

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BASHAS', INC., d/b/a BASHAS',  
FOOD CITY, and A.J.'S FINE FOODS**

**and**

**Cases 28-CA-21435  
28-CA-21501**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 99**

**and**

**Cases 28-CA-21590  
28-CA-21592  
28-CA-21639  
28-CA-21640  
28-CA-21646  
28-CA-21676  
28-CA-21738  
28-CA-21785  
28-CA-21803**

**UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION**

**GENERAL COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

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Counsel for the General Counsel files this opposition to Bashas', Inc., d/b/a Bashas', Inc., Food City and A.J.'s Fine Foods' (Respondent) Motion for Summary Judgment [as to Certain Allegations of the Third Consolidated Complaint](#) (Motion) filed on April 4, 2008, [and received in this office on April 7, 2008](#). Respondent claims that the charges in Cases 28-CA-21435 and 28-CA-21501 in the Third Consolidated Complaint and Notice of Hearing (Third Complaint) that issued on March 28, 2008, involve matters where there [are](#) no genuine issues of material fact. Respondent claims this despite its [Answer to the Third Complaint](#), filed April 4, 2007, which denies the very facts alleged that make up the basis for those charges.

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Respondent further claims that because settlement negotiations occurred at some point but were not finalized and because it has partially remedied the violations, but for a Notice to Employees posting, the charges should be disposed of by summary judgment.

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The Board should deny Respondent's Motion because Respondent has not filed its Motion in accordance with the Board's Rules and Regulations, Section 102.24 (b) and there exists several issues of material fact which are most appropriately resolved in an administrative hearing before the Administrative Law Judge.

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## I. BACKGROUND

Respondent is a retail grocery store chain which operates approximately 160 stores in and near the State of Arizona. In about 1993, Respondent purchased seven stores from Arizona Supermarkets and became a successor employer for the bargaining units in those stores. Those bargaining units were represented by the United Food and Commercial Workers, Local 99 (Union). Respondent and the Union began negotiating over wages, hours and terms of conditions for represented employees in the seven stores. In 2001, Respondent purchased two stores from ABCO Supermarkets and became a successor employer for the bargaining units in those stores. Respondent and the Union incorporated those two stores into the negotiations that had been ongoing since 1993.

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The Union filed charges against Respondent in 2006 and 2007, and a hearing was held on those charges on July 24-26, 2007. The charges related to Respondent making unilateral changes to represented employees health care benefits, the closing of two of the represented stores, unlawful withdrawal of recognition and direct dealing with represented employees.

On September 28, 2007, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (First Complaint) issued in Case 28-CA-21435, and Case 28-CA-21501.

(Exhibit A). These two cases are the cases Respondent seeks to have resolved by summary judgment. This First Complaint alleged that Respondent denied Union representatives access to employees at two of the represented stores by ordering them to leave, threatening to call the police, and refusing their requests for limited access to the represented stores. The First Complaint also alleged that Respondent promulgated an overly-broad and discriminatory rule prohibiting union representatives from entering any Respondent store for any purpose. The First Complaint alleged that these actions violated Section 8(a)(1) and (5) of the Act. Also alleged in the First Complaint is that Respondent disparaged the Union by blaming them for wage increases and benefits withheld from Unit employees, threatened to further withhold wage increases and other benefits if the Union refused to agree to a Board-conducted representation election, solicited employees to decertify the Union, and undermined the Union by blaming them for the withholding of current and future wage increases and other benefits, all in violation of Section 8(a)(1) of the Act. The First Complaint further alleged that Respondent withheld wage increases to Unit employees because they had joined, supported, or assisted the Union in violation of Section 8(a)(3) of the Act, as well as alleging that Respondent failed to bargain with the Union over the wage increases in violation of Section 8(a)(5).

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Since the issuance of the First Complaint, two more consolidated complaints have issued, all including the charge [allegations in Case 28-CA-21435 and 28-CA-21501 which](#) Respondent seeks to have disposed of by summary judgment. The Second Consolidated Complaint and Notice of Hearing (Second Complaint) issued on December 31, 2007, alleging additional violations of the Act as well as the allegations contained in Cases 28-CA-21435,

and 28-CA-21501. The Third Complaint, issued on March 28, 2008, again contained the charge allegations in Cases 28-CA-21435 and 28-CA-21501.

