

**Wolf Street Supermarkets, Inc. d/b/a Jim's Big M;
and Big M Supermarkets, Inc. and United Food
and Commercial Workers, District Union Local
1. Case 3-CA-10203**

September 30, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On March 26, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, Respondent Jim's Big M filed cross-exceptions and a brief in answer to the General Counsel's and the Charging Party's exceptions and in support of its cross-exceptions, and Respondent Big M Supermarkets filed a brief in opposition to the General Counsel's and the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, find-

¹ The General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Charging Party asserts in its exceptions that it was prejudiced by the Administrative Law Judge's improper characterization of the December 1, 1980, conversation between Anthony Pento and Respondent Big M Supermarkets' vice president, Vincent Genecco, regarding Big M's alleged decision to delay the opening of the store for 30 days following the closure of Pento's store. The Charging Party argues that the mischaracterization contributed to the Administrative Law Judge's decision generally not to credit Pento's testimony because the Administrative Law Judge erroneously concluded that the testimony suggested that Pento, not Genecco, initially viewed a delay in opening the store as a way to avoid having to hire Pento's employees. Although not entirely clear from the record, we agree the Charging Party is correct in stating that Pento corrected himself while testifying about the December 1 conversation and that Genecco first raised the subject of delaying the opening of the store. However, in light of the fact that the Administrative Law Judge's credibility finding with respect to Pento was based on many factors, including demeanor, and the testimony concerning the delay in opening the store played a minor role in the Administrative Law Judge's general conclusion that it was entirely improbable that Genecco would have raised the subject of the Union in any conversation with Pento, we specifically affirm the Administrative Law Judge's credibility finding as to Pento.

We agree with the Administrative Law Judge that allegations in the complaint did not place in dispute the legality of Respondent's hiring decisions after the initial employees complement began work on January 11, 1981. The issue of subsequent discrimination in hiring was, however, so related to the subject matter of the complaint that, if fully litigated, it could have been decided. Although Respondent Jim's Big M's co-owner Jim Enzerillo stated that he decided not to consider hiring any of the alleged discriminatees after they began picketing on January 11, we reject

ings,¹ and conclusions² of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

the General Counsel's argument in exceptions that this bare statement constituted full litigation of alleged discrimination in hiring after January 11.

² Respondent Jim's Big M, citing *Marriott Corporation*, 251 NLRB 1355 (1980), excepts to the Administrative Law Judge's finding that the General Counsel adduced sufficient evidence to establish a *prima facie* case under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), to support the inference that the employees' union activity was a motivating factor in Respondent's decision not to hire Pento's former employees. We find merit in Respondent's exception. Even though we are in agreement with the Administrative Law Judge's ultimate disposition of the case, we find that in the circumstances herein, absent a showing of union animus or other unlawful reason for the alleged discriminatory conduct, the evidence relied on by the Administrative Law Judge in finding a *prima facie* case was insufficient to raise an inference that the employees' status as union members, rather than, for example, their status as former employees of an unsuccessful business, was in any way related to Respondent's decision not to hire them.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me on November 30 and December 1 and 2, 1981, in Syracuse, New York, upon an original unfair labor practice charge filed on January 19, 1981, and a complaint which issued on March 30, 1981, which, as amended, alleges that Respondents violated Section 8(a)(3) and (1) of the Act by failure to hire employees of the former operator of a retail grocery store. In their duly filed answers, Respondents denied that they committed any unfair labor practices. Following close of the hearing, briefs were filed on behalf of the General Counsel, Respondent Jim's Big M, Respondent Big M, and a statement was filed on behalf of the Charging Party.

Upon the entire record in this proceeding,¹ including my direct opportunity to observe the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs and statement, it is hereby found as follows:

FINDINGS OF FACT

1. JURISDICTION

Respondent Jim's Big M is a New York corporation with a principal place of business in Syracuse, New

¹ Counsel for the General Counsel's motion to correct the official transcript is granted. Additional errors therein are hereby corrected.

York, from which, since January 11, 1981, it has been engaged in the retail sale of groceries and related products. Based upon a projection of revenues, said Respondent will annually derive gross revenues exceeding \$500,000 per annum, and will purchase goods and materials valued in excess of \$5,000 from vendors located within the State of New York, which goods and materials will be shipped to the latter from points outside the State of New York.

Respondent Big M Supermarkets is a New York corporation with a principal place of business in Syracuse, New York, from which it is engaged in the franchising of services to grocery stores located in New York and Pennsylvania. In the course and conduct of said operation Big M Supermarkets provides services valued in excess of \$50,000 to its franchisees. Respondent Big M Supermarkets is a wholly owned operating division of P & C Food Markets, Inc., a New York corporation engaged in retail grocery operations and wholesale distribution of groceries, from its Syracuse, New York, facility. During the calendar year preceding the hearing, P & C Food Markets, Inc., purchased goods valued in excess of \$50,000 shipped directly to its New York facilities from points outside the State of New York.

