Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62; Love's Enterprises, Inc. *and* Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union. Cases 32-CA-522 and 32-CA-574

September 20, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND MURPHY

On January 25, 1979, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, Respondent Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62 (hereinafter called Respondent Kallmann) filed cross-exceptions and a supporting brief. Respondent Love's Enterprises (hereinafter called Respondent Love's) filed a cross-exception and a supporting brief,[1] and Respondent's Love's and Kallmann filed an answering brief to the exceptions and briefs in support of exceptions filed by the General Counsel and the Charging Party.[2]

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order with respect to Respondent Love's, but only to the extent consistent herewith with respect to Respondent Kallmann.

The Administrative Law Judge found that none of the employees hired by Kallman had ever been employed at the Hayward restaurant, and that there was no showing that a majority of these employees desired representation by the Union. He further found that a preponderance of the evidence does not support the allegation that Respondent Kallman refused to hire former employees of the Hayward restaurant because of their affiliation with the Union. The Administrative Law Judge concluded that Respondent Kallman was not, therefore, a successor to Respondent Love's. The General Counsel contends that the Administrative Law Judge's own findings and credibility resolutions require the conclusion that Kallman possessed union animus and refused to hire Love's former employees because of considerations unlawful under Section 8(a)(3)of the Act. He further contends that Respondent Kallman is a successor to Respondent Love's and therefore violated Section 8(a)(5) of the Act by refusing to bargain with the Union and by changing the rates of pay and benefits without prior notification to or consultation with the Union. We find merit in the General Counsel's contentions.

The following facts are not in dispute. In December 1973, Respondent Love's took over the operation of the Hayward, California, restaurant from a franchisee, not a party to this proceeding. During the period in 1973 when the restaurant was operated by the franchisee, a memorandum agreement was executed with Culinary Workers and Bartenders Union, Local 823 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (hereinafter called Local 823), the predecessor of the Charging Party herein. Under the terms of the memorandum agreement, the franchisee agreed to recognize Local 823 as the sole collective-bargaining representative for all of its employees coming under the Union's charter. Thus, the unit consisted of all employees at the Hayward restaurant engaged in the preparation, handling, and serving of food and/or beverages, excluding office clerical employees, guards, and supervisors as defined in the Act. The agreement further provided that: "The Employer agrees to accept, adopt and observe all of the wages, hours and other terms and conditions of employment contained in the Collective Bargaining Agreement between the Union and the East Bay Restaurant Association, Inc., California Licensed Beverage Association, Inc., or its successors . . . ." as well as "the Restaurant and Tavern Health Fund Trust Agreement, the Southern Alameda County Restaurant and Tavern Pension Trust Agreement, the health and pensions plans established thereunder, and all amendments to said Trust Agreements and plans." When Respondent Love's took over the

[1] Respondent Love's excepts to the failure of the Administrative Law Judge to find that its franchisees are required to follow section "L" of its operations manual. We find merit in this exception. Respondent Love's vice president, Mesker, testified that Love's franchisees are requested to follow section "L" of the manual which prescribes, *inter alia*, how the meal is to be placed on the plate, how it is to be presented, and what portions of products are to be used on the plate served to the customer.

[2] Respondent Love's and Kallmann move to strike a portion of the Charging Party's brief on the ground that it sets forth facts not contained in the record developed before the Administrative Law Judge. We have not considered or relied on this section of the Charging Party's brief because it contains facts *dehors* the record. Accordingly, we find it unnecessary to pass on Respondents' motion.

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

restaurant in December 1973, it continued to apply the memorandum agreement.[4]

On September 26, 1977,[5] Respondent's Love's closed its Hayward restaurant and terminated all of the employees who had been working there. On October 20, Respondent Kallmann opened the restaurant for business under a franchise agreement, equipment lease, and real property sublease with Respondent Love's. Respondent Kallmann then operated the restaurant, as Respondent Love's had done, using the same equipment to produce identical products for the same customer market from the same location. Respondent Kallmann, however, did not hire any of the employees who had been employed by Respondent Love's. Nor did it recognize the Union or apply the memorandum agreement. Instead, it began nonunion operations with an entirely new complement of approximately 30 employees. On October 21, the Union commenced picketing the restaurant to protest Respondent Kallmann's failure to reemploy any of the former employees and its failure to recognize the Union as the collective-bargaining representative.

