

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GREAT ATLANTIC & PACIFIC TEA CO.
d/b/a WALDBAUM'S

and

CASE NOS. 29-CA-29008
29-CA-29244

LOCAL 338, RETAIL WHOLESALE
DEPARTMENT STORE UNION, UNITED
FOOD & COMMERCIAL WORKERS

Tabitha Boerschinger, Esq., for the
General Counsel
Douglas P. Catalano, Esq., (*Fulbright &
Jaworski, LLP*), of New York, New
York, for the Respondent
Jae Chun, Esq., (*Friedman & Wolf*), of New
York, New York, for the Charging
Party Union

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in Brooklyn, New York, on March 2 and 11, 2009. The Complaint alleges that Respondent, in violation of Section 8 (a)(1) and (5) of the Act, demanded that the Union agree to a non-mandatory subject of bargaining as a condition of reaching a collective-bargaining agreement, conditioned further bargaining upon agreement on pension benefits, refused to provide information to the Union, and caused Union handbillers to leave two of its locations. The Respondent denies that it has engaged in any violations of the Act and asserts that the Complaint is barred by the applicable statute of limitations.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties on April 30, 2009, I make the following²

Findings of Fact

I. Jurisdiction

¹ The Respondent made no further mention of its assertion concerning the 10(b) period and it appears that this defense was made without any basis in fact or law.

² The General Counsel's Brief contains a Motion to Amend Transcript. The suggested corrections are valid and I hereby grant the Motion.

Respondent, a domestic corporation, is engaged in the ownership and operation of various retail supermarkets including Waldbaum's stores located in Carle Place, New York and Jericho, New York. Annually respondent derives gross revenues in excess of \$500,000 and purchases and receives at its Carle Place and Jericho facilities goods and products valued in excess of \$5,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of section 2(2), (6) and (7) of the Act and that Local 338, retail Wholesale Department Store Union, United Food & Commercial Workers, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Union is the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

All full-time and regular part-time Supervising Pharmacists, Staff Pharmacists, Graduate Pharmacists, and Pharmacist Interns employed at Waldbaum's stores in New York City and the State of New York, excluding guards and supervisors as defined in the Act.

Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which was effective from October 1, 2005 though April 1, 2008. Negotiations for a successor agreement to the 2005-2008 contract commenced on March 4, 2008. Approximately 26 bargaining sessions have been held by the parties.

Most of the pharmacies in Waldbaum's supermarkets are organized by the Union. The Union represents pharmacists at 35 or 40 Waldbaum's stores; about 4 or 5 other stores employ non-union pharmacists. Waldbaum's supermarket clerks are also represented by Local 338 but they are covered by a separate contract which is not at issue herein.

B. The Negotiations

1. The Pharmacy Benefits Proposal

Keith Halpern, Esq., the Vice President for Labor Relations of Great Atlantic and Pacific Tea Company was the lead negotiator for the company. He was accompanied by Nick DeGiorgio, Director of Pharmacy Robin Page, John Gigliotti and a person identified as Ali. The Local 338 negotiating team was led by Director of Collective Bargaining Michael Pasquaretta, who was accompanied by Contract Negotiator Carlos Sanchez, Secretary/Treasurer John DiMartino and, alternately, Jae Chun, Esq., or Willie Anspach, Esq.

At a bargaining session on April 2, 2008, the Union presented its demands which included the following language as a proposed amendment to Article 15 of the collective-bargaining agreement. Article 15 provides for employer contributions, at collectively-bargained rates, to the Health and Welfare Fund, the Pension Fund and the Benefits Fund, formerly called the Dental & Legal Services Fund:

U 6)Article 15-Local 338 funds:

(a) Maintain current Medical, Benefits, and Retirement benefits

(b) Add the following language to the CBA: the Union reserves the right, at its sole discretion, to adjust the contribution rates set forth above so as to raise the rates to the Health & Welfare Fund and to lower the rates in an equal amount to the Benefits Fund,

or so as to raise the rates to the Benefits Fund and to lower the rates in an equal amount to the Health & Welfare Fund, so long as the aggregate amount contributed to the two Funds remains the same.

(c) The Employer shall provide medical wrap around insurance for all Pharmacists.

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Halpern testified that the Union's proposal did not seek an increase in the current contribution rates in order to maintain the existing employee benefits.

10 Prescription benefits are provided to unit employees through the Local 338 Benefits Fund. Halpern described the operation of the prescription benefit in testimony that was uncontradicted on the record.³ Pharmacy employees obtain prescriptions through the Local 338 Benefits Fund either at a retail pharmacy or by mail. Employees are liable for a co-pay amount each time they fill a prescription. Normally, the co-pay amount is charged for each 30-day prescription filled at a retail pharmacy. However, if a 90-day supply of a prescription is ordered by mail only two co-pays will be charged instead of three. Further, at some retail pharmacies unit employees may obtain a 90-day prescription and still be charged only two co-pays. This reduced co-pay aspect of the prescription benefit is called "mail at retail."

20 Waldbaum's pharmacies are providers under the Local 338 Benefits Fund. Another provider is Duane Reade, a competitor of Waldbaum's. The two co-pay "mail at retail" price for 90-day prescriptions is available to unit employees at Duane Reade pharmacies but not at Waldbaum's pharmacies. When pharmacists employed by Waldbaum's attempt to fill a 90-day prescription at a Waldbaum's pharmacy they are told to go to Duane Reade.

25 Halpern testified that there had been discussions between the company and the Union about this situation which was viewed as inequitable by Waldbaum's. The company had informed both the Union and the Fund that Waldbaum's was concerned about this arrangement between the Fund and a competitor of Waldbaum's.

30 At a negotiating session on May 22, 2008 Halpern gave a proposal to the Union which provided:

Add the following language to Article 15(a):

35 In order to provide improved pharmaceutical services and prescription benefits for its employees who are represented by the Union, including but not limited to "mail at retail" rates, the Employer and Union agree that the Waldbaum's pharmacies shall be included as providers for the Local 338 Health and Welfare Fund at equal pharmaceutical rates and terms as the Fund receives from its other ninety (90) day at retail and mail order Pharmacy providers.⁴

40 Halpern told the Union that the company's proposal would be an improvement in employee pharmacy benefits and would provide a job security benefit for the unit employees.

45 ³ I shall credit Halpern's testimony. Halpern answered the questions put to him fully and directly and he was cooperative on cross-examination by opposing Counsel. He did not hesitate to give answers that were not particularly helpful to Respondent's case. I formed the impression that Halpern was a truthful witness.

50 ⁴ The company's proposal incorrectly identified the Health and Welfare Fund as the provider of pharmacy benefits. Halpern acknowledged that this was an error and that he knew the benefits were provided by the Benefits Fund.