The complaint, as amended, alleges, and I find, that Respondent Jim's Big M and Respondent Big M Supermarkets are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondents admit, and I find that United Food and Commercial Workers, District Union Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

This proceeding relates to allegations that the operator of a newly acquired grocery store, Jim's Big M, violated Section 8(a)(3) and (1) by refusing to hire employees who formerly worked at that location. The complaint further alleges that liability for the aforesaid unfair labor practices should also be imposed upon a separate entity, Respondent Big M Supermarkets, because Jim's Big M was operated as its franchisee and because Respondent Big M Supermarkets allegedly "influenced or caused" Jim's Big M to engage in the alleged discrimination.

B. Background

Between April 1969 and December 1980, a grocery store at the Wolf Street location was operated by Anthony T. Pento. From the inception of his operation, Pento had recognized the Union, or its predecessor, as the exclusive representative of his employees. The most recent collective-bargaining agreement was to expire on December 31, 1980.

For many years Pento had maintained business relationships with Respondent Big M Supermarkets. First it had functioned as a franchised Big M store for some 7 to 8 years. This ended in 1977 in consequence of legal action taken against Pento by Big M, which, in turn, re-

sulted in an agreement terminating Pento's franchise agreement and obliging him to execute a secured note to Big M for \$34,000. Thereafter, Pento, though no longer a Big M franchise, continued to purchase from P & C² and to participate in advertising programs conducted under the auspices of Big M Supermarkets and its franchisees.

On December 1,³ Pento was forced to close the Wolf Street store. Prior thereto Pento labored under serious cash flow problems. As in 1977, Pento in 1980 again had fallen heavily into the debt of Big M Supermarkets. Indeed, during the last 6 months of his operation, Pento was placed on a c.o.d. basis thereby precluding his utilization of credit to support his inventory. In the interim, on September 17, 1980, P & C filed suit against Pento seeking, *inter alia*, \$65,000 in damages as well as possession of Pento's inventory. During the Thanksgiving period of 1980, that lawsuit was resolved by Pento's execution of a settlement agreement dated November 26. The latter called for termination of Pento's lease from P & C for the premises, effective December 1, 1980, and a 70-30 split of Pento's existing inventory, with the larger share going to P & C. It was also agreed that P & C would buy all of Pento's unencumbered equipment for the sum of \$15,000.⁴

On December 1, Pento terminated his operation at the Wolf Street store, and Big M opened procedures for the disposition of inventory contemplated by the settlement agreement.

As of December 1, insofar as this record discloses, Pento employed only eight individuals.⁵ They were: Judy Allen—nee Brewster, Joseph C. Cyr, Jr., Joe Formica, Sandy Maxim, Pat Naylor, Margaret O'Connell, Sue Ranger, and Michael Tisdell.

P & C and Big M, for purposes of this proceeding are treated as a single entity. Although P & C operates large stores in its own name, there is no indication that Big M operates its own stores, and neither was shown to operate stores of the type and size that reverted to their possession upon ouster of Pento from the Wolf Street location. Accordingly, since Big M held the lease obligation and then acquired Pento's inventory and equipment, as would be expected it immediately embarked upon an

² It will be recalled that Big M Supermarkets is an operating division of P & C, which operates warehouses from which franchisees and independent grocery operators purchase dry groceries.

³ Unless otherwise indicated all dates refer to 1980.

⁴ See Resp. Exh. 2. Generally, the settlement was signed by Pento during the Thanksgiving period. His recollection that it may have been Saturday, November 29, fits logically within the overall sequence of events.

⁵ The complaint named nine discriminatees, including one Jackie Persechino. At the hearing, counsel for the General Counsel moved that Persechino be deleted from the complaint, as there was no evidence that she filed an employment application with Jim's Big M. Counsel for the Charging Party opposed said action and, at my suggestion, the General Counsel withdrew said request. Later, however, the evidence also failed to substantiate that Persechino was situated similarly to the alleged discriminatees or that she was in any sense a victim of discrimination on the theory advanced in this proceeding. Thus, there is no clear, credible evidence that Persechino, at the time of the December 1 closing of the Wolf Street store, was employed by Pento. Accordingly, the complaint is dismissed insofar as it includes 8(a)(3) and (1) allegations on behalf of Persechino.

effort to secure a new owner-operator of the premises. In early December, after two prospects dropped out of the running, Jim and Lou Enzerillo purchased the business from P & C. Lou Enzerillo, an insurance broker in the area, was to be a silent partner; responsibility for day-to-day operation of the newly acquired business was to be lodged in his brother Jim. Acquisition of the Wolf Street store culminated a continuing search by James Enzerillo for a Big M store and marked his first experience as an entrepreneur. Thus, in 1974, he informed Vincent Genecco, vice president of both Big M and P & C, of his desire to secure a Big M franchise. At the time, Jim Enzerillo was an employee of Western Electric, where he had worked for some 20 years, during which he participated intensively in union affairs, having been the president of his CWA Local for some 8 years. In 1975, he volunteered for layoff at Western Electric in contemplation of the purchase of a Big M store in Brewerton, New York. However, that deal fell through when the store operator changed his mind about selling, and Enzerillo found himself back in the job market. However, later in that same year, Genecco was told of the availability of a Big M store in Syracuse, operated by a Mr. Balduzzi. Enzerillo followed this up, eventually entering an agreement with Balduzzi whereby he would work in the store as a manager for a few months and attempt to raise the volume of business to desirable levels. After several months and in early 1976, Enzerillo lost interest as his efforts to improve the store's profit potential in the face of local competition failed. Nonetheless, Enzerillo informed Genecco of his continuing interest in obtaining a Big M store. Enzerillo exited from this brief stint in the grocery business and found a job with General Foods.