On the basis of the foregoing, there is no question that all the factors for finding successorship are present but for the failure to retain the former employees of the restaurant.[6] Further, it is well settled that successorship will be found in such circumstances if the new owner fails to hire the predecessor's employees because of their affiliation with the Union.[7] Thus, the central question herein is whether Respondent Kallmann refused to hire the former employees of Love's Hayward restaurant (hereinafter, the former Hayward employees) for antiunion reasons. We find that this question must be answered in the affirmative.

The record reveals that after entering into the franchise agreement with Respondent Love's, Karl Kallmann reserved two rooms at the Vagabond Motel, located near the Hayward Restaurant, to be used for interviewing job applicants. He placed advertisements in the Oakland Tribune (Tribune) and the Hayward Daily Review (Review) which stated that a new restaurant was hiring and that applications should be made in person at the Vagabond Motel. The name of the restaurant did not appear in the advertisement. Kallmann testified that he conducted interviews at the motel for 2-1/2 days, starting on October 12, and subsequently completed the interviewing of applicants in the restaurant. After October 14, the advertisements in the Tribune and the Review substituted the name and address of "Love's Barbeque Restaurant" for the name and address of the motel.

The Administrative Law Judge did not credit Kallmann's testimony regarding the manner in which employees were hired. He found that, while Kallmann testified that he was the only official to have interviewed applicants, Kallmann's assistant manager, Stebban, controverted this testimony by stating that he also had interviewed applicants. He further found that Kallmann's pretrial affidavit stating his reasons for not hiring two former Hayward employees, Wadsworth and Logan, was inconsistent with his testimony at the hearing concerning these employees.[8]

Further, the Administrative Law Judge observed that normally, when an employer advances a false reason for its actions, it is permissible to infer that the actions are taken for an unlawful reason. He nevertheless refused to draw this inference from his having discredited Kallmann's testimony. Instead, the Administrative Law Judge found that several circumstances exist which refute a conclusion of illegal motive. An examination of these circumstances reveals no basis for the Administrative Law Judge's finding.

With respect to the question of Respondent Kallmann's union animus, the Administrative Law Judge found that Kallmann believed that the choice as to whether or not the restaurant would be unionized was his to make, and that Kallmann made remarks to the effect that he had a choice as to whether or not to be unionized and that he had chosen to operate nonunion. The Administrative Law Judge also found that a similar remark by Kallmann to a picketing employee violated Section 8(a)(1) of the Act. Thus, Kallmann asked former Hayward employee Pingree why she did not put down her picket sign, that she could be rehired at her previous rate of pay, but that the restaurant would be nonunion. Finally, the Administrative Law Judge found that Respondent Kallmann violated Section 8(a)(1) of the Act by Assistant Manager Sebban's unexplained act of photographing employees Logan and Wadsworth immediately after they had finished picketing the restaurant.

In spite of these findings, the Administrative Law Judge concluded that Respondent Kallmann did not unlawfully refuse to hire former Hayward employees. He reasoned that Kallmann had no need to avoid the union sympathies of the former Hayward employees becauase Kallmann truly believed that the choice re-

[4] In 1975, by virtue of a merger of three unions, Hotel, Motel and Restaurant Employees and Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union, the Charging Party herein, succeeded Local 823 and became the Hayward employees' collective-bargaining representatives.

[5] All dates occurred in 1977 unless otherwise indicated.

[6] *N.L.R.B.* v. *Burns International Security Service*, 406 U.S. 272 (1972).

[7] *Potter's Drug Enterprises, Inc. d/b/a Potter's Chalet Drug and Potter's Westpark Drug*, 233 NLRB 15 (1977).