Halpern testified that bargaining unit members had complained that when they tried to fill a 90-day prescription at their own pharmacies they were told to go to a Duane Reade store. As a matter of convenience, employees wanted to be able to fill prescriptions at their own pharmacies at the lower “mail at retail” rates. Further, permitting Waldbaum’s to fill the 90-day prescriptions at the lower rate would cause more prescriptions to be filled at Waldbaum’s and would increase the amount of work available for unit employees. Halpern noted that some Waldbaum’s pharmacies had decreased their hours due to lack of sales, and the proposal could prevent that from happening and might also have the effect of increasing overtime. Thus, the company’s proposal would contribute to job security for unit employees. Halpern told the Union representatives that the prescription benefit proposal was a mandatory subject of bargaining because it related to employee benefits.⁵

Halpern testified that DiMartino agreed it was onerous to oblige unit employees to fill their prescriptions at other pharmacies and he said the Union would “work with you.” This position was not held by the other Union negotiators.

At the negotiations on May 23, Halpern told the Union that the company’s Director of Pharmacy had contacted the Local 338 Benefits Fund about the company’s concerns and had gotten no response. The Union replied that it had no standing to negotiate on behalf of the Local 338 benefits Fund and that it would not bargain over the “mail at retail” pharmacy benefit proposal. Halpern replied that the Union had an obligation to negotiate over wages, benefits and terms and conditions and that the pharmacy proposal was a benefit improvement for employees. Halpern believed that the Union has standing to bargain over employee benefits.

At a bargaining session on June 5 Halpern again discussed the “mail at retail” proposal with Chun and gave his reasons for believing that it was a mandatory subject of bargaining. Chun maintained that it was prohibited under ERISA but Halpern did not agree with his legal theory. On June 12, the parties again discussed the “mail at retail” proposal and DiMartino asserted that it would only affect 2% of prescriptions. Halpern asked the Union for information to back up this claim but he never received any such information.⁶

Pasquaretta and Sanchez both testified that before Halpern advanced the pharmacy benefit proposal on May 22, 2008 Halpern had told the Union the main issues that remained to be resolved by the parties were duration, wages and pension. Halpern denied this version of the bargaining history. Halpern testified that on May 21 DiMartino said all that remained to be negotiated was wages, pension and duration. Halpern recalled that he did not agree nor disagree. It was clear to him that there were still many items proposed by both sides that had not been removed or tentatively agreed. I note that all of the Union’s proposals bear a heading that states: “The Union reserves the right to Modify, Add, or Delete proposals made during the course of these negotiations.” The Waldbaum’s proposals bear a similar heading.

Pasquaretta and Sanchez stated that on June 13 when Chun asked Halpern if there could be an agreement without resolution of the company’s “mail at retail” prescription demand Halpern said no, it had to be part of the agreement. Sanchez testified that at every meeting Halpern said the parties could not go forward unless they agreed on the pharmacy proposal.

⁵ Halpern testified that the Director of Pharmacy had informed him that it would not be lawful for the Waldbaum’s pharmacy to waive the co-pay for its unit employees. This testimony is uncontradicted.

⁶ There is no evidence in the record to show how many prescriptions would be affected by the company’s “mail at retail” proposal.

However, Halpern testified that he told the Union that he needed a solution and that this was an important aspect of the bargaining. Halpern denied that he said there would be no collective-bargaining contract without an agreement on the prescription drug proposal.

5 The parties met with a mediator on July 16. Halpern explained the “mail at retail” prescription proposal to the mediator and the parties met face to face so that Halpern could reiterate the reasoning behind the proposal.

10 At a bargaining session on October 22, 2008 the company gave the Union a modified pharmacy proposal. Halpern testified that he was trying to respond to what DiMartino had said at the table. The new proposal provided as follows:

Add the following language to Article 15(a):

15 In order to provide improved pharmaceutical services and prescription benefits for its employees who are represented by the Union, including but not limited to “mail at retail” rates, the Union agrees that it will fully recommend to the Local 338 Health and Welfare Fund trustees that the Waldbaum's pharmacies be included as providers for the Local
20 338 Health and Welfare Fund at equal pharmaceutical rates and terms as the Fund receives for its other ninety (90) day at retail and mail order Pharmacy providers.

Sanchez testified that after proposal was given to the Union Chun asked why the parties were still discussing the company request.⁷ Chun told Halpern to discuss his proposal with the Fund.

25 Halpern testified that he had never held the negotiations hostage to an agreement on prescriptions. He said he needed to resolve the prescription issue and wanted to bargain over it, but the Union did not want to negotiate. Halpern pointed out that the company discussed other issues in the course of the many bargaining sessions and did not stop negotiating. He
30 said the parties had to address “mail at retail” in order to have an agreement but he did not condition agreement on any particular proposal; he wanted a collaborative resolution for the issue. Halpern modified the initial proposal to say “fully recommend” to meet Union objections. He saw no reason why the Union could not recommend a provision to the Fund trustees.

35 On cross-examination by Counsel for Respondent, Pasquaretta testified that he does not know if the Union can make a recommendation to the trustees of the Benefit Fund to permit Waldbaum's to provide prescriptions on a “mail at retail” basis.⁸ He has not spoken to the trustees concerning this issue. Pasquaretta confirmed that when the Union formulated its demands, including the demand that current benefits be maintained at the current rate of
40 contributions, the information about the rates necessary to maintain current benefits was obtained by Union President John Durso who is a trustee of the Benefit Fund.

45 ⁷ According to Sanchez, Halpern said the Union would not get a contract without the company proposal. I do not credit Sanchez that Halpern made this statement. Sanchez placed the exchange in September and the totality of his testimony led me to the conclusion that Sanchez did not have a good recall of the event.

50 ⁸ I note that Pasquaretta was not cooperative on cross-examination and gave convoluted answers in order to avoid giving a direct answer to questions posed by Counsel for Respondent. I formed the impression that Pasquaretta did not testify fully on cross-examination and that in general he shaded his testimony to favor the General Counsel's case; I shall give less credit to his testimony for that reason.

Sanchez testified that trustees of the Benefit Fund tell the Union what dollar amounts of employer contributions are necessary to pay for the pharmacy benefit and the Union must then negotiate with the employer to obtain the contributions. The Union makes a commitment in the collective-bargaining agreement that the benefits will be maintained if the employer makes the negotiated contributions. According to Sanchez nothing prevents the Union from discussing the company's pharmacy proposal with the Fund. Indeed, a Union official who is also a trustee of the Fund could be asked to present Waldbaum's proposal to the other trustees.

Halpern acknowledged that if the Local 338 Benefits Fund made the change requested by the company any employee of any other employer covered by the Fund could obtain the 90-day "mail at retail" price at a Waldbaum's pharmacy. Halpern pointed out that the company's contributions to the Fund are not used solely for the benefit of Waldbaum's employees.

The Union has continued to reject the company's modified prescription benefit proposal and it has never made a counter-proposal on this subject. Sanchez testified that Union has always maintained a position that it would not discuss the "mail at retail" prescription proposal.

2. The Pension Fund Proposal

The Local 338 Pension Fund to which Waldbaum's contributes pursuant to Article 15 of the collective-bargaining agreement is a multi-employer defined benefit pension plan. Waldbaum's employees in a different bargaining unit composed of clerks are also covered by this pension plan.