In November 1980, Genecco informed Enzerillo that there was a possibility that the Pento store might become available and inquired as to his interest. Enzerillo responded in the affirmative, and during the first week of December visited the store. On or about December 7, Enzerillo told Genecco that he wanted the store. According to Enzerillo, as he was "pretty confident then" that he was going to get the store, he contacted his brother about the financial arrangements and gave notice to his employer, General Foods.

The transition in ownership between Pento and Big M could only be accomplished after certification of the results of the inventory and an exchange of checks. This, together with actual release of Pento's keys to Big M attorneys did not take place until about some 7 to 10 days after the closedown. Formal designation by Big M of the Enzerillos as the new operators of the store or purchasers of the store did not occur until December 15 or 16. At that time the Enzerillos took possession of the store,⁶ which had been reduced to a state of deterioration. Accordingly, Jim Enzerillo, with assistance from a P & C representative, formulated plans to renovate the store prior to opening. As of December 23, a determination had been made that the grand opening of the new store would be on January 11, 1981.⁷ The delay in opening be-

tween December 16 and January 11, 1981, accommodated planning and completion of renovations, the selection and installation of new equipment, incorporation of the new operation, restocking the store, and the procurement of licensing, including the beer license.

During the period prior to the opening of the store, employment applications were received by Respondent from several sources, including those filed by applicants directly at the store. With the exception of Jackie Persechino, all the originally named discriminatees filed applications. None of the latter were interviewed or hired by Enzerillo.

On January 11, 1981, Enzerillo had his grand opening. At 9 a.m. that day pickets appeared in the vicinity of the entrance to the store carrying picket signs which recited as follows:

NOTICE TO THE PUBLIC
JIM'S BIG M DOES NOT EMPLOY
MEMBERS OF THE UNITED FOOD AND
COMMERCIAL WORKERS DISTRICT UNION
LOCAL NO. 1
UNFAIR TO ORGANIZED LABOR
PLEASE DO NOT PATRONIZE.

The picketing continued at least for several weeks thereafter and there is evidence of some vandalism in the store contemporaneous with the picketing. On January 19, 1981, the unfair labor practice charge in this proceeding was filed, and on March 31, 1981, a complaint issued thereon.⁸

B. Concluding Findings

Any analysis of the issue of motivation must acknowledge the recently articulated standards in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Pursuant thereto a *prima facie* showing of proscribed discrimination is substantiated merely upon evidence supporting the inference that protected conduct was a "motivating factor" in the employer's decision. With such proof, the burden shifts to the employer "to demonstrate

⁶ Enzerillo secured a liability insurance policy on December 16 covering that location.

⁷ See G.C. Exh. 12.

⁸ On February 23, 1981, an unfair labor practice charge was filed in Case 3-CA-10284, alleging, *inter alia*, that Jim's Big M violated Sec. 8(a)(5) and (1) of the Act by refusing to recognize the Union. On March 19, 1981, the Regional Director dismissed Case 3-CA-10284 stating that the investigation disclosed: (1) "... insufficient evidence that the Employer is an *alter ego* of or joint Employer with either Anthony T. Pento's Groceries, Inc., Big M Supermarkets, Inc. or P & C Foods, Inc." and (2) "... the Employer apparently can not be considered a successor to Anthony T. Pento's Groceries, Inc., inasmuch as the investigation revealed that the Employer has not of this date hired, as a majority of its workforce, the former employees of the predecessor employer." The Charging Party appealed said dismissal and, according to representation by the General Counsel herein, said appeal "... questions whether the Region should seek a bargaining order remedy in the instant case." See G.C. Exh. 1(i). By letter dated June 19, 1981, the appeal was denied by the General Counsel, reasoning, *inter alia*: "Even if it were assumed that all the former Pento Groceries' employees would have been hired but for Enzerillo's unlawful motivation, since these employees would still constitute less than a majority of Enzerillo's present work force, insufficient basis existed to support an 8(a)(5) finding." In the light of the foregoing, even were I to find merit in the instant complaint, I would reject the Charging Party's present request for a bargaining order. See, e.g., *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1420-21 (1976).

that the same action would have taken place even in the absence of protected conduct."⁹

Putting aside for the moment some of the more controversial theories expressed by the proponents of the instant complaint, it is clear that on the admitted, undisputed facts, an initial inference of discrimination is warranted; at least in connection with the failure of Jim's Big M to hire Pento's employees on or before January 11, 1981. Thus, Enzerillo admittedly was mindful that Pento's employees were historically represented by a union. Although Enzerillo's operation would draw on skills typical of grocery operations, he declined to hire the alleged discriminatees with apparent disinterest in their *individual* ability or reputation as workers. Thus, he made no inquiry to Pento or anyone else who could have furnished information with respect to their individual qualifications. Though all eight filed applications, none were granted interviews by Enzerillo. In contrast, during the relevant period prior to January 11, 1981, all applicants were granted interviews, with the exception of those known personally by Enzerillo. On these facts alone, the spectre of discrimination emerges with sufficient clarity to warrant the conclusion that ". . . the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of [such] motivation is most accessible to him."¹⁰

