) Rubin acknowledged that the Union has a subscription to this periodical, and also that the Union's office is only a few miles from the location of the Broadway store. However, he credibly testified that the first time that he became aware of the closure was when Haubert so informed him in May. In any event, as indicated above, there is no dispute that the Respondent never directly notified the Union of the pending closure of the store, nor of its offer to transfer the store employees.<sup>9</sup>

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<sup>6</sup> Of the six stores that remained open, one store was non-union.

45 <sup>7</sup> As there was no collective-bargaining agreement in effect between the parties, the only mechanism that existed for the filing of grievances was the Respondent's internal policy for the receipt of complaints.

<sup>8</sup> I will take administrative notice that The Arizona Daily Star is a major daily periodical in the Tucson, Arizona metropolitan area.

50 <sup>9</sup> Rubin acknowledged that after learning from Haubert that the Broadway store had closed, he could have contacted Garrett had he wanted to. However, apparently after discussing the matter with the Union's attorney, a decision was made to file an unfair labor practice charge.

On June 2, the Respondent's legal counsel notified the Union of the pending closure of two additional stores, its Grant and River stores. (G.C. Exh.3.) By letter dated June 10, the Union requested certain information for these two stores, for the apparent purpose of engaging in effects bargaining for the involved employees. Specifically, the Union requested the following: The names of all bargaining unit employees, their seniority dates (with both the Respondent and ABCO), their job classifications, store location of job offerings, reasons for rejecting offers, and the impact on hours worked for those union-represented employees at the stores receiving transferees. (G.C. Exh. 4.) By letter dated June 17, the Respondent's labor counsel acknowledged receipt of the Union's request for information. (G.C. Exh. 5.)

According to Rubin, the first time the Respondent offered to bargain with the Union over the effects of the closing of the Broadway store was in an e-mail message from labor counsel's office, dated July 11. (G.C. Exh. 6.) However, the parties did not actually meet for this purpose until August 6.<sup>10</sup> At this meeting, Rubin requested that the Respondent provide the Union with the same information for the Broadway store that the Union had previously requested be provided to it for the River and Grant stores. That information had still not been furnished to the Union. Rubin testified that similar information was needed for all three locations in order for the Union to engage in meaningful negotiations regarding the impact of the closures upon both the employees in the stores that closed, and those employees at stores that received transferees.

Attached to a letter from the Respondent's labor counsel dated August 18, 2003, were store rosters for the Broadway, River, and Grant stores, containing employee classifications, hire dates, and status. (G.C. Exh. 8.) This information was obviously intended to satisfy the Union's written request of June 10 for the River and Grant stores, and the Union's oral request of August 6 for the Broadway store. However, the information furnished by the Respondent did not include all the information that the Union had previously requested. By letter dated September 5, Rubin specified for labor counsel those items, which had not been furnished, and for which the Union was still requesting information. (G.C. Exh. 9.) Specifically, the Union still sought the following information: A more complete listing of the employees employed at the Broadway store at the time of its closure, any reason given by employees from the closed stores for rejecting a transfer, and the impact of the transfers on the hours worked by the employees in those stores receiving transferees. While this letter was somewhat imprecisely drafted, it was clear from the parties' correspondence (G.C. Exh. 4, 5, & 8.) that the Union had not received all the information which it had previously requested for the River and Grant stores, specifically the impact on the hours of employment of the represented employees at the stores which were receiving transferees. The Respondent's counsel responded by letter dated September 26, furnishing the Union with the additional information regarding the Broadway store, and indicating that the transferees had no known impact on the stores to which they were transferred. (G.C. Exh. 10.) Doubting that the Respondent was correctly reporting no impact from the transfers, the Union by letter dated October 21, requested detailed information on the hours worked by employees in those stores receiving transferees from the Broadway, River, and Grant stores.<sup>11</sup> (G.C. Exh.11.) Attached to a letter dated October 23 from the Respondent's labor counsel to

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<sup>10</sup> Rubin testified on cross-examination that he could not recall whether at an earlier meeting with Respondent's labor counsel on June 10, they had discussed the closing of the Broadway store.