At the April 2, 2008 bargaining session Halpern told the Union that he would make a pension fund proposal. Halpern said that the company was concerned about its mounting withdrawal liability from the Local 338 Pension Fund. Halpern explained that the reason for the company's concern was that A & P participated in over a dozen defined benefit plans in various bargaining units for which the withdrawal liability over time could amount to hundreds of millions of dollars.⁹ In the past A & P had incurred costs of tens of millions when it withdrew from the Teamsters Central States Pension Fund. Further, withdrawal liability is a major impediment to strategic transactions, such as acquisitions, that the company may wish to pursue. Capital lenders scrutinize withdrawal liability when deciding on a loan, thereby making it hard for the company to obtain financing. For these reasons, the company wanted an escape hatch from the Local 338 Pension Fund if the Fund ran into difficulties. Waldbaum's was willing to stay in the Fund for the present because it was well funded but the company needed a trigger mechanism in case the funding level and withdrawal liability worsened.

At the April 4, 2008 negotiations Halpern proposed to the Union that if the Local 338 Pension Fund fell below 100% funding or exceeded \$50,000 in withdrawal liability for the company, the company could withdraw from the Local 338 Fund and carry the benefits to a mutually agreed upon plan. Halpern emphasized that the company would continue to contribute the same per capita to the new plan as to the Local 338 Pension Fund. DiMartino said \$50,000 was "nothing". Halpern suggested that the parties discuss this and come up with a new proposal.

On April 8, Halpern presented a modified proposal: the company would not withdraw

⁹ The withdrawal liability is the company share of the underfunded status of the plan as calculated when the company closes an operation or when it ceases to participate in a fund.

from the Fund if it were less than 100% funded so long as the funding percentage was not declining year after year. Only if the funding percentage declined over the years would the company be permitted to withdraw from the Fund. Halpern again explained his concern to the Union, saying that the company would experience difficulty in obtaining financing for
5 transactions that would benefit the company in the long run and it needed a floor to its withdrawal liability. Pasquaretta said the Union was not interested. He said the Fund was in fine shape and that he did not trust the company or its fund. The Union made no counter proposal.

10 At a session on April 29 Halpern presented another company proposal. If the Local 338 Pension was below 95% underfunded or the company faced a \$6 million withdrawal liability, then the company could withdraw from the Fund and move the benefits and future service credits to either the A & P pension fund or another mutually agreed upon fund. Halpern stressed that employees would maintain their service credits. The Union did not agree and did
15 not make a counter proposal.

In bargaining on April 30 Halpern offered a new pension proposal which consisted of a possible move to the A & P pension fund and an alternative 401(k) that might appeal to younger unit employees. The company would maintain the defined benefit unless an employee wanted
20 to switch to a 401(k). DiMartino rejected this proposal saying, "We're not going any further with this." Halpern tried to engage the Union in discussions about the pension on May 5, 21 and 23, but DiMartino again rejected the company proposals. Sanchez testified that the Union would not discuss pension modifications in the negotiations. Pasquaretta confirmed that the Union has never made a counter proposal on the subject of pensions.

25 On June 2 the Union told Halpern that since the company had proposed that employees could participate in a 401(k) the company was obviously willing to match contributions. The Union then submitted a new pension proposal, raising the original \$155 per month per capita contribution to the Local 338 Pension Fund to \$372 per month. Halpern said this was a
30 regressive proposal.

At a meeting on September 12, the Union gave the company a set of proposals, including wages, at 11:30 am. The Union's wage proposal reflected agreement with the company based on prior negotiations concerning the dollar value of eliminating certain premium
35 pay and converting it to wages. This was a piece of the negotiations for a wage increase. Thus, there had been some agreement on wage issues, but the parties were still several dollars apart on total wages. Halpern testified that the Union's total wage demand amounted to a 9% increase. Halpern testified that in the afternoon at 2:30 pm the company responded with a new proposal on wages and other issues.¹⁰

45 ¹⁰ Halpern testified, and I credit him, that his notes show the Union presented its proposal at 11:30 in the morning and he presented the company proposal at 2:30 pm. At first Halpern answered "yes" when asked if the Union proposal was a counter offer, but while testifying in great detail about the wage negotiations Halpern was quite clear that the Union's proposal reflected prior discussions and agreement about conversion of certain premium pay but was not given in response to the company's September 12 proposals. Halpern's testimony on this issue shows that after he examined the documents he had excellent recall of the specific issue and
50 how it was dealt with in negotiations. I find that Halpern was entirely credible concerning the September 12 meeting.

When questioned by Counsel for the General Counsel about the September 12 meeting, Sanchez testified that the company did not want to talk about this most recent Union wage demand because it was more concerned about the pharmacy and pension proposals; however, Sanchez recalled that the company responded to the Union's wage demand by saying that it was out of the ball park. Sanchez appeared to recall more details when questioned later by Counsel for the Union. Sanchez testified that the Union asked for a counter-proposal but the company refused to provide one until they had a response on the pension and pharmacy proposals. He testified that the company "never" responded to the Union's wage demand and that the Union has not received any response to the September 12 wage proposal. Sanchez testified that the company had provided its September 12 proposals before the Union gave its own proposals. On cross-examination, Sanchez maintained that the company's September 12 offer was the same as previous offers. After being pressed on this issue, Sanchez said that Halpern gave a corrected wage offer on September 12 because he had made a mistake in a previous offer. Then, Sanchez said that Halpern had moved money around "maybe a dime." Finally, Sanchez admitted that the company's September 12 wage proposal was a better one than it had made before. I note that Sanchez' testimony on the issue of wage proposals was shifting and that he resisted answering questions on cross-examination. I conclude that Sanchez shaded his testimony on this issue and I shall not credit it where it is contradicted by reliable documentary and testimonial evidence.

On October 22 the parties met with a mediator and the company made yet another pension proposal; it offered to create a single employer plan managed by the Union and A & P to cover only Waldbaum's employees. The Union rejected this proposal. The mediator and the Union asked to discuss wages. Halpern replied that that the company had made seven wage proposals which represented a lot of movement on wages and had submitted a wage proposal in response to the Union's last demand. Halpern said if the Union wanted to focus on wages it could make a new proposal and he would discuss it. But, in the absence of a new Union proposal he wanted to focus on the pension. Halpern pointed out that the company had made five pension proposals and that there had been no back and forth on this issue. Pasquaretta at first testified that he did not recall this meeting. After further questioning he recalled that Halpern said the company had to have an agreement on the pension before he would move forward on wages.

Pasquaretta testified that the parties met in December to go over the status of the negotiations. At this meeting Halpern said the pension had to be done before wages could be considered. Pasquaretta acknowledged that although Halpern has said that the parties must agree on the pension before they could move forward on wages, he never said he would not bargain over the wages.

The last bargaining session between the parties took place on January 13, 2009. The Union gave the company a written proposal that maintained the same wage demands as had been presented on September 12, 2008. Halpern stated that the company had replied to these demands on September 12. Halpern told the Union that there were many items still to discuss including wages, terms and conditions and pension. He did not want to foreclose discussion of wages but he wanted to focus on the pension. Halpern pointed out to the Union that Waldbaum's had revised its pension proposal many times. He said there had to be a resolution of the pension issue but he never said he would not discuss other subjects. Halpern pointed out that he had discussed other subjects and negotiated on them all along. Pasquaretta testified that at this meeting Halpern said he wanted to give wage increases provided the parties came to an agreement on the pension.