It is upon this simplified initial formulation that the case will ultimately turn. Nonetheless, it remains necessary to treat with the protracted effort on the part of the General Counsel to bolster the inference of discrimination on the basis of a suspicion held that Enzerillo, from the very date of the Pento closedown, embarked upon a "scheme of deceit" to obscure the true motive for his refusal to hire the alleged discriminatees. Along this line, it is argued (1) that Enzerillo had been designated on December 1 as the new owner-operator of the store, (2) that Enzerillo deliberately delayed effecting the renovations on the store until December 23, and (3) that Enzerillo took the unnecessary step of keeping the store closed until the renovations were completed. Suspicion held by the advocates of this view produced extensive examination, consuming more than half the pages in the official stenographic transcript. Yet, the entire undertaking impressed as lacking in rational fiber. Just how such a ploy would cast off suspicion on the issue of motivation is inexplicable. While anything is possible, it is a bit bewildering that Enzerillo could have believed that a delayed grand opening would mask his action with innocence. In any event, the evidence adduced by the General Counsel in this respect was either incompetent, incredible, or dependent upon wildly speculative inferences, irreconcilable with uncontrovertible fact.

1. Parole testimony to the effect that at the time of closure, agents of Big M announced that reopening would be delayed for 30 days was unpersuasive. It is noted in this respect that this point together with the imputation of expressed union animus to Genecco appears in testimony of Pento, that, on December 1, he had a conversation with Genecco in which Genecco suddenly

digressed, asking Pento: "By the way . . . are you a union store?"¹¹ Pento responded in the affirmative, whereupon Genecco allegedly said: "You know that can't be anymore . . . because independents cannot live with the Union . . . the cost of the Union is too high."¹² Pento, in out-of-the-blue style, testified that he next stated to Genecco, "you mean that you are going to close the store for a certain length of time," and Genecco responded, "I'm closing the store for 30 days."¹³ According to Pento, he then remarked, ". . . this man is taking over the store and you expect him to succeed and make money by closing over the holidays?"¹⁴ Genecco assertedly responded, "You know damn well that you cannot exist with a union . . . it's impossible for us to exist with a union."¹⁵

Pento also testified that he asked John Palange, a "new account executive" for Big M, if Palange felt that a union store could still operate as an independent. According to Pento, Palange said, "no, we cannot . . . a store that wants to be an independent in order to survive, cannot be union."

¹¹ It is noteworthy that a seal or notice identifying the store as a union operation is maintained at the entrance in a fashion which would be visible to all who enter. Also curious is the fact that the General Counsel went to some length at the hearing to prove that Big M representatives, by having given assistance to Pento in earlier negotiations with the Union, knew of the union status of Pento's store.

¹² It will be recalled that P & C filed the lawsuit that culminated in Pento's being forced out of business in a manner which, by his own admission, caused him to walk out of his store with nothing. Genecco was a vice president of P & C. Pento admitted to his dislike for Genecco. Against this background, it struck as entirely improbable that Genecco would have seized upon that occasion to inject the Union into any conversations he had with Pento.

¹³ Pento's own account suggests that he, not Genecco, initially viewed a delay in reopening as a viable scheme for avoiding hire of his employees. Here again concern exists, as to why if Genecco were of a mind to engage in such a scheme, he would have barred such an intent under such compromising conditions.

¹⁴ There is absolutely no foundation for Pento's insinuation that a successor had been chosen or that Pento suspected or was aware that such was the case at the time. See also fn. 19, *infra*.

¹⁵ An attempt at corroboration is suggested by the General Counsel's examination of former Pento employees Judy Allen and Sue Ranger. Thus, Allen testified that, on the morning of December 1, she had a private conversation with Pento, in reference to the closing of the store. He indicated to Allen that "it wasn't suppose to happen this way," going on to explain, "you guys weren't suppose to lose your jobs . . . you know, I wouldn't have hurt you." According to Allen, Pento went on to indicate that ". . . after [he] . . . signed the contract, they asked . . . if [he] . . . was a union store," with Pento then incanting that, when he responded in the affirmative, he was told that they ". . . were closing the store for 31 days and you [Pento's employees] were out." Ranger testified that she too had a private conversation with Pento on December 1. She claims to have been informed by Pento that the employees were not suppose to lose their jobs and that he had talked to P & C and ". . . they didn't want us because we were union . . . [and that] he tried everything that he could to keep us from losing our jobs." Both Allen and Ranger testified that in a meeting with employees on December 2, Pento's presentation to the group included "basically the same things. . . ." Although reservations are held concerning the credibility of Allen and Ranger, even were I to believe them, the statements that Pento imputed to P & C and Big M are purely hearsay and not necessarily consistent with his own testimony concerning events or conversations on which they were based. From my observation of Pento, it was not unlikely that he would play loosely with facts in order to shift responsibility for the employees' plight from him to Big M. It is noted in this connection that Ranger acknowledged that, despite at least two sessions with Pento concerning the store closing, she was never informed that a lawsuit forced Pento out of business.