Prior to the Second Complaint issuing, settlement discussions did occur between Respondent and Counsel for the General Counsel (CGC). Despite those discussions, and contrary to Respondent's assertions, no agreement was finalized or reached. Certain remedial actions may have been taken by Respondent in hopes of reaching a settlement, but the settlement did not occur.

## II. ARGUMENT

### A. Procedural Defects In Respondent's Motion

Respondent's Motion is not in accord with the Board's Rules and Regulations at Section 102.24. Those rules provide that all motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing. Respondent was aware on January 29, 2008, that the hearing concerning Cases 28-CA-21435 and 28-CA-21501 was scheduled for April 15, 2008. (Exhibit B). Yet, Respondent did not file its motion until April 4, 2008, only 11 calendar days before the hearing. Respondent's Motion for Summary Judgment should be denied for being untimely.

### B. Issues Of Material Fact Remain

Summary judgment may be rendered if the pleadings and supporting materials establish that there is no genuine issue requiring a hearing and, that the moving party is entitled to judgment as a matter of law. Lakeview Convalescent Center, 307 NLRB 563, 564 (1992). In a summary judgment proceeding the pleadings and evidence are viewed in the light most favorable to the nonmoving party. Eldeco, Inc., 336 NLRB 899, 900 (2001) (pleadings must be read in the light most favorable to the nonmoving party); Petrochem

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Deleted: II. PROCEDURAL DEFECTS IN RESPONDENT'S MOTION¶

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Insulation, Inc., 330 NLRB 47, 52 n. 20 (1999) (evidence evaluated in the light most favorable to the nonmoving party). It is well settled that, in order for a matter to be appropriate for summary judgment it must affirmatively appear in the record (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law. Stephens College, 260 NLRB 1049 (1982). In addition, the Board has held that “a simple denial of unlawful conduct is sufficient to raise a material question, without requiring [General Counsel] to come forward with affidavits or other evidence.” Lake Charles Memorial Hospital, 240 NLRB 1330, 1331 n. 4 (1979) (citing Florida Steel Corporation, 222 NLRB 586 (1976)).

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Respondent claims that there are no issues of material fact regarding allegations in the complaint of denial of access and the discriminatory denial of wage increases. Respondent’s claim is disingenuous, given the Answer that was filed wherein Respondent denies the facts regarding the denial of access and the wage increase. Respondent’s recitation of the facts is merely their argument, not facts. Without clear admissions of the allegations related to these specific complaint allegations, Respondent cannot argue that there is no material issue with regards to the facts. The issues of material fact that exist include, but are not limited to the past practice regarding access, the past practice regarding wage increases, and whether the letter sent to employees by Vice President Mike Gantt contained threats which violate the Act, as alleged. Respondent argues that there is no material issue of fact only due to its assertion that the parties were close to a settlement of the issues. Although Respondent and Counsel for the General Counsel engaged in settlement discussions and may have been close to an agreement at the time, Respondent never signed an agreement, the Union never agreed to the terms of any settlement, and the Regional Director never approved a settlement of the

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charges. Finally, at hearing, General Counsel intends to introduce evidence at hearing which will demonstrate that Respondent has filed a lawsuit related to the Union agents access to its property which is antithetical to the settlement resolution and its affirmative obligations to right its wrongs. In sum, significant and genuine issues of material fact remain and preclude summary judgment.

### **III. CONCLUSION**

Based on the foregoing, it is respectfully requested that the Board reject Respondent's Motion. Respondent has failed to timely file its Motion with the Board at least 28 days before the scheduled hearing date and, as shown above, its motion raises significant issues of fact. As to many of its factual assertions, Counsel for the General Counsel intends to introduce contravening evidence at the hearing. It is respectfully submitted that Respondent's Motion should be denied expeditiously to avoid any delay of the litigation of this matter which is scheduled to commence on April 15, 2008.

Dated at Phoenix, Arizona, this 11<sup>th</sup> day of April 2008.