On January 13, 2009 Halpern requested information from the Union concerning the

financial condition of the Local 338 Pension Fund. The Union responded that Halpern should ask the Fund directly. On February 12 Halpern wrote to Fund Administrator Hamilton requesting a variety of information relevant to the negotiations. Halpern received the information on February 27.

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On March 9, 2009 Halpern sent a letter to Pasquaretta proposing that the parties continue negotiations on March 27 and April 3 “over all aspects of the agreement, including but not limited to wages, pension, term, etc.”

10

Halpern testified that the company had made several wage proposals which showed continual movement and the company had discussed wages with the Union. Halpern stated his position that there could be no collective-bargaining agreement without a resolution of the pension issue, but the company could resolve the wage issue before it obtained an agreement on pensions.

15

Pasquaretta stated that the company has made about 15 wage proposals and it has modified its pension proposal three times.

3. Information Request

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Pasquaretta testified that on October 8, 2008 he asked the company for wage data for per diem pharmacists and non-Union pharmacists. Article V (g) of the collective-bargaining agreement provides that per diem pharmacists may be called in by Waldbaum’s “when a department cannot be covered through the utilization of the regular full time and regular part time workforce.” Sanchez testified that unit pharmacists have trained per diem pharmacists.

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As stated above, in addition to the 35 or 40 Waldbaum’s stores whose pharmacists are represented by Local 338, there are 4 or 5 other locations that employ non-Union pharmacists. According to Pasquaretta he heard that a non-Union pharmacist worked in a store with Local 338 unit employees.

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On October 21, 2008 the Union sent the following information request to the company:

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We repeat our request for wage information pertaining to A & P’s non-union and per-diem pharmacists. We request this information because the non-union and per-diem pharmacists perform the same kind of bargaining unit work performed by our members, and therefore the amount they receive is relevant and useful for us to intelligently frame a wage proposal for our members.

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You have stated that the amounts paid to A & P’s non-union and per-diem pharmacists do not take into consideration the absence of union protection and other benefits enjoyed by our members. To that end, we also request information concerning benefits received by A & P’s non-union and per-diem pharmacists.

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Halpern testified that he did not provide the information because he believed it was not relevant to the negotiations. However, he later provided the per diem pharmacist information. He did not provide any information about the non-Union pharmacists because these do not work in the same stores as the Union members and are not used as replacement personnel for unit employees. Halpern said he heard of one instance where a non-Union pharmacist worked in the same store as a bargaining unit employee and the situation was “immediately rectified”. Halpern stated that he does not deal with non-Union pharmacists and he is not familiar with their working conditions.

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On February 25, 2009 Halpern sent the Union data showing the stores where per diem pharmacists were employed with their current hourly pay and a statement that the only benefit provided to per diem pharmacists is “a 10% employee discount on purchases made within our stores (‘Associate Bonus Card’).”

Sanchez testified that the company response did not satisfy the Union’s request for information. Sanchez said he did not know where the information came from and when the employees began getting the rates. Sanchez also said he did not believe Halpern that the only benefit the per diem pharmacists receive is an employee discount.

C. Handbilling by Union Agents

The Union handed out flyers at the Jericho and Carle Place, Long Island, Waldbaum’s stores in May or June, 2008.

The flyers informed the public that the Waldbaum’s pharmacists had been working without a contract for weeks and were seeking to preserve their pension and obtain a fair salary. The flyers asked that the public support the pharmacists by contacting Waldbaum’s.

1. Jericho Store

Sanchez testified that he handed out flyers at the Waldbaum’s in Jericho, Long Island, in May or June 2008 with Jeff Reis.¹¹ The Jericho store is in a strip mall and there are stores adjoining it on either side. Waldbaum’s leases the store property from the owner. As one faces the store there is a Dunkin Donuts shop attached on the right. On the left there are a bank, a liquor store, a restaurant and a nail salon. All these stores are connected by a common sidewalk. At the front of the strip mall is a parking lot. The parking lot is separated from the roadway in front of Waldbaum’s by an island. Sanchez testified that there are benches on the island where Waldbaum’s employees sometimes spend their break time. Sanchez and Reis began handing out the flyers while standing on the island in front of the Waldbaum’s entrance. After an hour or two it began to rain and they moved to the sidewalk so as to gain shelter from the overhang on the stores. The two men stood in front of the Dunkin Donuts. Sanchez noticed Waldbaum’s shopping carts in front of Dunkin Donuts or near Dunkin Donuts. When a customer took a shopping cart from the parking lot and walked towards the Waldbaum’s store Sanchez and Reis would approach and hand the customer a flyer.

At lunch time John Romanelli, the Waldbaum’s manager, came out of the store and asked Sanchez and Reis what they were doing. He told the two that they were not allowed there. Sanchez replied that they were not on the manager’s property but Romanelli said they were on his property and if they did not leave he would call the police. Sanchez told the manager to call the cops if he had to. Romanelli opened his cell phone and walked away. Later he returned and said the two Union agents would have to leave the property. No police officers came to the premises and Sanchez and Reis left of their own accord.

Romanelli testified that he saw the two Union agents handing out flyers 12 feet from the Waldbaum’s entrance. The store had put items for sale on the sidewalk where the men were standing including potting soil, mulch, fertilizer, plants and the like. There were Waldbaum’s shopping carts placed for customer use on the far end of the sidewalk beyond the entrance to

¹¹ Reis was a Union representative; he no longer works for the Union.

Dunkin Donuts. Romanelli stated that when he saw Sanchez and Reis they were in front of the Dunkin Donuts plate glass windows; these windows about the Waldbaum's store. Romanelli called the strip mall landlord and asked who "owned" the property on which the Union agents were standing; the landlord replied that Waldbaum's owned the property. Romanelli then asked
 5 Reis and Sanchez to leave, but they refused. Romanelli insisted and said he would call the police if they did not depart. Then Romanelli called the landlord again and said the Union was handing out leaflets; he asked whether he had the right to tell them to leave. The landlord confirmed that Romanelli had the right to eject them. Romanelli did not ask the landlord to call the police nor did he call them himself. When Romanelli again spoke to Sanchez and Reis
 10 about leaving the property, Sanchez denied that he had the right to eject them and Romanelli offered to call the landlord and let Sanchez speak to him. At that point Sanchez walked away and Reis said they were leaving in five minutes anyway. Romanelli went back into the store and had no further contact with the Union agents.

15 Romanelli testified that Waldbaum's has a leasehold interest in the sidewalk in front of Dunkin Donuts. Waldbaum's employees maintain the sidewalk in front of the company's store and in front of Dunkin Donuts and the bank; they sweep, empty the garbage cans, shovel snow and power wash the pavement.