⁹ 251 NLRB 1089.

¹⁰ *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

Pento was regarded as unreliable. It is true that Palange was not examined with respect to the above conversation, and that Genecco merely testified that he neither formulated nor was aware of any "plan . . . to change the status of the Wolf Street store from union to non-union." However, in light of the topsy-turvy and haphazard manner in which the General Counsel elected to adduce evidence, confusion on the part of counsel was a decided possibility. In any event, oversight on the part of opposing counsel, or inferences that might be drawn from the absence of direct denial, fails in this instance to neutralize my deep mistrust of Pento. Pento reacted with an evasiveness and a strong tendency to dwell upon both argumentation and lack of recollection, initially to conceal the bias he held against Genecco, P & C, and Big M. Considering the fact that Pento's acceptance of the settlement agreement was imponderable until a few days earlier, and would have become known during the course of a holiday weekend, I also consider it implausible that Genecco had a clear view as of December 1 as to the store's future. If he did, I consider it unlikely that he would have discussed it with Pento. Thus, I did not believe that Palange or Genecco expressed as to how, by whom, or under what circumstance the store would be operated following completion of inventory.

2. Also unsubstantiated by competent proof is the claim that Enzerillo's designation as owner-operator of the store was settled as early as December 1. The General Counsel's contention in this regard is founded upon slanted, if not erroneous, interpretation of ambiguities and a preoccupation with what appears to be rumor or scuttlebutt. It runs counter to the clear fact that the December elimination of Pento came as a surprise to both sides.¹⁶ Turning to the evidentiary claims, it is first noted that the manner in which Genecco handled the solicitation and ultimate grant to Enzerillo impressed me as plainly neutral. He did deal directly with Enzerillo, excluding John Palange, even though the latter's official duties normally included the solicitation of new franchises. However, as heretofore indicated, the effort to secure a store for Enzerillo in the past had been an undertaking pursued by Genecco without involvement of Palange, and to my mind, nothing sinister emerges from his following a like course in more recent dealings. Nor would there seem to be any need for Genecco to instruct Palange to seek out a buyer when the credible testimony indicates that Genecco, himself, at the time, was actively engaged in communicating with three different prospects.

Also unconvincing is the testimony of Richard Potts. Potts, at times material, was employed as a meat manager at a P & C food market. Potts testified that he happened to be in the Pento store on the day it closed and that John Palange, in response to Potts' inquiry, told him that he could see no reason why someone like Potts could not get into the store, while advising that he would get back to Potts. Potts also claims to have called Bill Caffrey, a meat buyer for Big M, the next day to ex-

¹⁶ Prior to Pento's signing the settlement agreement, an event which probably took place on Saturday, November 29, there could be little basis for anticipating with certainty that he would do so. He had rejected settlement overtures concerning the lawsuit in the past.

press his interest in the store. Caffrey indicated that he would look into it. According to Potts, Caffrey called him back the following day and stated that Big M already had someone in mind for the purchase of the store. This testimony, even if true, and even if accurately reflective of the time frame, is hardly a reliable foundation for concluding that Enzerillo was designated as the new owner as of December 1. Potts was a young man of 32 years, who was an incumbent employee of a P & C store. Even if Potts understood clearly what was actually expressed by Caffrey and Palange, it is entirely possible that they sought to dissuade, seizing upon inaccuracy, to avoid offending Potts. Furthermore, it is not entirely clear from his testimony that Potts had clearly expressed a desire for a proprietary interest rather than an interest in functioning as a nonowning store manager.

Finally, the General Counsel cites the testimony of Michael Tisdell to the effect that, on or about December 2, he had a conversation with Kenneth Chapman, wholesale coordinator for Respondent Big M, in which Chapman allegedly informed him that a new owner for the store had been found, and "they did not want to open until after the holidays." While I have no reason to doubt the credibility of Tisdell, there is no evidence in this record that Kenneth Chapman would be in a position to have firsthand information as to the status of negotiations between Big M and prospective operators of the store, and further there is a strong possibility that one would respond with rumor or even from imagination when pumped for information, as Chapman was in this instance.

On balance, objective and irrefutable evidence establishes that Respondent Big M had no way of knowing that the store would be vacated on December 1 until Saturday, November 29, at the earliest. Deliberations over a purchase and plans for opening would in all likelihood require far more extensive deliberations than could be accomplished in so limited a time frame over a holiday weekend. Contrary to the General Counsel, I find no basis for rejecting the testimony by Genecco that it was not until mid-December that Enzerillo was *formally* notified that he would be the new owner-operator of the Wolf Street store.¹⁷

3. Furthermore, there can be little in the way of genuine dispute as to the need for a substantial delay in the store's reopening. Even if Enzerillo had acquired the store as of December 1, he could not open until the following were effected:

1. Certification of the inventory so as to facilitate transfer of possession and title from Pento, an event which apparently did not occur until December 10, when the keys were released from attorneys to Big M.