/s/ Sandra L. Lyons

Sandra L. Lyons

Counsel for the General Counsel  
National Labor Relations Board - Region 28  
2600 N. Central Avenue - Suite 1800  
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Telephone: 602-640-2133  
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**Deleted:** Richard A. Smith

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT in BASHAS’ INC., d/b/a BASHAS’, FOOD CITY, and AJ’S FINE FOODS, Cases 28-CA-21435 et al., was served was served via E-Gov, E-Filing and by facsimile (with permission) on this 11<sup>th</sup> day of April 2008, on the following:

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**The original and seven copies on:**  
Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW, Room 11602  
Washington, DC 20570-0001

**One Copy on the following:**  
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San Francisco, CA 94104  
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**One Copy regular mail only:**  
Bashas’, Inc.  
22402 South Basha Road  
Chandler, AZ 85248

United Food and Commercial Workers  
(UFCW) Union Local 99  
2401 North Central Avenue, 2<sup>nd</sup> Floor  
Phoenix, AZ 85004

**Deleted:** I hereby certify that a copy of GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT in NEVADA READY MIX CORPORATION, Case 28-CA-21259, was served via E-Gov E-Filing and was served on the following via facsimile (with permission) on this 23<sup>rd</sup> day of May 2007:¶

¶ **Filed via E-Gov E-Filing**¶  
Lester A. Heltzer, Executive Secretary¶  
Office of the Executive Secretary¶  
National Labor Relations Board¶  
1099 14<sup>th</sup> Street, N.W.¶  
Washington, D.C. 20570¶

¶ **Via facsimile on the following:**¶  
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/s/ Sandra L. Lyons  
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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28

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BASHAS', INC., d/b/a BASHAS',  
FOOD CITY, AND A.J.'S FINE FOODS

and

Cases 28-CA-21435  
28-CA-21501

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 99

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT  
AND NOTICE OF HEARING

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Upon a charge filed in Case 28-CA-21435 by United Food and Commercial Workers Union, Local 99, herein called the Union, a Complaint and Notice of Hearing issued on August 31, 2007, against Bashas', Inc., d/b/a Bashas', Food City, and A.J.'s Fine Foods, herein called the Respondent, and the Union has charged in Case 28-CA-21501 that the Respondent has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act. Based thereon, and in order to avoid unnecessary costs or delays, the General Counsel, by the undersigned, pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, **ORDERS** that these cases are consolidated.

These cases having been consolidated, the General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Order Consolidated Cases, Consolidated Complaint and Notice of hearing and alleges as follows:

Exhibit A

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1. (a) The charge in Case 28-CA-21435 was filed by the Union on June 19, 2007, and a copy was served by regular mail on the Respondent on the same date.

(b) The amended charge Case 28-CA-21435 was filed on June 29, 2007, and a copy was served by regular mail on the Respondent on the same date.

(c) The charge in Case 28-CA-21501 was filed by the Union on July 31, 2007, and a copy was served by regular mail on the Respondent on August 1, 2007.

(d) The amended charge in Case 28-CA-21501 was filed on September 27, 2007, and a copy was served by regular mail on the Respondent on the same date.

2. (a) At all material times the Respondent, an Arizona corporation, with an office and place of business in Chandler, Arizona, has been engaged in the retail sale of groceries, meat, and related products.

(b) During the 12-month period ending June 19, 2007, the Respondent in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) During the 12-month period ending June 19, 2007, the Respondent, in conducting its business operations described above in paragraph 2(a), purchased and received at the Respondent's Arizona facilities goods valued in excess of \$50,000 directly from points outside the State of Arizona.

(d) At all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) In or about 1993, a more precise date being unknown to the General Counsel, the Respondent purchased the business of Arizona Supermarkets, Inc.,

herein called ASI, and renamed them to AJ's Fine Foods Store 63, AJ's Fine Foods Store 64, Bashas' Store 65, Bashas' Store 66, Bashas' Store 67, Bashas' Store 68, and Food City Store 69, herein collectively called the Respondent's ASI stores, and continued to operate the business of ASI at these stores in basically unchanged form, and immediately following the purchase of the Respondent's ASI stores, employed as a majority of its employees individuals who were previously employees of ASI at these stores.

(f) In or about 2001, a more precise date being unknown to the General Counsel, the Respondent purchased the business of ABCO Food Group, Inc., herein called ABCO, and renamed them to Food City Store 124 and ABCO Store 125, herein called Store 124 and Store 125, respectively, and collectively called the Respondent's ABCO stores, and since then has continued to operate the business of ABCO at these stores in basically unchanged form, and immediately following the purchase of the Respondent's ABCO stores, employed as a majority of its employees individuals who were previously employees of ABCO at these stores.

(g) Based on the operations described above in paragraph 2(e), the Respondent has continued the employing entity and is a successor to ASI.