20 **2. Carle Place Store**

Sanchez and Steve Pezenick, the Union Director of Special Projects, handed out flyers at the Waldbaum's store in Carle Place, Long Island, in mid-May 2008. The Carle Place facility is a free-standing store set in a shopping mall which contains other establishments.¹² Across the
 25 road from the store is a parking lot. To reach the store, drivers come down Glen Cove Road and turn onto Westbury Avenue which leads to the store parking lot. Both Glen Cove Road and Westbury Avenue have sidewalks. An island separates the parking lot from the street in front of the store. The Waldbaum's store is an L-shaped structure with a side entrance and a main entrance and a sidewalk that continues around the building.

30 Pezenick testified that on the day they distributed flyers in Carle Place, he and Sanchez arrived at the Waldbaum's store at about 10:30 am.¹³ Pezenick spent most of his time at the side entrance while Sanchez stayed at the main entrance. At about 2 pm Pezenick went to stand with Sanchez at the main entrance. Pezenick testified that he and Sanchez stood on the
 35 sidewalk in front of Waldbaum's. He said that if they had stepped off the sidewalk they would have been standing in the street. There were items for sale on the sidewalk including water bottles and potting soil. Pezenick acknowledged that he and Sanchez could have stood on Glen Cove Road or on Westbury Avenue and distributed their flyers from those locations.

40 Sanchez testified that at first he stood on the street. While he was standing there Waldbaum's manager John Brown came out and took a flyer. After 2 pm, Brown came out while Sanchez and Pezenick were standing on the sidewalk and told the two men to leave. Sanchez protested that they were not blocking the entrance, but the manager said he would have to call the police. Brown went back inside the store and Pezenick left the area to attend to
 45 other matters. Sanchez testified that sometime later a police car pulled up and the officer asked Sanchez who he was. Sanchez gave the officer his business card. The officer said he had heard there was picketing and after Sanchez said he had not seen any picketing the officer drove off. Sanchez stayed on the sidewalk for about ½ hour after the patrol car left. He was not

50 ¹² Waldbaum's leases the store from the owner of the shopping mall.

¹³ Pezenick was a cooperative and truthful witness and I shall credit his testimony.

evicted from this position.

Brown testified that Waldbaum's maintains the sidewalk in front of the store by sweeping, shoveling snow and using a power washer. Brown had seen the Union agents handbilling and he had called the company to discuss this. The Waldbaum's district manager directed him to ask the Union to move on. Sometime after Brown asked Sanchez and Pezenick to leave the sidewalk he looked out of the store and he did not see either of them. Brown did not call the police and he did not call the landlord.

III. Discussion and Conclusions

A. The Pharmacy Benefits Proposal

The General Counsel asserts that Respondent's proposal that Waldbaum's pharmacies shall be providers at equal rates and terms as other mail at retail providers under the Local 338 Benefit Fund is a permissive subject of bargaining. The General Counsel urges that Respondent's later modification of the proposal should not bar a finding that the company insisted to impasse on a non-mandatory subject of bargaining in view of the length of time the company maintained its original proposal. Further, the General Counsel asserts that the crux of both proposals is the same: "a third party is being injected into the negotiations."

The General Counsel urges that the benefit to unit employees of being able to fill their prescriptions at a lower cost in the location where they work is a "tangential and indirect benefit." The General Counsel also points to the fact that increasing the number of prescriptions filled at the Waldbaum's Union pharmacies is not guaranteed to increase the working hours available to pharmacists and thus is not guaranteed to increase job security.

As noted above, I found that Halpern was a reliable and credible witness and I found that both Pasquaretta and Sanchez gave testimony that was not reliable. I shall credit Halpern's version of the events wherever it is contradicted by other testimony.

I credit Halpern that he had alerted both the Union and the Benefits Fund to the issue of mail at retail prescriptions prior to May 22, 2008, and that Halpern presented the company's proposal on that day after receiving no response from the Fund. I credit Halpern that bargaining unit pharmacists had complained to the employer that they could not fill a 90-day prescription at the pharmacy where they worked and that this was an inconvenience. I credit Halpern that permitting Waldbaum's pharmacies to fill 90-day mail at retail prescriptions at the lower co-pay amount would cause more prescriptions to be filled by company pharmacists. I credit Halpern that a greater number of prescriptions being filled at the Union-represented pharmacies could prevent unit employees from having their hours decreased and might increase their overtime.

I credit Halpern that he told the Union he needed a solution to the pharmacy mail at retail situation and that it was an important part of the bargaining. I credit Halpern that he did not tell the Union there would be no collective-bargaining agreement without agreement on his pharmacy proposal. I credit Halpern that he continued negotiating with the Union over many issues while also seeking discussion of the pharmacy issue. I credit Halpern that he did not condition a collective-bargaining agreement on any particular pharmacy proposal. In fact, in the face of the Union's refusal to bargain on the pharmacy mail at retail issue the company modified its original proposal on October 22, 2008. After October 22 the company met with the Union and discussed other subjects, it requested information and after the receipt of the information it requested further bargaining.

There is no question that pharmacy benefits are mandatory subjects of bargaining. Indeed, the Union's demands in collective-bargaining specifically address the Benefit Fund which provides the pharmacy benefits at issue herein.

5 I find that being able to fill a prescription at lower cost at the pharmacy where they work would indeed be a direct and substantial benefit to the Respondent's unit employees. There can be no question that the ability to obtain 90 days' worth of medication at a lower rate than if the drugs were purchased in three 30-day installments is a significant benefit. Similarly, the ability to fill a prescription at one's own workplace is a significant convenience. Long Island
10 traffic is notoriously congested; avoiding a trip to a different pharmacy is a considerable saving in time and effort for the typical employee who must work and maintain a family. I do not agree with Counsel for the General Counsel that saving money, time and effort is a "tangential and indirect benefit" to an employee. In *AT & T Corp.*, 325 NLRB 150 (1997), the Board found that providing employees with free check-cashing services or time during working hours to cash their
15 paychecks is a mandatory subject of bargaining because it provides an economic benefit to employees arising out of their employment. The benefit is substantial and significant because it relieves employees of the burden of "cashing paychecks on their own time at their own expense." In the instant case, Waldbaum's request to bargain over the issue of permitting employees to fill 90-day mail at retail prescriptions in the pharmacies where they work would
20 relieve the pharmacists of the burden of traveling on their own time and at their own expense to another pharmacy in order to fill these lower cost prescriptions. The prescription benefit which the employees would be exercising at lower cost is an economic benefit arising out of their employment.

25 Similarly, I find that increasing the number of prescriptions filled at Respondent's pharmacies that employ unit members is a job security benefit. I do not find it significant that Halpern could not guarantee that working hours for unit employees would rise: it stands to reason that if pharmacists fill prescriptions for themselves and their families where they work instead of at a competitor this would tend to increase available work for unit members. Further,
30 non-employee beneficiaries of the Fund might also begin filling prescriptions at Waldbaum's. It is axiomatic that labor organizations generally seek to increase the amount of work available for bargaining unit members, and many of these efforts are made on the basis of likely outcomes and not guaranteed outcomes. The fact that a benefit given to employees may also benefit the employer's business does not deprive it of its mandatory status.