2. Enzerillo's obtaining financing for the purchase.

3. The legal incorporation of the new grocery operation.

¹⁷ It is true that neither Caffrey, Chapman, nor Palange was examined as to the above conversations. However, the fact that counsel refrained from expanding hearings to contradict items which on their face are vague and appear only remotely to the point is a practice to be encouraged rather than penalized by technical concepts having little relation to truth.

4. Securing a beer license.
5. Securing various other permits related to food handling operations.
6. Determining what equipment had to be replaced, and what renovations were necessary, or to what extent store layout should be revised.
7. Obtaining estimates, materials, and actually completing renovations, including the organization of the store, its cleaning and restocking with inventory.

In light of the foregoing, any claim that the store could have remained open for business on a continuous basis despite the change in ownership is totally unrealistic. As for the delay in reopening to January 11, 1981, credible testimony which struck me as entirely plausible, when weighed against the totality of the record, convinces me that this date was fallen upon in consequence of routine business judgments and normal exigencies of the transition, which were lacking in any suggestion of an untoward effort to conceal antiunion discrimination. Thus, it is noted that Enzerillo ended his employment with General Mills on December 12. I credit his testimony that he was informed of the likelihood that the store would be his a week earlier. He did not take possession until December 15 or 16. Enzerillo credibly testified that Pento left the store in a condition of deterioration,¹⁸ with extensive lighting deficiencies, filth, equipment in disrepair, etc. I have no reason to fault his opinion that the Pento store had failed in consequence of the neglect apparent from these deficiencies. Nor can there be fairly based quarrel with the fact that it would take some time to devise plans for correcting these conditions and effecting renovations, including (1) the cleaning, expansion, and relocation of shelving; (2) realignment of the basic merchandising layout; (3) painting of all walls; (4) replacement of floor tiles; and (5) the purchase and replacement of store fixtures, and equipment, etc. Contrary to the General Counsel, Enzerillo's failure to open the store for business while making these changes did not run afoul of good business judgment.¹⁹ This is particu-

¹⁸ The financial plight of Pento immediately preceding the closing is consistent with Enzerillo's description of the condition of the store on December 16. Thus, Pento admitted to serious cash flow problems, that he had not paid rent since June 1980, and that he permitted his inventory to decline by more than 50 percent of normal levels. In these circumstances, it is entirely possible that his cost-cutting efforts might well have included a disregard for routine maintenance.

¹⁹ No weight is given to testimony of the General Counsel's rebuttal witnesses, Pento and Danella. Though accusing Enzerillo of attempts to deceive, the General Counsel elected to call Danella, a union representative with no management experience in the operation of the grocery business, as an expert competent to afford opinion testimony on the need to close the business while renovating. Although Danella's opinion pointed to lack of necessity, rather than a lack of rationality, and thus is beside the point, it is somewhat astonishing that a government attorney would overreach to the point of attempting to pass off a party's argumentation as the opinion of an expert. Pento was examined along this same line by the General Counsel, but when questioned by me as to what would prove customary in the case of one starting a new business, Pento responded, "Well, that is different." Pento also showed an appreciation for the cliché "A new broom sweeps clean." The General Counsel's use of Pento to support his claim extended to other areas as well. Pento initially related that closing during the December holiday period would involve poor business judgment because sales volume was highest during that month. This view, however, was neutralized on cross-examination when Pento admitted that in past Decembers he could have sustained losses and that it was possible that, during one fiscal period, December was his

larly so in circumstances where the store previously had been taken out of service for 2 weeks prior to possession being surrendered to the new operator. Finally, the delay was also justified by "red tape" in connection with efforts by Enzerillo to obtain a beer license. A beer license was acknowledged to be important in the successful operation of the store.²⁰ Application for the beer license was not made until December 31, 1980, a delay prompted by Pento's failure to turn in his license.²¹ The license for Jim's Big M was not approved until January 9, 1981.

4. Accordingly, it is concluded that the *prima facie* case of the General Counsel is not enhanced by the fact that the store did not reopen until 6 weeks after Pento's removal. Nevertheless, as indicated above, sufficient basis had already been presented for inferring that the history of union representation of Pento's employees contributed at least in part to the refusal to hire. Hence the onus fell upon Jim's Big M to disassociate its action in that respect from union considerations.

The defense as postulated was addressed solely to the complaint's allegation of discrimination during the period December 1, 1980, through January 11, 1981. Pursuant thereto, there can be no question that Enzerillo acquired an unsuccessful operation. At the close of his business, Pento's cash flow was adverse and he had fallen into debt, being unable, among other things, to pay his rent for the 5 previous months. The lack of cleanliness in the store and its generally adverse appearance was not likely to have gone unnoticed by the consuming public. Enzerillo understandably "... wanted to create a new image of the store." It was his view that the unsuccessful Pento operation caused a loss of customers who could be brought back only through renovation and a work force which started from "scratch" with Enzerillo "training ... [his] ... own people."²² Nonetheless, Enzerillo considered the applications of the former Pento employees, making notations upon them.²³ He credibly testified

least profitable month. Thus, the sum total of the testimony of Pento is that despite high sales in December, profit margins are impaired during that period due to added promotional costs. This hardly shows a lack of prudence in Enzerillo's failure to make a hurried preholiday opening.