[8] Thus, in his affidavit Kallmann asserted that he did not hire Wadsworth and Logan because they were not available for the day shift due to their school schedule, whereas, at the hearing, Kallmann testified that the only reason he did not hire the two employees was because of the absence of openings and not because of conflicts with their school schedules.

garding unionization was his alone to make and that the employees' desires did not enter into it. This is one of the "objective considerations" which, the Administrative Law Judge asserted, refutes a conclusion of illegal motive. We disagree. Kallmann's conceded intention not to allow the employees to be unionized itself supports a conclusion of illegal motive. However, Kallmann's intention, far from being held merely as an opinion, was expressed in action by his unlawful statement to employee Pingree. Further, Respondent Kallmann engaged in the unlawful act of photographing employees after they left the picket line. It is inconceivable that an employer whose anti-union attitude led to these unlawful acts would have no interest in the union sympathies of job applicants. To the contrary, the foregoing facts fully support the conclusion that Respondent Kallmann was very much concerned with the union affiliation of the former Hayward employees and did not hire them because of it.

Similarly, we find, contrary to the Administrative Law Judge, that Kallmann's method of hiring indicated a desire to avoid hiring former Hayward employees. As noted above, the initial newspaper advertisements made no mention of the name of the restaurant, and the initial 2-1/2 days of interviewing was done at a motel rather than at the restaurant. Although the Administrative Law Judge acknowledged that Respondent Kallmann offered no explanation for this procedure, he found there was nothing to support the General Counsel's contention that Kallmann use the procedure in order to conceal the fact that interviews were being conducted. In support of this finding, the Administrative Law Judge observed that not all positions had been filled when the place of interviewing was changed from the motel to the restaurant, and that Kallmann had used the format of Respondent Love's for the newspaper advertisements. He reasoned that had Respondent Kallmann been attempting to conceal the fact that he was interviewing, he would not have used the easily recognizable format of Respondent Love's for the advertisements and he would have continued to interview at the motel room until all the positions were filled.

The General Counsel argues that it was unnecessary for Kallmann to incur the added expense of renting the motel room until all positions were filled because 11 of the initial complement of 28 hires had applications dated October 12 or 13 and were, therefore, interviewed at the motel; another 7 had applications dated October 14, some of whom, therefore, must have been interviewed during the last half-day at the motel; and only one former Hayward employee, Porter, applied at the motel. In these circumstances, the General Counsel argues, Kallmann had filled the majority of positions with new employees and had nothing to fear from completing his hiring in the restaurant. In addition, the General Counsel points out that Respondent Love's newspaper advertising was done in 1972 and it is therefore improbable that in 1977 former Hayward employees would have recognized the 1972 format. We agree with the General Counsel. We find the Administrative Law Judge's explanation of the hiring procedure to be entirely speculative and implausible. Indeed, Kallmann's failure to explain his unusual hiring procedure, coupled with his lack of candor regarding the interviewing process, his demonstrated union animus, and his handling of the applications of Wadsworth, Logan, and Porter as discussed below warrant the inference that the hiring procedure was designed to conceal from the former Hayward employees the fact that Kallmann was hiring. We so find.

The Administrative Law Judge's reasoning with respect to Kallmann's "offers" to former employees is also implausible and unsupported by the record. The Administrative Law Judge found that Respondent Kallmann offered a job to former Hayward employee Pingree when he told her that she could be rehired at her previous rate of pay, but that the restaurant would not be union. He further found that Kallmann offered positions to former Hayward employee Wadsworth and "probably" to Logan. The Administrative Law Judge concluded that these offers of employment militate against a finding that Respondent Kallmann did not hire former Hayward employees because of their union sympathies. We disagree.

As the General Counsel correctly points out, Kallmann's offer to Pingree constituted a violation of the Act; thus, to accept the Administrative Law Judge's reasoning concerning the offer to her would be to find that an unlawful offer of employment negates an unlawful motive in hiring. Such reasoning is clearly invalid and we reject it.