(h) Based on the operations described above in paragraph 2(f), the Respondent has continued the employing entity and is a successor to ABCO.

3. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times the following individuals held the positions set forth opposite their respective names and have been agents of the Respondent within the meaning of Section 2(13) of the Act:

<u>Mike Proulx</u>	-	<u>President/ Chief Operating Officer</u>
<u>Mike Gantt</u>	-	<u>Senior Vice President of Human Resources</u>
<u>Chuck Siegal</u>	-	<u>District Manager</u>
<u>Mike Decker</u>	-	<u>Store 124 Manager</u>
<u>Aaron Felix</u>	-	<u>Store 124 Manager</u>
<u>Norma (last name unknown)</u>	-	<u>Manager</u>
<u>Gabe F. (last name unknown)</u>	-	<u>Store 64 Manager</u>
<u>Ralph (last name unknown)</u>	-	<u>Store 64 Manager</u>

5. (a) The following employees of the Respondent's ASI stores, herein called the ASI Clerks Unit, constitute separate units at each of the Respondent's ASI stores appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees, including journeyman food clerks, chefs, scanning coordinators, receiving clerks, night stock crew managers, produce managers, customer service supervisors, bakery clerks, deli clerks, merchandise clerks, service center clerks, cake decorators, assistant bakery managers, assistant deli managers, service (fast food) clerks, utility clerks, custodians, and courtesy clerks, excluding all Meat Department employees.

(b) From in or about 1988, until in or about 1993, the Union had been the exclusive collective-bargaining representative of the ASI Clerks Unit employed by ASI, and during that period of time the Union had been recognized as such representative by ASI. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 21, 1992 to September 18, 1994.

(c) Since in or about 1993, based on the facts described above in paragraphs 2(e), 2(g), 5(a), and 5(b), the Union has been designated the exclusive collective-bargaining representative of the ASI Clerks Unit at the Respondent's ASI stores.

(d) From at least June 21, 1992 to in or about 1993, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the ASI Clerks Unit employed by ASI at the ASI stores.

(e) At all times since in or about 1993, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the ASI Clerks Unit at the Respondent's ASI stores.

(f) The following employees of the Respondent's ASI stores, herein called the ASI Meat Unit, constitute separate units at each of the Respondent's ASI stores appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish, and domestic fowl of all kinds, regardless of their origin, displayed in the Meat Departments, including all meats that are cut or prepared for immediate human consumption, including packaged items, fresh, frozen and smoked meats, fresh or frozen fish, poultry and rabbits displayed in the Meat Department, and items in the Deli Section which the Union previously handled, excluding all other employees.

(g) From in or about 1988 until in or about 1993, the Union had been the exclusive collective-bargaining representative of the ASI Meat Unit employed by ASI, and during that period of time the Union had been recognized as such representative by ASI. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was effective from February 8, 1992 to September 18, 1994.

(h) Since at least in or about 1993, based on the facts described above in paragraphs 2(e), 2(g), 5(f), and 5(g), the Union has been designated the exclusive collective-bargaining representative of the ASI Meat Unit at the Respondent's ASI stores.

(i) From at least February 8, 1992, to in or about 1993, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the ASI Meat Unit employed by ASI at the ASI stores.

(j) At all times since 1993, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the ASI Meat Unit at the Respondent's ASI stores.

(k) The following employees of the Respondent's ABCO stores, herein called the ABCO Clerks Units, constitute separate units at each of the Respondent's ABCO stores appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees, excluding Meat Department employees, Store Directors, Assistant Store Directors, Produce Department Managers, Night Managers, Pharmacy Managers and Staff Pharmacists.

(l) The following employees of the Respondent's ABCO stores, herein called the ABCO Meat Units, constitute separate units at each of the Respondent's ABCO stores appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in retail and wholesale distribution of all fresh meats and all other meat products, including rabbits, fish and domestic fowl of all kinds, regardless of their origin, displayed in the Meat Departments, including all meats that are not cut or prepared for immediate human consumption, including packaged items, fresh, frozen and smoked meats, fresh or frozen fish, poultry and rabbits displayed in the Meat Department.

(m) From in or about 1997 until in or about 2001, the Union had been the exclusive collective bargaining representative of the ABCO Clerks Units and the ABCO Meat Units employed by ABCO, and during that period of time the Union had been recognized as such representative by ABCO. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 26, 1997 to October 29, 2000.