<sup>11</sup> Under the Respondent's payroll system, the Grant, Broadway, and River stores are referred to as store number 4, 5, and 6, respectively.

the Union appears to be an additional payroll list, but only for the Broadway store and, which list, still does not indicate the impact on the hours worked for those employees in stores receiving transferees. (G.C. 12.) In fact, this list is merely a duplicate of the list provided earlier to the Union as an attachment to counsel's letter of September 26. (G.C. Exh. 10.)

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There was apparently no further correspondence between the parties concerning the information that the Union had requested from the Respondent on the transfers from the three stores and their corresponding closures.<sup>12</sup> However, it should be noted that admitted into evidence at the hearing at the request of the Respondent was a "roster" of all the Respondent's employees from each of its stores. According to Garrett's testimony, this document listed the names of all the Respondent's employees for a period of time, their hire date, termination date, each store they worked at, their hourly rate, hours worked, and job classification. (Res. Exh. 5.) It is significant to note that this document was apparently not previously provided to the Union pursuant to the Union's information request, but only on the day of the hearing. It is unclear to the undersigned whether even at that late date, the document is responsive to the Union's request for information as to the impact on the hours worked by the employees of those stores receiving the transferees.

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## C. Analysis and Conclusions

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### 1. The Broadway Store

The complaint alleges that the Respondent violated the Act by closing the Broadway store and offering the employees of that store transfers to its other stores without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct on the employees. Section 8(a)(5) of the Act requires that an employer "bargain collectively with the representatives of his employees." Although an employer has no duty to bargain with a union over an economically motivated decision to close a store, the employer does have a duty to notify the union that the store will be closing, and to bargain over the effects of that store closing. *National Car Rental Systems*, 252 NLRB 159, enf'd. 672 F. 2d 1182 (3<sup>rd</sup> Cir., 1982); *Gannett Co. Inc.*, 333 NLRB 355 (2001). Further, notice must be given with sufficient time to allow a union an opportunity to request bargaining. *"Automatic" Sprinkler Corp.*, 319 NLRB 401 (1995). A union must have the opportunity to bargain in a meaningful manner and at a meaningful time. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981).

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The facts in this case establish without any doubt that the Respondent failed to notify the Union that the Broadway store was closing. Ray Garrett does not deny failing to notify the Union of the pending closure of the store, merely claiming that he did not know that he had such an obligation. Even giving Garrett the benefit of the doubt, that old cliché is accurate in this instance and "ignorance of the law is no excuse." The Respondent made no effort to notify the Union prior to the closure that the Broadway store was closing. The Respondent's failure came despite Garrett's obvious knowledge by mid-March that the store would close approximately one month later. Presenting the Union with a fait accompli is not timely notice. *Penntech Papers v. NLRB*, 706 F. 2d 18, 26 (1<sup>st</sup> Cir. 1983); *Los Angeles Soap Co.*, 300 NLRB 289 (1990). Similarly, the Respondent cannot rely on an article in a local newspaper and the close location of the

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<sup>12</sup> Another letter dated October 23, with an attachment, from counsel for the Respondent to the Union was apparently inadvertently offered into evidence and deals with a totally different store (the Oracle store, number 7), which store is not directly involved in this proceeding. (G.C. Exh. 13.)

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Union office to the Broadway store to constitute notice to the Union. The Respondent had an affirmative obligation to notify the Union. It failed to meet that obligation and to give the Union timely notice of the closure and a significant opportunity to meaningfully bargain over the effects of the closure. In so doing, it violated Section 8(a)(1) and (5) of the Act. *Champion International Corporation*, 339 NLRB No. 80 (2003); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Los Angeles, Soap Co.*, *supra*, at 295.