35 The fact that beneficiaries of the Local 338 Benefit Fund who do not work for Waldbaum's might take advantage of a 90-day mail at retail option if it were made available at Waldbaum's is not relevant. These non-employee beneficiaries are now free to shop for 30-day prescriptions at Waldbaum's and presumably they do so already. Nor does the company's
40 attempt to bargain for benefits for its own employees fail because the benefit might be used by employees of another employer. Every Waldbaum's payment to the Local 338 Benefit Fund is used for the general purposes of the Fund which is a multi-employer fund: Waldbaum's payments to the Fund are not segregated for the sole use of Waldbaum's employees.

45 It is hard to fathom Counsel for the General Counsel's argument that the company's proposal relating to pharmacy benefits improperly injects a third party into the negotiations. The purported "third party", the Benefit Fund, is already part and parcel of the collective-bargaining agreement and the current negotiations. The most recent collective-bargaining agreement provided for benefits to be maintained by the Benefit Fund at stated rates of employer
50 contributions. The Union's demand, quoted above, provides that the employer will contribute to the Benefit Fund at current rates to maintain the current level of benefits. Further, the Union proposal would reserve to the Union the right to change the various contribution rates for the

respective funds, including the Benefit Fund, so long as total contributions did not change. From these demands it is clear that the Union has the ability to negotiate rates and the type of benefits available to Respondent's employees through the Benefit Fund. The Union could not know the rates and benefits it was negotiating without having thorough discussions about them with the Fund. Sanchez confirmed that the Union obtains information about benefits and contribution rates from the Fund. In fact, Sanchez testified that nothing prevents the Union from discussing the pharmacy proposal with the Fund. Further, the president of the Union, John Durso, is a trustee of the Benefit Fund and there is no evidence to show that Durso could not present Waldbaum's proposal to the other trustees.¹⁴ Of course, Waldbaum's original proposal or its amended proposal might not be acceptable and explanations might be furnished to support a rejection, but that is the stuff of negotiations.

The Charging Party Union's Brief incorporates various factual assertions about the Local 338 Benefits Fund and the status of Duane Reade. The Charging Party did not call any witness with direct knowledge of the Fund, its business or its operations or the details of Duane Reade's relations with the Benefit Fund; the assertions in the Brief are therefore without any factual support in the record and I shall disregard them. I note that the Charging Party's Brief quotes Halpern out of context so that he seems to admit that the only purpose of the pharmacy proposal is to increase the company's business. In fact, Halpern's testimony on the transcript page cited by the Brief shows that he considered the proposal "a win/win for both sides; this drove business through the pharmacies and also was a benefit improvement and the union agreed." The Union's Brief makes certain assertions about benefits purportedly available to all members of the public through A & P. There is no testimony on the record to support this assertion because the Union did not call a witness with direct knowledge of the benefits. The Union's Brief offers citations to various websites and to various press releases, presumably because the record herein lacks the facts that the Union wishes to rely on at this stage in the litigation. Although Counsel for the Union was present throughout the instant hearing, the Union did not seek to authenticate and introduce this evidence at the hearing, there is no showing that it was not available and no motion, on notice to all parties, has been made to admit additional evidence. I shall disregard all the references to purported facts, websites, news releases, petitions and documents not placed into evidence at the hearing. Finally, I find that the Union's reliance on *Mental Health Services*, 300 NLRB 926 (1990), is misplaced. That case concerned an employer's attempt to curtail the political activities of employees and the Union vis-à-vis governmental entities which were the primary source of the employer's funding.

B. The Pension Fund Proposal

Counsel for the General Counsel's Brief asserts that Respondent conditioned bargaining over wages upon the parties reaching agreement on the company's pension proposal. The General Counsel maintains that Halpern repeatedly told the Union that the parties could not discuss wages until they came to an agreement on the company's pension proposal. This refusal to discuss wages allegedly occurred from October 22, 2008 until March 9, 2009 when Halpern wrote to Pasquaretta offering dates for negotiations.¹⁵

¹⁴ There is nothing in the record to show why the Union is unwilling to talk to the trustees about a situation that favors another pharmacy over Waldbaum's.

¹⁵ At trial the General Counsel amended the Complaint to allege that "Since October 22, 2008 until March 9, 2009, Respondent has refused to bargain over wages and other mandatory subjects of bargaining and has conditioned further bargaining over all subjects upon the parties reaching agreement on the subject of pension benefits."

I find, based on Halpern's testimony, that beginning on April 2, 2008 and continuing on April 4, April 8, April 29, and April 30 2008 he made various proposals relating to the company's desire to put a ceiling on its pension withdrawal liabilities. Halpern tried to engage the Union in further pension discussions on May 5, 21 and 23 with no success. I find that Halpern explained the reasons for the company's concern and that his proposals dealt with maintaining benefits for employees as well as providing alternatives to the Local 338 Pension Fund should the Fund run into difficulties. I find that the Union made no counter proposals to any of the Waldbaum's pension proposals. Pasquaretta and DiMartino rejected the various Waldbaum's proposals saying that the Union "was not interested" and "we're not going any further with this." Sanchez testified that the Union would not discuss pension modifications in the negotiations.

I credit Halpern that on the morning of September 12 the Union gave the company a set of proposals including a demand for a 9% wage increase. That afternoon the company responded with its proposals including a new wage offer. As set forth in detail above, Sanchez admitted that on September 12 Waldbaum's gave the Union a wage proposal that improved on its previous offer.

I credit Halpern that on October 22 he made yet another pension proposal on behalf of Waldbaum's and that the Union rejected this new formulation. When the mediator and the Union asked to discuss wages, Halpern replied that the company had responded to the Union's last wage demand and that if the Union made a new wage proposal he would respond to it. I credit Halpern that he said if there was no new Union wage proposal he wanted to focus on the pension issue.

I do not credit Pasquaretta that Halpern said in October or December that there had to be an agreement on pension before he would move forward on wages. I credit Halpern that on January 13, 2009 he informed the Union that the company had already replied to its current wage demand. On this occasion, Halpern said that the parties still had to discuss wages, terms and conditions and pension. Thereafter, Halpern requested information concerning the finances of the Local 338 Pension Fund and, upon receipt of the information, Halpern sent a letter dated March 9, 2009 proposing dates for continued negotiations.

I credit Halpern that although the next collective bargaining contract had to contain some resolution of the pension issue the company could resolve the wage issue before it obtained an agreement on pensions.

In summary, I find that the Union has never responded to the company's last wage offer made in the afternoon of September 12, 2008 and that it has consistently refused to consider Waldbaum's various amended pension proposals. I find that Halpern has always made it clear to the Union that he had responded to its last wage demand and that he would respond to any new wage demand it presented. In the absence of such a new proposal Halpern wanted to discuss the pension issue.