(n) Since at least in or about 2001, based on the facts described above in paragraphs 2(f), 2(h), 5(k), 5(l), and 5(m), the Union has been designated the exclusive collective-bargaining representative of the ABCO Clerks Units and the ABCO Meat Units at the Respondent's ABCO stores.

(o) From in or about 1997, to in or about 2001, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the ABCO Clerks Units and the ABCO Meat Units employed by ABCO at the ABCO stores.

(p) Since at least in or about 2001, and at all material times, the Union has been the exclusive collective-bargaining representative of the ABCO Clerks Units and the ABCO Meat Units at the Respondent's ABCO stores, and since then, the Union has been recognized as such representative by the Respondent. This recognition has been embodied in a recognition agreement dated July 7, 2001.

(q) At all times since at least 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the ABCO Clerks Units and the ABCO Meat Units at the Respondent's ABCO stores.

6. (a) On or about December 29, 2006, the Respondent, by Gabe F., at Store 64, denied Union representatives access to Store 64 unit employees by:

- (1) ordering Union representatives to leave the store;
- (2) threatening to call the police if Union representatives did not leave the store; and
- (3) refusing the Union representative's request for limited access to the store.

(b) On or about January 18, 2007, the Respondent, by Mike Decker, herein called Decker, at Store 124, denied Union representatives access to Store 124 unit employees by:

- (1) ordering Union representatives to leave the store; and
- (2) threatening to call the police if Union representatives did not leave the store.

(c) On or about March 8, 2007, the Respondent, by Aaron Felix, and Norma, at Store 124, denied Union representatives access to Store 124 unit employees by:

- (1) ordering Union representatives to leave the store; and
- (2) threatening to call the police if Union representatives did not leave the store.

(d) On or about June 1, 2007, the Respondent, by Mike Gantt, herein called Gantt, by letter, promulgated an overly-broad and discriminatory rule prohibiting union representatives from entering any Respondent store for any purpose.

(e) In or about late June 2007, the Respondent, by Gantt, at the Respondent's facilities, by letter:

- (1) disparaged the Union by blaming the Union for wage increases and other benefits being withheld from Unit employees;
- (2) threatened employees with further withholding of wage increases and other benefits if the Union refused to agree to a Board-conducted representation election;

- (3) solicited employees to decertify the Union; and

(4) undermined the Union by blaming the Union for withholding of current and future wage increases and other benefits.

7. (a) On or about July 1, 2007, the Respondent granted a wage increase to all of its employees except those approximately 170 unit employees who are in the ABCO and ASI Clerks and Meat Units .

(b) The Respondent engaged in the conduct described above in paragraph 7(a) because those referenced Unit employees had joined, supported, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

8. (a) On or about July 17, 2007, the Union requested that the Respondent bargain collectively about a wage increase.

(b) Since on or about July 17, 2007, the Respondent has failed and refused to bargain collectively about the subject set forth above in paragraph 8(a).

(c) The subjects set forth above in paragraphs 6(a) through 6(e), 7(a), 8(a) and 8(b) relate to wages, hours, and other terms and conditions of employment of the ASI and the ABCO Clerks and Meat Units and are mandatory subjects for the purposes of collective bargaining.

(d) The Respondent engaged in the conduct described above in paragraphs 6(a) through 6(e), and 7(a) without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

(e) By its overall conduct, including the conduct described above in paragraphs 6(a) through 6(e), 7, and 8(a) through 8(d), the Respondent has failed and refused

to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Units described above.

9. By the conduct described above in paragraph 6, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

10. By the conduct described above in paragraph 7, the Respondent has discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

11. By the conduct described above in paragraphs 6, 7(a), and 8, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

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

**WHEREFORE**, as part of the remedy for the unfair labor practices alleged above in paragraphs 4 through 6, the General Counsel seeks an Order requiring that the Respondent pay interest on any back pay or other monetary awards on a compounded, quarterly basis. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

#### **ANSWER REQUIREMENT**

The Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to this complaint. **The answer must**

be received by this office on or before October 12, 2007 or postmarked on or before October 11, 2007. The Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. When an answer is filed electronically, an original and four paper copies must be sent to this office so that it is received no later than three business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in this complaint are true.