The Board and the courts have held that “effects bargaining” is intended to provide a union with an opportunity to bargain in the employees’ interest for such benefits as severance pay, payments into pension funds, preferential hiring, reference letters, health insurance, and retraining funds. *Nathan Yorke, Trustee v. NLRB*, 709 F.2d 1138, 1143 (7<sup>th</sup> Cir. 1983), cert denied 465 U.S. 1023 (1984); *Los Angeles Soap Co.*, *supra*, at 295. Certainly, in the case at hand, there were matters over which the parties could have negotiated. The Respondent claims otherwise, contending that as the employees were given the opportunity to transfer to other stores, the status quo was essentially maintained. However, even with a cursory review of the Broadway store employees’ situation, the undersigned can envision any number of matters over which the Union might have attempted to improve the employees’ positions. Such proposals might have included payment of severance pay, medical insurance benefits, reference letters, retaining funds, and commuting funds for those transferees who incurred added transportation costs. By the Respondent’s own admission, three Broadway store employees declined the transfer offers and, so, it is logical to assume that they at least were not entirely satisfied with the Respondent’s unilateral offers. In any event, it is not possible at this late date to know what matters the parties might have negotiated over or reached agreement on, as the Respondent never notified the Union of the closure nor gave the Union a meaningful opportunity to bargain over the effects of the closure. This conduct constituted a violation of Section 8(a)(1) and (5) of the Act.

Not only did the Respondent fail to give the Union a meaningful opportunity to engage in “effects bargaining,” it also engaged in direct dealing with the Broadway store employees. The complaint alleges that the Respondent dealt directly with the employees in violation of the Act by offering them transfers to other stores. It is well established Board law that an employer engages in unlawful direct dealing when the employer communicates directly with union-represented employees, for the purpose of establishing or changing the employees’ wages, hours, or working conditions, and where such communication is to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific*, 196 NLRB 458, 459 (1972). This is precisely what the Respondent did regarding the Broadway store employees.

The Respondent does not deny engaging in direct dealing over the transfer issue. Rather, the Respondent continues to take the position that any violation of the Act was inadvertent, caused by Ray Garrett’s ignorance of the law under which he was required to negotiate with the Union. As I noted above, even if true, this is not a valid defense. Nor is it a legitimate defense for the Respondent to suggest that somehow the Union was partially responsible by not being more active in representing the employees, since such activity would have allegedly alerted Garrett that the Union was still interested in representing the employees. Of course, the level of the Union’s representational activity is irrelevant. The Union was at the time of the events in question the collective bargaining agent for the Broadway store employees. Ray Garrett knew this, having personally executed a recognition agreement between the parties on May 18, 2001. (G.C. Exh. 2.) However, less than two years later, he apparently authorized the Broadway store manager to engage in direct dealing with the union-represented employees and offer them transfers to other stores. The Union, which was unaware of the pending closure



the Board was not deciding that such a remedy was warranted for all effects bargaining violations, regardless of loss. However, counsel's reliance on a number of cases, where the Board declared that the employer would be permitted to challenge a *Transmarine* backpay remedy, is inapposite, as these cases all reached the Board on the General Counsel's motion  
5 for a default judgment.<sup>14</sup> Having reached the Board on a motion for default judgment, the actual effect on represented employees of the decision to close was unclear. Therefore, it was most appropriate for the Board to permit the employer to challenge the standard *Transmarine* remedy at a compliance proceeding.

10 The Respondent's argument is premised on the assumption that because the Broadway store employees could have all accepted the transfer offers, they would have suffered no financial loss as a result of the closure of the store. However, it is a mystery to me how the Respondent can make this assumption, and I see no evidence to support it. Certainly, there were at least additional transportation costs incurred for some transferring employees in  
15 commuting to their new stores. Further, as the Respondent has apparently never furnished the Union with the requested payroll records for the employees of the Broadway store, it is simply not possible to know whether there was a reduction in the number of hours worked following their transfers. It is also unclear why three employees declined the transfer offers. Had the Respondent engaged in timely effects bargaining, the Union may have been able to obtain  
20 severance pay, continued health insurance, retraining benefits, letters of recommendation, or other benefits for those employees who declined the transfers, and even enhanced benefits such as a transportation subsidy for those who agreed to the transfers.