The Administrative Law Judge's reasoning in finding that Kallmann offered employment to Wadsworth and Logan is also faulty. Wadsworth testified that he applied for the position of cook and was interviewed by Kallmann at the Hayward restaurant. When asked whether Kallmann offered him a job, Wadsworth stated: "No, he didn't—well, they offered me a busboy position and I said that I felt—that I had worked my way up in seniority because I was working there before and I told him I would not be interested in the busboy position." When asked whether Kallmann offered him the position or stated that the position was open, Wadsworth testified, "He stated that it is a possibility, he didn't actually offer it to me." Logan also testified that he applied for the position of cook and was interviewed by Kallmann at the restaurant. He stated that, after Kallmann looked

at his application, Kallmann told him that there were no positions open except possibly for a dishwasher job. Logan further stated that he told Kallmann that he would take the position and that Kallmann "replied again, that all the positions were taken at the time and that there was that one dishwashing job and that he was pretty certain that that was taken also." Kallmann made no further contact with Logan regarding a position at the restaurant.

On the basis of the foregoing testimony, the Administrative Law Judge concluded that Kallmann offered a position of busboy to Wadsworth and "probably" also to Logan. As indicated, the record does not support this conclusion. There is nothing to show that Logan received anything more than the expression of a possible offer that Kallman never acted upon. Similarly, there is some question as to whether Kadsworth actually received an offer from Kallmann. While Wadsworth stated that Kallmann offered the position of busboy to him, he qualified this statement by adding that Kallmann told him there was a "possibility" that a busboy position was open and that he did not actually offer the position to Wadsworth.

Thus, the testimony relied on by the Administrative Law Judge indicates that in Logan's case no offer was made and in Wadsworth's case, the testimony is insufficient to establish that an offer was in fact made. Further, Kallmann himself did not testify that he made an offer to either Logan or Wadsworth. Instead, at the hearing Kallmann stated that he did not hire these employees because there were no openings at the time they applied, whereas in his pretrial affidavit he stated that he did not hire them because they were not available for the day shift due to their school schedule.[9] In these circumstances, we find no support for the Administrative Law Judge's conclusion that Kallmann offered positions to Logan and Wadsworth. *A fortiori*, we find that the Administrative Law Judge's reliance on the testimony of Logan and Wadsworth in determining that Respondent Kallmann was not averse to hiring former Hayward employees is equally without support.

Finally, we are not persuaded by the Administrative Law Judge's conclusion that Respondent Kallmann had a valid business reason for not hiring the former Hayward employees. The Administrative Law Judge credited Kallmann's testimony that, while initially he had been impressed with former Hayward employee Porter's application, he ultimately decided not to hire Porter because of the unclean condition of the kitchen after Respondent Love's closing, coupled with Porter's position as head cook prior to the closing. He therefore concluded that Respondent Kallmann's true reason for avoiding hiring former Hayward employees was the uncleanliness of the restaurant. He did so in spite of his own finding that Kallmann did not offer the uncleanliness of the restaurant as a defense, but rather attempted to construct a different defense to ensure that he would not be found to have violated the Act. The Administrative Law Judge excused Kallmann's false and tailored testimony on the grounds that Kallmann so testified because he was young, not well versed in labor relations matters, and had undertaken significant financial obligations which would be magnified in the event Respondent Kallmann were found to have violated the Act. We cannot agree with the Administrative Law Judge's reasoning in this matter. However difficult Kallmann's position may have been, we find that it does not warrant the speculation engaged in by the Administrative Law Judge or an inference that Kallmann's reasons for not hiring the former Hayward employees were based on lawful considerations. To the contrary, as we have found above, Kallmann's untruthful testimony gives rise to the inference that he was attempting thereby to mask the real reason for his failure to hire Love's former Hayward employees; namely, their union affiliation.

In view of the foregoing, we find that Respondent Kallmann expressed an intention not to have the union in his restaurant; unlawfully photographed employees; conducted his initial job interviews under conditions which virtually ensured that the former Hayward employees would not know of the interviews; gave inconsistent testimony regarding his reasons for not hiring former Hayward employees; and gave false, tailored testimony regarding his hiring practices. In the absence of credible testimony and competent evidence to the contrary, these circumstances compel the conclusion that Respondent Kallmann avoided hiring former Hayward employees because of their affiliation with the Union. Consequently, we find that Respondent Kallmann violated Section 8(a)(3) of the Act by refusing to hire the former Hayward employees of Love's.[10] Further,

[9] The Administrative Law Judge attempted to explain the inconsistency in Kallmann's testimony as being the result of a desire to enhance Respondent Kallmann's defense. We may assume that is so, but that objective in no way improves the Respondent's position or the impact of the inconsistency. Regardless of the Administrative Law Judge's attempt to provide an unfounded explanation for Kallmann's inconsistent testimony, the fact is that he discredited Kallmann's asserted reasons for not hiring Logan and Wadsworth.