#### **NOTICE OF HEARING**

PLEASE TAKE NOTICE that on November 14, 2007, at 9:00 a.m. (local time), in the Hearing Room, National Labor Relations Board, 2600 North Central Avenue, Suite 1800, Phoenix, Arizona, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, the Respondent and any other party to this proceeding have the right to appear

and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached form NLRB-4338.

Dated at Phoenix, Arizona, this 28<sup>th</sup> day of September 2007.

/s/ Cornele A. Overstreet  
Cornele A. Overstreet, Regional Director

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Attachments

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 28**

**BASHAS', Inc., d/b/a BASHAS',**  
**FOOD CITY, and A.J.'S FINE FOODS**

**and** **Cases 28-CA-21435**  
**28-CA-21501**

**UNITED FOOD AND COMMERCIAL**  
**WORKERS UNION, LOCAL 99**

**and** **Cases 28-CA-21590**  
**28-CA-21592**  
**28-CA-21639**  
**28-CA-21640**  
**28-CA-21646**  
**28-CA-21676**

**UNITED FOOD AND COMMERCIAL**  
**WORKERS INTERNATIONAL UNION**

**ORDER RESCHEDULING HEARING**

An Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing (the Consolidated Complaint) issued in the above matter on December 31, 2007, scheduling a hearing to commence on February 12, 2008, in Phoenix, Arizona. On January 24, 2008, Charging Party United Food and Commercial Workers International Union filed a charge against the Respondent in Case 28-CA-21739. The new charge is closely related to charge allegations in the Consolidated Complaint and if found meritorious, would be appropriate for further consolidation. The parties have stated that they and their witnesses are available for a hearing to commence on April 15, 2008. Accordingly, in order to permit time for the investigation and disposition of the recently filed charge,

Exhibit B

IT IS HEREBY ORDERED that the hearing in the above matter, scheduled to commence on February 12, 2008, be, and the same hereby is, rescheduled to commence on April 15, 2008, at the same time and location, as previously noticed, and will continue on consecutive days thereafter until completion.

Dated at Phoenix, Arizona, this 29<sup>th</sup> day of January 2008.

/s/ Cornele A. Overstreet  
Cornele A. Overstreet, Regional Director

.....Respondent argues that there is no material issue of fact only due to its assertion that the parties were close to a settlement of the issues. Although Respondent and CGC engaged in settlement discussions and tentative meeting of the minds occurred, Respondent never signed an agreement, the Union never agreed to the terms of any settlement and the Regional Director never approved a settlement of the charges. The Regional Director at no time since some items were in its Motion is their version and theory of the case and does not comport with the *Aramiremai*. Further, the *Aramiremai* schedule 21 with the *de* *yuleandpR* ; *lCh, aWe, andwereothe*. The First Complaint also alleged that *aaupr* *rperesentdf98Eom* With regarding to *complicprethe* *repreesndndcomplSe* These are the *thethbotemb* October 21, 2002, the Union sent a letter to Respondent stating, among other things, that the Union had recently become aware of a possible impending merger between Respondent and Service Rock Products Corporation (SRPC), a non-union ready-mix company. The Union further stated that it believed that the merger would have implications under the Act with respect to Respondent's single employer status. Attached to the Union's letter was a questionnaire that addressed the extent, or lack thereof, of single employer status between Respondent and SRPC. The Union requested that Respondent complete and return the questionnaire in a timely fashion. On October 28, 2002, Respondent replied to the Union's letter. Respondent stated, among other things, that, ". . . NRM [Nevada Ready Mix] and Service Rock Products Corporation ("Service Rock") are not now and never have been a 'single entity.'"

On October 31, 2002, the Union responded, stating among other things, that ". . . [the Union] does not **now** claim that NRM and Service Rock Products Corporation is a single entity under the National Labor Relations Act." (emphasis in original) The Union

further stated that that it would consider Respondent's failure to respond to the questionnaire to be an unfair labor practice and a refusal to bargain in good faith.

On November 7, 2002, Respondent replied and informed the Union's counsel that, ". . . rather than call your unfair labor practice bluff, your client may rest assured of the following:

- 1) Both NRM and SRPC are subsidiaries of MCCD, a Mitsubishi company.

NRM and SRPC do not have common business locations, supervisors, employees, bank and payroll accounts, post office boxes, phone numbers, directory listings, wages, benefits, accounting records, principal accountants, corporate records, bookkeepers, payroll preparers, workers compensation policies, insurance policies, federal taxpayer ID numbers, administrative, bookkeeping, clerical, managerial or labor personnel.