25 In any event, the Board has consistently found a *Transmarine* remedy appropriate even when affected employees are offered transfers to other facilities. In *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999), the Board affirmed the *alj* who held that the remedy served to restore the union's bargaining power, not just to compensate actual loss. That case was very similar to the case at hand as the employer, while failing to bargain with the union about the effects of the closure of the facility, contacted the represented employees directly and offered them transfers.  
30 According to the judge, the Respondent's offer of employment to the unit employees was "part and parcel of the unfair labor practice" and the Respondent "should not be allowed to rely on its own misdeeds in order to avoid a remedy." Further, as the *alj* noted, "the purpose of the remedy is not only to compensate the employees, but to restore to the Union the bargaining leverage it would have enjoyed in the absence of the employer's unfair labor practices." As the  
35 Board stated in *Transmarine*, the remedy is intended to ensure that the bargaining has "economic consequences" for the employer. Thus, in the case at hand, as in *Sea-Jet*, the Respondent's offer of transfers to the represented employees does not negate the appropriateness of the backpay remedy under *Transmarine*.

40 I conclude that as a result of the Respondent's unlawful failure to bargain about the effects of its closure of the Broadway store, those represented employees have been denied an opportunity to negotiate through their collective-bargaining representatives at a time when the Respondent was still in need of their services, and a measure of balanced bargaining power existed. Had bargaining taken place prior to the store's closure, the Union might well have been  
45 able to obtain addition benefits for the employees. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. Therefore, a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices committed.

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50 <sup>14</sup> See, *Duncan Security Consultants*, 339 NLRB No. 87, fn. 4 (2003); *ACS Acquisition Corp.*, 339 NLRB No. 86, fn. 2 (2003); *United Exposition Service Co.*, 313 NLRB 1007, fn. 3 (1994).

Accordingly, I shall order the remedy provided under *Transmarine*, including a limited 2-week back pay requirement. This is intended both to make whole the employees for losses suffered as a result of the violation, and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for the Respondent.

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### 3. The River and Grant Stores

It is alleged in paragraph 6(g) of the complaint that since about June 10, 2003, the Respondent has failed and refused to timely furnish the Union with certain specific information requested by it regarding the employees of the bargaining units at the River and Grant stores; and it is further alleged that for other requested information regarding those stores, the Respondent has failed and refused to furnish the Union with anything.<sup>15</sup> Except for its general denial that it violated the Act, the Respondent does not offer any specific evidence in rebuttal to these allegations.

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The facts concerning these allegations are not disputed and have been set forth in detail above. Without being redundant, it is still necessary to note that the Respondent first notified the Union on June 2 of the pending closure of the River and Grant stores. The Union responded by letter dated June 10 with a request for information including the following: The names of all bargaining unit employees, their seniority dates (with both the Respondent and ABCO), their job classifications, store location of job offerings, reasons for rejecting offers, and the impact on hours worked for those union-represented employees at the stores receiving transferees. (G.C. Exh. 4.)<sup>16</sup> Attached to a letter from the Respondent's labor counsel dated August 18 were, among other matters, store rosters for the River and Grant stores, containing employee classifications, hire dates, and status. (G.C. Exh. 8.) This information was obviously intended to satisfy the Union's written request of June 10. However, it arrived two months and one week after the request was made. The information was necessary in order for the Union to engage in meaningful "effects bargaining" regarding the closure of the River and Grant stores, and the failure to timely receive the information would undoubtedly have delayed such bargaining.