[10] In light of the fact that Kallmann appears to have hired most of the new complement of employees during the first 2-1/2 days of interviewing conducted at the Vagabond Motel on the basis of advertisements which did not state the name of the restaurant, it is hardly surprising that only seven of the former Hayward employees of Love's applied for positions with Respondent Kallmann. The Board has long held that where an employer makes known to prospective employees his refusal to hire them because of their prior union affiliation, their failure to undertake the useless act of making formal application for work is no defense to an 8(a)(3) allegation. *Macomb Block and Supply, Inc.*, 223 NLRB 1285 (1976). *Tri State Maintenance Corporation*, 167

(Continued)

these employees were represented by the Union in an appropriate unit.[11] It is, therefore, apparent that but for Respondent Kallmann's unlawful conduct, the Union's status as the exclusive collective-bargaining representative would have survived Respondent Kallmann's takeover of the Hayward restaurant. This, together with Respondent Kallmann's continued operation of the restaurant at the same location and in substantially the same manner as before, compels us also to find that Respondent Kallmann is a legal successor of Respondent Love's with respect to Respondent Love's bargaining obligation to the Union. We therefore conclude that Respondent Kallmann violated Section 8(a)(5) and (1) of the Act by disavowing Respondent Love's obligation to the Union.

In addition, we find that Respondent Kallmann violated Section 8(a)(5) by unilaterally reducing rates of pay and eliminating benefits of employees provided in the collective-bargaining agreement observed by Respondent Love's without prior notice to or consultation with the Union. In so finding, we recognize that a successor employer is ordinarily free to set initial terms on which it will hire the predecessor's employees.[12] However, as the Supreme Court observed in *Burns*:[13]

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

Here, any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent, since it cannot be permitted to benefit from its unlawful conduct.[14] In these circumstances, we find that Respondent Kallmann would have retained all of the employees had it not decided to avoid hiring them because of their union activity. Therefore, it was not entitled to set initial terms of employment without first consulting the Union.

NLRB 933 (1967); *Wayne R. Sherwood d/b/a Grounds Service*, 180 NLRB 1040 (1970). The same reasoning applies here, where an employer has attempted to conceal from employees the fact that it is accepting applications for employment. In such circumstances, employees cannot be faulted for failing to apply and those who discovered that the employer was hiring would be justified in assuming the futility of applying for a position.

[11] The appropriate unit is:

> All employees employed at Love's Barbeque Restaurant at 24123 Hesparian Blvd., Hayward, California, engaged in the preparation, handling and serving of food and/or beverages, excluding office employees, guards, and supervisors as defined in the Act.

[12] *N.L.R.B.* v. *Burns International Security Services, supra*, 406 U.S. at 294 295.

[13] *Id.*

[14] *Potter's Drug Enterprises, Inc., supra.*

THE REMEDY

Having found that Respondent Kallmann discriminatorily refused to offer employment to the former employees of Respondent Love's, we shall order that their employment status to restored to what if would have been but for the discrimination against them, and that Respondent Kallmann offer them immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary employees hired from sources other than Love's Enterprises, Inc., Hayward, California, restaurant to make room for them, and make them whole for any loss of earnings that they may have suffered due to the discrimination practiced against them, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[15]

Further, we shall order that Respondent Kallmann bargain with the Union, upon request, concerning any terms and conditions of employment on which it would have been required to bargain had the Union's lawful status been acknowledged on October 20, 1977-the date Respondent Kallmann opened the Hayward restaurant for business. In addition, we shall order the Respondent Kallmann cancel, upon request by the Union, changes in rates of pay and benefits unilaterally effectuated and make the employees whole by remitting all wages and benefits that would have been paid absent Respondent Kallmann's unlawful conduct as found herein from October 20, 1977, until Respondent Kallmann negotiates in good faith with the Union to agreement or to impasse.[16]

CONCLUSIONS OF LAW

1. Respondent Kallmann and Respondent Love's are separate employers within the meaning of Section 2(2) of the Act, each of whom is engaged in commerce and in operations affecting commerce within meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union, is a labor organization within the meaning of Section 2(5) of the Act.