Counsel for the General Counsel relies on *Patrick & Co.*, 248 NLRB 390, 391-2 (1980). In that case the employer and union held their first bargaining session in a meeting that lasted 15 minutes. The employer asked a question about the union's wage proposal which the union agent proceeded to explain. The employer then stated it was "absolutely firm" in refusing to pay the wages requested by the union. The union said its request was "serious." The union asked to go through its demands to narrow the issues. The employer refused to discuss any other subjects and stated that "until we settle" on the employer's wage offer "there is no use of us talking." Thereupon, the employer walked out of the negotiations. The Board found that "Respondent refused to bargain with the Union for a new collective-bargaining agreement by

insisting that the Union accede to its position on wages before there could be any negotiation on other issues.”

5 The facts in the instant case are in stark contrast to those in *Patrick & Co.* Waldbaum’s has made many wage offers, has reached agreement on aspects of a wage increase and has stated its willingness to discuss any new wage demand the Union might present in response to the company’s last wage offer. Further, other subjects of bargaining have been discussed throughout the negotiations. Waldbaum’s did not insist that no other discussions could take place until the Union agreed to its pension proposal. Indeed, the company has modified its
10 pension proposal many times and has made it clear that it needs some relief and is willing to discuss possible solutions to its pension liability dilemma. If the Union had come back with a new wage proposal Waldbaum’s was prepared to discuss that while maintaining its position that the final contract had to contain some agreement on a company pension proposal.

15 In *Day Automotive Group*, 348 NLRB 1257, 1263 (2006), cited in the Charging Party’s Brief, the Board found that the employer violated the Act by adamantly insisting upon the union’s acceptance of its healthcare proposal. The company’s chief negotiator conceded that from the first his position was that the union had to accept the healthcare plan that had already been implemented for the nonunit employees and take the same benefits and pay the same
20 premium. The company adamantly refused to consider the union’s alternative healthcare proposals. The company’s negotiator told the union that he would not discuss economics until the union agreed to the healthcare proposal. Manifestly, the facts in *Day Automotive* are not apposite to the facts in the instant case. Halpern discussed wages with Local 338, agreed to some aspects of a wage increase and was ready to discuss any new wage offer the Union might make. Further, Halpern repeatedly modified the company’s pension proposals in an effort
25 to induce the Union to enter into a discussion of the Pension Fund issue.

C. Information Request

30 The facts relating to the Union’s October 21, 2008 information request are not in dispute. The Waldbaum’s per diem pharmacists fill in for unit employees if no Union pharmacist is willing to work the available hours. The per diem pharmacists work at the same locations as the Union pharmacists and have been trained by Union pharmacists. As to non-Union pharmacists, the record establishes that there has been at least one occasion where a non-Union pharmacist
35 worked in a bargaining unit store.

40 The October 21 Union information request seeks “wage information” pertaining to non-union and per diem pharmacists and “information concerning benefits” received by non-union and per diem pharmacists. Halpern admitted that he did not provide the information because he did not deem it relevant. However, on February 25, 2009 he provided a list of stores where per diem pharmacists were employed along with their current hourly pay and their benefit, which consists of a 10% employee discount on purchases at Waldbaum’s.

45 It is axiomatic that an employer has an obligation to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). When a union seeks information concerning matters outside the bargaining unit the union is required to make a showing of relevancy and necessity. The burden of establishing relevancy and necessity is not heavy and requires only
50 that there is a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.

5 The per diem pharmacists work in the same locations as Union pharmacists, they may work side by side with unit members and their use is regulated by the collective-bargaining agreement. It requires no extended discussion to find that information concerning their wages and benefits would be useful, relevant and necessary to the Union in preparing its wage demands for contract negotiations. Indeed, Respondent's Brief does not contest this issue. I find that Respondent unlawfully delayed providing information about the wages and benefits of per diem employees from October 21, 2008 to February 25, 2009. *Woodland Clinic*, 331 NLRB 735, 736-7 (2000).

10 As noted above, Sanchez testified that the information sent to the Union was not fully responsive because he did not know where the information came from and when the per diem employees began to receive the rates of pay. Further, he "did not believe" Halpern's response about the benefits. The Union's request for information, quoted in full above, did not ask the company to specify the source of the information nor did it request the dates when per diem employees began to receive the current rates of pay. I note that the Union's request did not specify or request the underlying business records or documents. If the Union wanted this information it should have asked for it. If the Union was not satisfied with the information it received on February 25 then it could have submitted another more detailed request for information. As to Sanchez' gratuitous statement that he does not believe Halpern about the benefits, there is no basis in the record for his belief.

25 The non-Union pharmacists work in other Waldbaum's stores on Long Island. As pharmacists they fill prescriptions as do the members of the bargaining unit. On at least one occasion, a non-Union pharmacist was assigned to work in a store whose pharmacists are represented by the Union. I find that information about the wages and benefits received by non-Union pharmacists is relevant and useful and would allow the Union to bargain intelligently. This information would allow the Union to frame its bargaining demands with due regard to the company's employees with the same job title who are working in the same geographical area. The failure to provide such information was a violation of the Act. *Frito-Lay, Inc.*, 333 NLRB 1296 (2001).

30 *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984), cited by Respondent, is not controlling herein as it concerns information requested for possible grievances and the Board specifically stated that "there is no evidence that the Union raised the subject matter of the information request during negotiations for a new contract."

D. Handbilling

40 The General Counsel argues that Waldbaum's did not have a property right that entitled it to exclude individuals from the respective properties when it directed Union representatives handing out flyers at the Jericho and Carle Place stores to leave the sidewalks in front of those stores.

45 The Board discussed the applicable law in *Wild Oats Community Markets*, 336 NLRB 179, 180 (2001):

50 It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This precedent, however,

presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. It if fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Food For Less*, 318 NLRB 646, 649-650 (1995), enfd. in relevant part 95 F.3d 733 (8th Cir. 1996); *Bristol Farms*, 311 NLRB 437, 438-439 (1993). In determining the character of an employer's property interest, the Board examines relevant record evidence – including the language of a lease or other pertinent agreement – in conjunction with the law of the state in which the property is located. See *Food For Less*, supra, at 649.

In *Bristol Farms, Inc.*, supra at 311 NLRB 438, the Board explained:

[A]n employer need not be accorded any greater property interest than it actually possesses. Thus, the analysis that applies when section 7 rights and property rights conflict is not appropriately invoked as to an employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individual.

New York State courts have held that there is no First Amendment right to distribute handbills or to demonstrate on private property. *Latrieste Restaurant & Cabaret, Inc.*, 622 Ny.Y.S.2d 765 (1995).

1. The Jericho Store

I find, based on the testimony of manager Romanelli, that when he directed Union agents Sanchez and Reis to leave the sidewalk where they were handing out flyers the two men were standing in front of the Dunkin Donuts store. I credit Sanchez that he and Reis were standing in front of Dunkin Donuts store when Romanelli told them that if they did not leave he would call the police.