You may consider those questions to which I have not responded, as requiring clear statements of relevance by Local 631; seek information Local 631 already has; or information about SRPC about which NRM has no knowledge."

In September 2006, the Union, having been given reason to believe that Respondent and SRPC were not competing against each other and were functioning as alter egos, assigned one of its organizers to investigate the relationship between the two entities. During its investigation the Union discovered, among other things, that Respondent and SRPC had common customers, same field supervisors, drops, telephone numbers, invoices, shared equipment, dispatch offices, and products. As the Union's investigation continued through January, it uncovered additional evidence that suggested that Respondent and SRPC may indeed, have had an alter ego relationship.

On January 26, the Union filed an information request with Respondent. In its request, the Union sought information similar to that contained in its October 2002 request, including but not limited to, Respondent and SRPC's business addresses, phone numbers, financial institutions, payroll accounts, tax identification numbers, names of customers, work performed, operations, identities and responsibilities of supervisory personnel, names of directors, stockholders, and officers, etc., which would enable it to establish an alter ego relationship between Respondent and SRPC.

On March 9, Respondent filed a unit clarification petition asserting that the Union's January 26 information request and accompanying letter demonstrated its interest in representing the SRPC employees as it constituted an investigation into whether Respondent was operating a non-union company. Respondent also asserted that the allegations contained in the charge,<sup>1</sup> which forms the basis for the instant Complaint, further demonstrated that the Union was interested in representing the employees of SRPC because the Union had alleged that Respondent and SRPC were alter egos.

On April 25, the Regional Director issued a Decision and Order in Case 28-UC-239 (Decision), dismissing Respondent's unit clarification petition. In rendering his decision, the Regional Director rejected Respondent's assertions and determined, among other things, that the Union's information request regarding the relationship between Respondent and SRPC did not amount to a claim to represent the employees of SRPC.<sup>2</sup>

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<sup>1</sup> The charge states, "During the past six months, preceding the date of this charge, the above-named Employer, by its officers, directors, and/or agents, has failed and refused to supply Teamsters Local 631 with necessary and relevant information that the Union has requested. By these and other acts, the Employer has violated the Act."

<sup>2</sup> In its Motion, Respondent claims that the Regional Director, "... found as fact and concluded that neither company changed operations in the ensuing five years; and, there is no evidence to the contrary." What the Regional Director stated in this regard was, "There is no suggestion that the Employer Petitioner

## ARGUMENT

### A. The Legal Framework

Summary judgment may be rendered if the pleadings and supporting materials establish that there is no genuine issue requiring a hearing and, that the moving party is entitled to judgment as a matter of law. *Lakeview Convalescent Center*, 307 NLRB 563, 564 (1992). In a summary judgment proceeding the pleadings and evidence are viewed in the light most favorable to the nonmoving party. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001) (pleadings must be read in the light most favorable to the nonmoving party); *Petrochem Insulation, Inc.*, 330 NLRB 47, 52 n. 20 (1999) (evidence evaluated in the light most favorable to the nonmoving party).

With respect to a contention that a complaint or allegation is time barred by Section 10(b), the Board has consistently held that the 10(b) period does not commence until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). Moreover, it is the employer's burden to establish that the union "was on clear and unequivocal notice" of the violation more than six months before the charge was filed. *Id.*

Under the Act, an employer is obligated, upon request, to furnish a union with information that is potentially relevant and useful in discharging its statutory responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A union is entitled to information if "there is a probability that such data is relevant and will be of use to the

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[Respondent] or SRPC have changed the way that either operated since 1999, so as to require inclusion of the employees of SRPC in the recognized unit."

union in fulfilling its statutory duties as the employees' exclusive bargaining representative." *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985).

With respect to information regarding data concerning employees or operations other than those represented by the union, there is no presumption that the information is relevant to the union's representation of employees. The Board may, however, provide the union with access to such information, but the union must establish that the requested information has an impact on the interests of the bargaining unit employees. *Chemical Workers v. Pittsburgh Plate Glass, Co.*, 404 U.S. 157 (1971).