[15] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Backpay is to be based on either rate structure prevailing under Love's Enterprises, Inc., Hayward, California, restaurant or the new rate structure established by Respondent Kallmann, whichever results in the higher backpay to the individual employees.

[16] The remission of wages is to be applied consistently with the make-whole remedy set forth above with respect to the discriminatees.

3. All employees employed at Love's Barbeque Restaurant at 24123 Hesparian Blvd., Hayward California, engaged in the preparation, handling, and serving of food and/or beverages, excluding office employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been the exclusive representative of all the employees in the above unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By telling employees that it did not intend to operate a unionized restaurant and by taking pictures of employees who had been engaging in picketing or other protected activities, without a valid reason, Respondent Kallmann has violated Section 8(a)(1) of the Act.

6. By failing to hire the employees named in paragraph 2(b) of the Order herein because of their union affiliation, Respondent Kallmann in each instance violated Section 8(a)(3) and (1) of the Act.

7. Respondent Kallmann is a successor employer to Respondent Love's and by disavowing its bargaining obligation to the Union and by departing from preexisting rates of pay and benefits without prior notification to and consultation with the Union, Respondent Kallmann violated Section 8(a)(5) and (1)of the Act.

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

9. Respondent Kallmann has not violated the Act in any other manner.

10. Respondent Love's has not violated the Act in any manner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Karl Kallmann, d/b/a Love's Barbeque Restaurant No. 62, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that it will not be operating a unionized restaurant and taking pictures of employees who have been engaging in picketing or other protected concerted activities.

(b) Refusing to hire or otherwise discriminating against employees to avoid bargaining with a union.

(c) Refusing to recognize Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union, as the exclusive collective-bargaining representative of its employees in this appropriate unit:

> All employees employed at Love's Barbeque Restaurant at 24123 Hesparian Blvd., Hayward, California, engaged in the preparation, handling, and serving of food and/or beverages, excluding office clerical employees, guards and supervisors as defined in the Act.

(d) Making changes in the rates of pay and benefits of the employees in the above unit without notice to and consultation with said union.

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

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Destroy any pictures of Richard Logan and David Wadsworth taken by Assistant Manager David Sebban.

(b) Offer immediate and full reinstatement to D. L. Marshall, A. L. Pingree, P. M. Phipps, P. M. Turner, E. L. Goodwin, D. S. Barker, J. M. Evanoff, E. G. Hayne, M. J. Shauver, M. Henshall, M. F. Chulata, G. B. Ricketts, D. Wadsworth, S. S. Hervey, H. Baigmohammadi, M. A. Quinn, A. J. Botelho, D. A. Logan, R. G. Logan, K. R. Fuentes, K. A. Milina, J. Boyd, M. J. Henshail, L. L. Macone, V. O. Thomas, J. C. Casarotti, M. R. Rafferty, M. A. Gron, J. M. Gutfeld, N. E. Hansen, K. C. Lawson, D. L. Loya, R. A. Bishop, C. Roy, B. K. Lewis, M. Silvera, R. R. Smart, R. Holguin, J. S. Porter, M. E. Evaneski, to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging, if necessary, employees hired from sources other than Love's Enterprises, Inc., Hayward, California, restaurant to make room for them, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Upon request, bargain with the above Union as the exclusive representative of all the employees in the above unit concerning their terms and conditions of employment; and, if an understanding is reached, embody it is a signed contract if asked to do so.

(d) Upon request of the above union, cancel any changes from the rates of pay and benefits that existed immediately before its takeover of Love's Enterprises, Inc., Hayward California, restaurant, and make the employees whole by remitting all wages and benefits that would have been paid absent such changes from October 20, 1977, until it negotiates in good faith with the Union to agreement or to im-

passe, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Hayward, California, facility, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent Kallmann's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Kallmann to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent Kallmann has taken to comply herewith.