The lease for the Jericho store differentiates between the "demised premises" and the common area of the strip mall on which the Jericho Waldbaum's store is located. The lease provides as follows:

2. DEMISED PREMISES AND COMMON AREA.

Landlord hereby leases to Tenant and Tenant hereby takes from Landlord the premises outlined in red on *Exhibit A* and the improvements on or to be built on said premises (said premises and the improvements on or to be built thereon being hereinafter collectively called *Demised Premises*).... Landlord hereby grants to Tenant the right to use, in common with other tenants of the shopping Center, the portions of the shopping Center intended to be for common use, including but not limited to parking areas, roads, streets, drives, tunnels, passageways, landscaped areas, open and enclosed malls, exterior ramps, walks and arcades (hereinafter collectively called *Common Area*).

Exhibit A attached to the lease is a diagram of the strip mall shopping center including a

plan of the “demised premises.” The demised premises are indicated by crosshatching on the plan. Only the space occupied by the Waldbaum’s store is crosshatched; to the right and left the areas that are not crosshatched show the space occupied by Dunkin Donuts, the bank, the liquor store, the restaurant and the nail salon. A continuous sidewalk is shown in front of all of these stores. Significantly, only the part of the sidewalk in front of the Waldbaum’s door is crosshatched. Three arrows point to this portion of the sidewalk and it is labeled “Tenant’s Sidewalk”. It is clear that the lease identifies only the sidewalk directly in front of the Waldbaum’s entrance as belonging to Waldbaum’s. The sidewalk area to the right in front of Dunkin Donuts is not part of the demised premises as defined by the lease.

Thus, the lease establishes that Waldbaum’s has a tenancy in its store and the sidewalk in front of the store, but only has a “right to use” the common areas including the sidewalk on either side of the store.

The lease requires Waldbaum’s to maintain the common area in good repair and to keep it clean and remove snow. However, Waldbaum’s use of the common area is restricted. It may not impose charges for use of the common area, it may not erect signs or loudspeakers and it may not sell or display merchandise in the common area.

I find that Waldbaum’s has not met its threshold burden of establishing that it had a property interest that entitled it to exclude individuals from the sidewalk in front of Dunkin Donuts. That area is defined by the lease as a common area where Waldbaum’s had no greater rights than the public. The fact that Waldbaum’s had a duty to clear dirt and snow from the sidewalk did not give it a right to exclude others in opposition to the clear language of the lease. The fact that the landlord of the property erroneously informed Waldbaum’s that the store “owned” the property and had a right to eject the Union agents is immaterial in the face of the clear provisions of the lease.

I find that Waldbaum’s violated Section 8(a)(1) of the Act when it directed Union handbillers to leave the sidewalk in front of Dunkin Donuts next to the Jericho store and when it threatened Union handbillers that it would call the police if they did not leave.

2. The Carle Place Store

I credit Pezenick and Sanchez that they were handing out flyers on the sidewalk in front of the Carle Place Waldbaum’s store when manager Brown told them to leave and said he would call the police. I credit Brown that he did not call the police to evict the Union agents.

The lease for the Carle Place store introduced into evidence at the hearing does not contain a diagram of the leased premises. The lease contains references to “Exhibit A” and that may have been a diagram, but this Exhibit A was not introduced in the instant hearing. The document in evidence consists of a 1987 Indenture of Lease together with a 1993 First Amendment and a 1995 Memorandum of Lease.

Section 1 of the Indenture of Lease identifies the “Demised Premises” as a building to be erected as shown on Exhibit “A”. Section 15 B (ii) of the lease requires Waldbaum’s to maintain and repair the Demised Premises. The lease speaks of “sidewalks adjoining the Demised Premises” but it is not clear that they are considered a part of the Demised Premises. Section 19 G of the lease requires the tenant to keep “the sidewalks adjoining the Premises” clean and to remove garbage and snow. Section 19 H gives the tenant “the right to use the sidewalk adjoining the building on the Premises as shown on Exhibit “A” as a cart corral and to install and maintain the cart corral at Tenant’s sole cost and expense; provided, however, the Tenant

covenants to use its best efforts to keep the parking and Common Areas of the shopping Center reasonably free from Tenant’s shopping carts.” Section 21 II, (b) provides that except with respect to the cart corral the tenant may not “use, or permit to be used the sidewalk adjacent to ... the Premises for display, sale or any other similar undertaking....”

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The lease refers to the sidewalks around the Waldbaum’s store as adjoining the Demised Premises but they are not affirmatively described as being part of the Demised Premises. Further, the tenant’s use of the sidewalks adjoining the premises is limited to use for a cart corral and other use is prohibited. It would seem that Waldbaum’s does not have a possessory interest in the sidewalks adjoining its store.

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I find that Respondent has not met its threshold burden of showing that it has a property interest that entitled it to exclude individuals from the sidewalk adjoining its store. Thus, Respondent violated Section 8(a)(1) of the Act when it directed Union handbillers to leave and said that it would call the police. There is no proof that Respondent actually telephoned the police.

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Conclusions of Law

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1. Local 338, Retail Wholesale Department Store Union, United Food & Commercial Workers, is the exclusive collective-bargaining representative of Respondent’s employees in the following appropriate unit:

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All full-time and regular part-time Supervising Pharmacists, Staff Pharmacists, Graduate Pharmacists, and Pharmacist Interns employed at Waldbaum’s stores in New York City and the State of New York, excluding guards and supervisors as defined in the Act.

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2. By its delay in providing to the Union relevant and useful information concerning per diem pharmacists and by its refusal to provide relevant and useful information concerning non-Union pharmacists, Respondent violated Section 8(a)(5) and (1) of the Act.

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3. By directing Union handbillers to leave the sidewalks adjoining its stores in Jericho, New York, and Carle Place, New York, and threatening to call the police if they did not leave, Respondent violated section 8(a)(1) of the Act.

4. The General Counsel has not shown that the Respondent engaged in any other violations of the Act.

Remedy

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

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

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¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5 The Respondent, Great Atlantic & Pacific Tea Co., d/b/a Waldbaum's, Carle Place, New York and Jericho, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Delaying in providing to the Union relevant and useful information concerning per diem pharmacists and refusing to provide relevant and useful information concerning non-Union pharmacists.

15 (b) Directing Union handbillers to leave the sidewalks adjoining its stores in Jericho, New York, and Carle Place, New York, and threatening to call the police if they did not leave.

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

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

(a) Provide to the Union the information it requested concerning wages and benefits of non-Union pharmacists employed by Respondent.

25 (b) Within 14 days after service by the Region, post at its [facility] [union office] [hiring hall] in [city, State], copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region [number], after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [date of first unfair labor practice].

35 (c) 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.

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50 ¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5 **Dated, Washington, D.C., May 27, 2009.**

10 **_____
Eleanor MacDonald
Administrative Law Judge**

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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 delay in providing to Local 338, retail wholesale Department Store Union, United Food & Commercial Workers, information concerning per diem pharmacists and WE WILL NOT refuse to provide information concerning non-Union pharmacists.

WE WILL NOT direct Union handbillers to leave the sidewalks adjoining our stores in Jericho, New York and Carle Place, New York, and threaten to call the police.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union the information it requested concerning the wages and benefits of non-Union pharmacists.

Great Atlantic & Pacific Tea Co., d/b/a Waldbaum's
(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.

Two MetroTech Center (North), Jay Street and Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

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, 718-330-2862.