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Additionally, the information furnished by the Respondent on August 18 (G.C. Exh. 8.) did not include all the information that the Union had previously requested. By letter dated September 5, Paul Rubin specified for the Respondent's labor counsel those items, which had not been furnished, and for which the Union was still requesting information. (G.C. Exh. 9.) While this letter was somewhat confusing in that it mentioned the Broadway store, it was clear from the parties' correspondence (G.C. Exh. 4, 5, & 8.) that the Union had not received all the information which it had previously requested for the River and Grant stores, specifically the impact on the hours of employment of the represented employees at the stores which were receiving transferees. By letter dated September 26, the Respondent's counsel indicated that the transferees had no known impact on the stores to which they were transferred. (G.C. Exh.

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<sup>15</sup> Counsel for the General Counsel amended paragraph 6(g) of the complaint at the hearing without objection by counsel for the Respondent. As amended, I find this paragraph to be poorly worded. However, the intention of the General Counsel is clear from the discussion between the undersigned and counsel on the record. (See transcript pages 10, 11, and 12.) Also, as these matters were fully litigated at the hearing, no prejudice to the Respondent resulted from this imprecisely worded paragraph.

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<sup>16</sup> In its answer to the complaint, the Respondent admits that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the employees in the two units.

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10.) Doubling that the Respondent was correctly reporting no impact from the transfers, the Union by letter dated October 21, requested detailed information on the hours worked by employees in those stores receiving transferees from the Broadway, River, and Grant stores. (G.C. Exh. 11.) However, it does not appear that even as late as the date of the hearing the Respondent had furnished the requested information seeking the impact on the hours worked of the represented employees at the stores to which River and Grant employees were transferred.

It is axiomatic that an employer has an obligation upon request to provide information that is necessary for a union to properly perform its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). The “relevance” of the request is governed by a “liberal” discovery-type standard, which standard tends to support “the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Id.* at 437 & fn. 6. Where the information sought relates to “core” terms and conditions of employment within the bargaining unit, no specific showing of relevance is required. *Atlas Metal Parts, Co. v. NLRB*, 660 F. 2d 304, 309-310 (7<sup>th</sup> Cir. 1981). In the matter at hand, the requested information clearly involves “core” terms and conditions of employment. After all, there could be nothing more basic to the collective-bargaining relationship than the continued presence in the bargaining units of the transferred employees.<sup>17</sup>

The Board has held that when a union is entitled to be provided with requested information, it is entitled to the information in a timely manner. A two-month delay in the employer providing information to the union was found to be untimely. *Gloversville Embossing Corp.*, 314 NLRB 1258 (1994). Further, a delay of two months in the furnishing of information was found to be excessive when an employer provides no explanation for the delay in providing the information. *United States Postal Service*, 310 NLRB 530, 536 (1993).

As I have indicated, the Respondent had a duty to provide the requested information to the Union. The information is clearly relevant for the Union to be able to bargain over the effects of the closing of the River and Grant stores and the impact on all the employees in the two units it represents. In order to fulfill its collective-bargaining duties, the Union would naturally be interested in whether employees were adversely affected in their hours, travel time to work, seniority, and wages due to the closure of the two stores. This was precisely why the Union requested the information it did.

The Union requested this information on June 10. However, it was not until August 18, two months and one week later, that the Respondent furnished some of the information. The Respondent has never provided the information requested regarding the hours worked for employees at those stores receiving transferees from the River and Grant stores. It is important to note that the parties met on August 6 to discuss the closing of the various stores. (G.C. Exh. 7.) Had the Respondent acted in a timely manner and furnished the requested information to

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<sup>17</sup> The Respondent has suggested that the Union’s information request was disingenuous because, when the ABCO markets were acquired by the Respondent two years earlier, the Union was aware of the names, job classifications, hours of work, and seniority for the employees in the bargaining units. However, I conclude that this argument is meritless in view of the testimony of both Rubin and Garrett that there exists a high turnover of employees in the grocery business. Certainly the composition of the bargaining units would have changed significantly over a two-year period.

the Union prior to this meeting, the parties might have been able to productively discuss these issues. Instead, the Union was left continuing to wait for the information relating to the closure of the River and Grant stores. Further, the Respondent never indicated a reason for this delay.