An employer is generally required to provide requested information to a union regarding any alleged alter-ego relationship it might have, as it is relevant. See *Consolidation Coal Co.*, 307 NLRB 69 (1992); *James Trouton and Sync-Pop, Inc.*, 299 NLRB 120 (1990). In determining whether one employer is an alter ego of another, the Board considers whether the two companies have substantially identical management, business purpose, operations, equipment, customers, supervisor and ownership. *Advance Electric, Inc.*, 268 NLRB 1001 (1984) enfd. As modified, 748 F. 2d 1001 (5<sup>th</sup> Cir. 1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). The Board has held that, "not all factors need to be present and no one factor is dispositive of an alter ego determination, common ownership between the two employers is a critical factor." *Shellmaker, Inc.*, 265 NLRB 749, 754 (1982); *Superior Export Packing*, 284 NLRB 1169, 1171 (1987).

B. The Complaint is not time-barred.

Respondent's assertion that that the Complaint is barred by Section 10(b) must be rejected as its own documents, discussed more thoroughly above, contradict its position. In this regard, Respondent avers that, ". . . Respondent unequivocally rejected the

Union's [October 21, 2002] request for information about SRPC." To the contrary, Respondent complied completely, to the extent possible, with the Union's information request by listing several areas where no relationship existed between it and SRPC.

With respect to any questions to which Respondent failed to reply, Respondent either requested that the Union show the relevance of the information; stated that the Union already possessed the information; or informed the Union that it possessed no information about SRPC.

Moreover, Respondent's response to the Union's information request makes sense in light of the Union's assertion that it would consider Respondent's failure to respond to be an unfair labor practice. Accordingly, upon receipt of Respondent's November 7, 2002 letter and the information provided therein, the Union could have reasonably concluded that its concerns about the relationship between Respondent and SRPC may have been unfounded. In this regard, and as discussed more thoroughly above, in September 2006, the Union received information that suggested that, what it may have learned from its October 2002 information request, might no longer be true.<sup>3</sup>

Respondent's reliance upon the Union's October 21, 2002 letter as the commencement of the 10(b) period is misplaced. In *Quality Building Contractors*, 342 NLRB 429, 431-432 (2004) the Board found that the 10(b) period began to run on the date of an employer's denial of union's information request (April 2004) and not from October 2002, when the union learned of some alleged contract violations, as contended by employer.

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<sup>3</sup> As the Decision demonstrates, Respondent's contention that the Regional Director had "found" that neither Respondent nor SRPC had changed operations in the ensuing five years is incorrect. As noted above, the Regional Director simply stated that there was, "no suggestion" to support any changed circumstances for either employer, implying that no evidence was presented on the issue.

In the instant matter, there is no evidence to suggest that Respondent's November 7, 2002 response to the Union's information request provided the Union with clear and unequivocal notice that Respondent had committed an unfair labor practice. Even assuming the Union was on notice by Respondent's conduct in 2002, *Quality Building Contractors* shows that in the instant matter, the 10(b) period did not begin to run until January 26, 2007, when the Union filed its request for information at issue here, less than three weeks before the charge was filed and well within the 10(b) period. Accordingly, Respondent's claim that the Complaint is barred by Section 10(b) is without merit and should be rejected.

The information requested by the Union is relevant and necessary to its statutory duties.

As discussed above, there is no presumption of relevance for the information that the Union has requested from Respondent regarding its relationship with SRPC. However, the Union may obtain access to this information if it can establish that the requested information has an impact on the interests of Respondent's bargaining unit employees.

Moreover, beginning in September 2006, through the filing of its January information request, the Union adduced evidence that suggested that the relationship between Respondent and SRPC had substantially changed since Respondent's November 2002 response to the prior information request.

In the instant matter the Union seeks information that will show the existence of a business relationship, or lack thereof, between Respondent and SRPC. More specifically,

the information will, among other things, demonstrate whether or not Respondent is operating a non-union ready-mix company in direct competition with its Union-represented employees. Any information that supports this theory would certainly be relevant since the possibility of Respondent operating a non-union company to siphon off bargaining unit work, would, without question, have an impact on unit employees. Accordingly, Respondent's assertion that the Union has no pending grievance to which its information request relates, and therefore the information requested is not relevant, is without merit and should be rejected.

Genuine issues of fact exist requiring a hearing in this matter. Respondent has failed to show that the underlying charge is time barred by Section 10(b) or that the information the

Union has requested is not relevant to its statutory duties. Accordingly, Respondent's Motion should be denied in its entirety.