²⁰ Beyond challenge is Enzerillo's testimony that in his judgment it would be inappropriate to open the store without a beer license. Pento confirmed the importance of beer sales to the success of the store.

²¹ The delay in obtaining the license was due to Pento's failure to surrender the old license. The General Counsel does not dispute that the State Alcohol Beverage Control Board will not issue a new license on premises covered by an outstanding one. Pento confirmed that at some point in December he was contacted by Enzerillo who requested that Pento relinquish his license. Pento could not recall when he complied with this request.

²² The complement hired by Enzerillo on and before January 11, 1981, consisted of 23 employees. Of this group only eight of those hired appeared without recommendation, were strangers, and were hired solely on the strength of their application and interview by Enzerillo. Of this latter group only one, Tina Surprise (bakery and deli girl) was hired as a full-time employee. The balance of the initial work force consisted of four individuals that Enzerillo had worked with in the past, three friends of the family, three more referred to Enzerillo by others and subsequently affirmatively recruited by him, one who had filed an application and enjoyed endorsement of Palange, one who was a daughter of an employee, and three members of the Enzerillo family.

²³ Enzerillo at some point in time placed a black mark over the notations originally placed on the applications of the Pento employees. He indicates that the black mark was placed to identify applicants that he no

Continued

that he anticipated possibly interviewing one or two, but declined to hire them as a group or as part of his initial complement because of the condition of the store and rumors concerning theft by employees from Pento.²⁴

Enzerillo impressed me as a trustworthy witness, who, despite his stumbling on a few dates and figures, testified in straightforward fashion and with an aura of honesty.²⁵ His explanation for the refusal to open the new store with any of Pento's employees was compatible with a rational exercise of business judgment. I believed him, and find that his testimony dispels the inference of discrimination that arises from the General Counsel's case-in-chief, and establishes that Pento's employees would not have been hired as of January 11 even if they had no history of union representation.

Based thereon, I find no violation of Section 8(a)(3) and (1) of the Act in the failure of Jim's Big M to hire any of the Pento employees "on or about December 2, 1980 and again on January 11, 1981 . . ."²⁶

Although, therefore, it shall be recommended that the complaint be dismissed in its entirety, further discussion is required with respect to matters occurring after the time frame specified in the complaint. For Enzerillo conceded that after January 11, 1981, he found it necessary from time to time to augment his work force through new hires. He did so without offering jobs to the alleged discriminatees, explaining that he decided, with finality, to decline to consider employment of the latter "when they started picketing." I would agree with the characterization by the General Counsel that on its face, the above statement by Enzerillo was of a "damaging nature."²⁷ Nonetheless, the General Counsel failed to

longer wished to interview. The record does not disclose the juncture at which Enzerillo took this step. The General Counsel argues that Enzerillo attempted to "deceive the Court" with regard to the use of the employment applications. If this was Enzerillo's intent, he succeeded because I see nothing sinister in marking over notations under conditions which left them obviously decipherable, as they were. Furthermore, Enzerillo freely admitted that during the period prior to January 11, the only employees that he did not grant interviews to were the Pento employees, and those hired with whom he was familiar.

²⁴ During the renovation period the doors were apparently open and various individuals, including applicants, neighbors, prospective customers, and curiosity seekers happened into the store. It is conceded that Pento had experienced thievery from within his staff, which ended upon Pento's discharge of two employees. It does not appear that Enzerillo was mindful of this latter fact.

²⁵ Enzerillo, in his prehearing statement apparently used the term "unqualified" in describing his reasons for not hiring the Pento employees. Unlike the General Counsel, I see no clear inconsistency between the use of that term and the reasons expressed for not hiring the Pento employees as a group. Furthermore, Enzerillo in his prehearing affidavit informed that "only about 2 or 3" former Pento employees filed applications. This statement was in error, and though of limited relevance, presents the only serious discrepancy in testimony of a basically honest witness. In all probability it was attributable to faulty recollection, for experience shows that deliberate misstatement is seldom made with respect to the readily verifiable. The euphemism is viewed as insufficient to compromise the otherwise credible testimony of Enzerillo.

²⁶ See G.C. Exhs. 1(e) and 1(k).

²⁷ Nevertheless, there is no merit in the contention by the General Counsel that this statement evidences that the earlier refusals to hire were founded upon union animus. The picket signs carried on January 11 expressly urged a boycott of the store. In reflecting upon his attitude toward pickets, Enzerillo related, "I just can't walk out there and ask the picketers to come in for an interview." This reaction was understandable and, fairly construed, was not indicative of general union animus. Hostility toward those who would inflict economic injury upon one's business

amend his complaint so as to place in issue the refusal to hire after January 11, 1981. This inaction is particularly significant in light of the fact that the limited scope of the complaint was a foundation for my rejection of the Charging Party's offer of evidence seeking to prove initial acts of discrimination occurring after January 11, 1981. No effort was made to amend the complaint, despite express ruling that the Charging Party would not be permitted to "vary the scope of the proceeding" but was required "to stay within the confines [set by] the General Counsel." In this light, the General Counsel's failure to seek to amend the complaint is deemed fatal. Respondents were denied notice that the matter was in issue. Possible factual defenses have gone unexplored²⁸ and a sensitive legal issue is unaddressed.²⁹ In short, no basis exists for concluding that such matters were fully litigated.