5 I conclude that the Respondent violated Section 8(a)(5) of the Act by failing to timely  
furnish the Union with the following requested information on the pending closure of the Grant  
and River stores: The names of all bargaining unit employees, their seniority dates (with both  
the Respondent and ABCO), their job classifications, store location of job offerings, and reasons  
10 given by employees for rejecting offers. Under the circumstances of this case, the  
Respondent's production of the requested information, after a delay of over two months, was  
clearly untimely. Further, I find that the Respondent has failed even by this late date to furnish  
the Union with the requested information regarding the impact on the hours worked for those  
union-represented employees at the stores receiving transferees from the Grant and River  
stores. This constitutes an additional violation of Section 8(a)(5) of the Act.

15

#### **D. Summary**

As is reflected above, I find that the Respondent has violated Section 8(a)(1) and (5) of  
the Act as alleged in paragraphs 6(c), (d), (g), and 7 of the complaint.

20

#### **Conclusions of Law**

1. The Respondent, Garrett's Markets, Inc. d/b/a Garrett's IGA, is an employer engaged  
in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25

2. The Union, United Food and Commercial Workers Union, Local 99, AFL-CIO, is a  
labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (5)  
30 of the Act:

(a) Failing to notify the Union of the closure of the Broadway store, and not affording the  
Union an opportunity to bargain over the effects of that closure;

35 (b) Dealing directly with the employees of the Broadway store by offering them transfers  
to other stores of the Respondent; and

(c) Failing to furnish the Union with requested information necessary for the performance  
of its duties as the collective-bargaining representative for the Respondent's employees, and/or  
40 failing to furnish that information in a timely fashion.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6)  
and (7) of the Act.

45

#### **Remedy**

Having found that the Respondent has engaged in certain unfair labor practices, I find  
that it must be ordered to cease and desist and take certain affirmative action designed to  
effectuate the policies of the Act.

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As a result of the Respondent's unlawful failure to bargain in a meaningful manner and  
at a meaningful time, about the effects of its closure of the Broadway store, the employees of

that store have been denied an opportunity to negotiate through their collective-bargaining representatives at a time when the Respondent might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order  
5 alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, I shall recommend that, in order to effectuate the purposes of the Act, the Respondent bargain with the Union concerning the effects on its employees of the closure of the Broadway store, and shall order a limited backpay requirement designed both to make whole  
10 the Broadway store employees for losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for the Respondent. Thus, the Respondent shall pay to the employees in the two units represented by the Union at the Broadway store at the time the decision to close was made their normal wages from 5 days after the date of the Board's  
15 Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the decision to close the Broadway store; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of the Board's Decision, or to commence negotiations within 5 business days after receipt of the  
20 Respondent's notice of its desire to bargain with the Union;<sup>18</sup> or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the closure of the Broadway store to the time he or she secured equivalent employment; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period  
25 at the rate of their normal wages when last in the Respondent's employ at the Broadway store, with interest.<sup>19</sup>

Further, I shall recommend that the Respondent be ordered to provide the Union with all the information requested by the Union in its letter of June 10, 2003,<sup>20</sup> including information  
30 regarding the hours worked by the represented employees employed at the stores to which the River and Grant store employees were transferred.

Since the Respondent has closed its Broadway, River, and Grant stores, these facilities are no longer available to post a notice to employees regarding violations and remedy.  
35 Therefore, I shall recommend that the Respondent be ordered to mail signed copies of the notice to the Union and to all of the Respondent's employees represented by the Union and employed at the Broadway, River, and Grant stores on the date each store closed.<sup>21</sup>

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45 <sup>18</sup> The undersigned is unclear to what extent the parties may have commenced effects bargaining a number of months after the closure of the Broadway store.

<sup>19</sup> This remedy is as provided for in *Transmarine Corp.*, *supra*, as modified by *Melody Toyota*, 325 NLRB 846 (1998). Interest on all monies paid pursuant this decision shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).  
50

<sup>20</sup> See G.C. Exh. 4.

<sup>21</sup> *Benchmark Industries*, 269 NLRB 1096, 1099 (1984).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>22</sup>

**ORDER**

5

The Respondent, Garrett's Markets, Inc. d/b/a Garrett's IGA, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

10

(a) Failing or refusing to notify and bargain with United Food and Commercial Workers Union, Local 99, AFL-CIO, concerning the closure of its Broadway store and the effects on employees represented by that labor organization resulting from the closure of that store;

15

(b) Bypassing the United Food and Commercial Workers Union, Local 99, AFL-CIO and dealing directly with the employees from the Broadway store represented by that labor organization;

20

(c) Failing or refusing to furnish and/or timely furnish the United Food and Commercial Workers Union, Local 99, AFL-CIO with the information requested by it in its letter of June 10, 2003, regarding the River and Grant stores, in order to discharge its duties as the collective-bargaining representative; and

25

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

30

(a) On request, bargain in good faith with the United Food and Commercial Workers Union, Local 99, AFL-CIO as the exclusive collective-bargaining representative of its employees at the Broadway store with respect to the effects on its employees of the decision to close the Broadway store and, if any understanding is reached, embody it in a signed agreement;

35

(b) Pay to its employees formerly employed at the Broadway store and represented by the United Food and Commercial Workers Union, Local 99, AFL-CIO their normal wages for the period set forth in the remedy section of this decision;

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(c) Forthwith furnish the United Food and Commercial Workers Union, Local 99, AFL-CIO with all the information requested in the Union's letter of June 10, 2003;

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<sup>22</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50

5 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

10 (e) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"<sup>23</sup> to all employees represented by the United Food and Commercial Workers Union, Local 99, AFL-CIO and employed at the Broadway, River, and Grant stores on the date each store closed. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative. A signed copy shall also be mailed to the Union; and

15 (f) 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.

20 Dated at San Francisco, California on January 8, 2004.

25 Gregory Z. Meyerson  
Administrative Law Judge

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50 <sup>23</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "MAILED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT fail and refuse to notify and bargain with the United Food and Commercial Workers Union, Local 99, AFL-CIO concerning the effects of our decision to close any of our stores where employees are represented by the Union.

WE WILL NOT bypass the Union and deal directly with our employees represented by the United Food and Commercial Workers Union, Local 99, AFL-CIO regarding the closure of a store and the effects of that closure on our represented employees.

WE WILL NOT refuse to give or delay in giving the United Food and Commercial Workers Union, Local 99, AFL-CIO information which it has requested and needs to represent employees at stores that we are closing, which information specifically relates to the effects of the closing upon our represented employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the United Food and Commercial Workers Union, Local 99, AFL-CIO, as the representative of our Broadway store employees, regarding the effects upon our represented employees of our decision to close that store, and put in writing and sign any agreement reached as a result of such bargaining.

WE WILL immediately give the United Food and Commercial Workers Union, Local 99, AFL-CIO all the information that it previously requested regarding the pending closure of our River and Grant stores, which information is necessary for the Union to bargain over the effects of those closures and their impact on our represented employees.

WE WILL pay the employees of our Broadway store represented by the United Food and Commercial Workers Union, Local 99, AFL-CIO and who were employed on the date we decided to close that store, their normal wages for a period specified by the National Labor Relations Board, plus interest.

Garrett's Markets, Inc. d/b/a Garrett's IGA

(Employer)

Dated \_\_\_\_\_

By

\_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.