Based on the foregoing, it is concluded that the allegations of discrimination in the complaint have not been substantiated by a preponderance of the evidence, and on that basis alone it shall be recommended that the complaint be dismissed in its entirety. I would note in this connection, that even were I to find that Respondent Jim's Big M were guilty of the violations as charged, I would dismiss like allegations against Big M Supermarkets. Liability is not sought against Big M Supermarkets on the theory of *alter ego*, successorship, single employer, or joint employer.³⁰ The complaint, as amended, simply alleges that Respondent Jim's Big M was enfranchised by Respondent Big M Supermarkets, and that the alleged discrimination was "influenced or caused" by Respondent Big M Supermarkets. The precise theoretical predicate for said allegation was articulated by counsel for the General Counsel, as follows:

The Board has held that there is no requirement in proving a violation of the Act over a discharge of an employee to establish that there was a direct employer-employee relationship if the evidence is otherwise such as to establish that a measure of association exists between the respondent and the employer and the thus affected employees. *Jimmy Kilgore Trucking Company*, 254 NLRB 935 (1981).

As noted in *Jimmy Kilgore, supra*, sufficient association has been found to exist to support a violation

does not necessarily reflect an attitude one way or the other on the question of the basic right of employees to organize.

²⁸ The failure to plead, quite possibly, denied Respondents the opportunity to litigate defenses founded upon possible misconduct on the part of the pickets. The record did include some evidence of vandalism associated with the picketing.

²⁹ The post-January 11 events raise a sensitive issue under *N.L.R.B. v. Local Union No. 1229 (IBEW) [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953), which would seem to warrant careful review on a full record. Board policy to the effect that incumbent employees are engaged in protected activity when, pursuant to a labor dispute, they urge a boycott of their employer's product has been rejected in at least one judicial circuit. See, e.g., *N.L.R.B. v. Knuth Brothers, Inc.*, 537 F.2d 950 (7th Cir. 1976); *N.L.R.B. v. National Furniture Manufacturing Co.*, 315 F.2d 280 (7th Cir. 1963). See also *The Hoover Company v. N.L.R.B.*, 191 F.2d 380, 389 (6th Cir. 1951). An extension of the Board's position to "nonemployee job applicants" who disparage the employer's product, might be viewed with even less sympathy.

³⁰ See G.C. Exhs. 1(i), 1(j), 1(k).

where the association is shown to have been of an intimate business character, or is one of clear employer community of interest, or the involved employers have themselves created a mutually beneficial pattern. Accordingly the Board has held that a Respondent which is instrumental in and/or causes the termination of an employee because of protected activities may violate the Act even though Respondent is not the actual employer of the individual involved. *Jimmy Kilgore, supra.*³¹

The evidence simply does not substantiate that such liability may be imposed in the present circumstances. There is no credible evidence that apart from isolated recommendations, Respondent Big M had any influence in the manner in which Jim's Big M was staffed. Enzerillo did hire one employee referred by Palange, and actively recruited a meatcutter who had been recommended by Bob Merrifield, a Big M field counselor. All final hiring decisions, however, were effected exclusively by Jim Enzerillo. The strongest evidence of Big M involvement related to Enzerillo's acting on the suggestion of a field counselor that he place an advertisement for help in a newspaper, using Big M's box number. Enzerillo agreed to this, and, as far as the evidence discloses, applicants who responded were given applications by Big M functionaries, who in turn submitted them in completed form to Enzerillo, without comment or recommendation. There is no evidence that Enzerillo hired anyone from this source. Most significant is the absence of evidence that Big M afforded any direction, suggestion, discouragement, or position, one way or the other, on the hiring by Enzerillo of former Pento employees. Cf. *Jimmy Kilgore Trucking Company, supra.* Furthermore, the relationship between Jim's Big M and Big M Supermarkets, and the assistance extended, seems typical of that made available between principals in the franchising field, and to impose liability on Big M Supermarkets on this record would give berth to a policy burdening enfranchisors with vicarious liability for any unfair labor practices

committed by their franchisees. Absent clearer direction under established policy than has been called to my attention, I am unwilling to endorse such a concept on this record.

Accordingly, it shall be recommended that the complaint herein be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Wolf Street Supermarkets, Inc. d/b/a Jim's Big M and Respondent Big M Supermarkets, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers, District Union Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Wolf Street Supermarkets, Inc. d/b/a Jim's Big M did not violate Section 8(a)(3) and (1) of the Act by failing and refusing on or about December 2, 1980, and again on January 11, 1981, to refuse to hire the employees of the former owner of the Wolf Street store.

4. Respondent Big M Supermarkets, Inc., did not violate Section 8(a)(3) and (1) of the Act by influencing or causing Respondent Wolf Street Supermarkets, Inc. d/b/a Jim's Big M to refuse to hire the employees of the former owner of the Wolf Street store.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³²

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

³² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³¹ See G.C. Exh. 1(r).