IT IS FURTHER ORDERED that in all other respects the complaint be, and it hereby is, dismissed.

[17] In the event that 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."

APPENDIX

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

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT tell you that we intend to operate only a nonunion restaurant.

WE WILL NOT take pictures of our employees who have been engaging in picketing or in other protected concerted activities.

WE WILL NOT refuse to hire or otherwise discriminate against employees to avoid bargaining with a union.

WE WILL NOT refuse to recognize Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees employed at Love's Barbeque Restaurant at 24123 Hesparian Blvd., Hayward, California, engaged in the preparation, handling, and serving of food and/or beverages, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT make changes in the rates of pay and benefits of the employees in the above unit without notice to and consultation with said Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL destroy any pictures of Richard Logan and David Wadsworth taken by Assistant Manager David Sebban.

WE WILL offer immediate and full employment to D. L. Marshall, A. L. Pingree, P. M. Phipps, P. M. Turner, E. L. Goodwin, D. S. Barker, J. M. Evanoff, E. G. Hayne, M. J. Shauver, M. Henshall, M. D. Chulata, G. B. Ricketts, D. Wadsworth, S. S. Hervey, H. Baigmohammadi, M. A. Quinn, A. J. Botelho, D. A. Logan, R. G. Logan, K. R. Fuentes, K. A. Milina, J. Boyd, M. J. Henshail, L. L. Macone, V. O. Thomas, J. C. Casarotti, M. E. Rafferty, M. A. Gron, J. M. Gutfeld, N. E. Hansen K. C. Lawson, D. L. Loya, R. A. Bishop, C. Roy, B. K. Lewis, M. Silvera, R. R. Smart, R. Holquin, J. S. Porter, M. E. Evaneski, without prejudice to their seniority and other rights and privileges, discharging if necessary employees hired from sources other than Love's Enterprises, Inc., Hayward, California, restaurant to make room for them, and we will make them whole for any loss of earnings they may have suffered by reason of our unlawful failure to hire them.

WE WILL, upon request, bargain with the above Union as the exclusive representative of all the employees in the above unit concerning their terms and conditions of employment; and,

if an understanding is reached, embody it in a signed contract if asked to do so.

WE WILL, upon request of the above Union, cancel any changes from the rates of pay and benefits that existed immediately before our takeover of Love's Enterprises, Inc., Hayward, California, restaurant, and make the employees in the above unit whole by remitting all wages and benefits that would have been paid absent such changes from October 20, 1977, until we negotiate in good faith with the Union to agreement or to impasse.

KARL KALLMANN D/B/A LOVER'S BARBEQUE RESTAURANT NO. 62

Decision

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Oakland, California, on June 6-9, on July 10-13, and 21, 1978. On December 30, 1977,[1] the Regional Director for Region 32 issued an Order consolidating cases, consolidated complaint, and notice of hearing, based upon unfair labor practice charges filed on November 7 in Case 32-CA-522 and on December 5 in Case 32-CA-574, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C., §151, *et seq.*, herein called the Act.[2]

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record,[3] upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

I. FINDINGS OF FACT

A. *Background and Issues*

The instant matter involves the nature of the relationship between Love's Enterprises, Inc., (herein called Respondent Love's) and Karl Kallmann, d/b/a Love's Barbeque Restaurant No. 62 (herein called Respondent Kallmann) with regard to the operation of a "Love's Wood Pit Barbeque Restaurant" located at 24123 Hesparian Boulevard in Hayward, California. At all times material, Respondent Love's, a California corporation and a wholly-owned subsidiary of I.H.O.P. Corporation, has been engaged in operating restaurants and lounges at various locations in the western United States, primarily in California. Its principal place of business has been located in Los Angeles, California. Since at least October 20, Respondent Kallmann has been a sole proprietor, existing by virtue of the laws of the State of California, with its principal place of business at the Hesperian Boulevard restaurant.

Since at least early 1973, Respondent Love's has leased the Hesperian Boulevard property and structure, from a lessor not a party to this proceeding, and has owned the fixtures, signs, and equipment used there. At the time that the restaurant was opened, in February 1973, it was operated by a franchisee, pursuant to a franchise agreement, a real property sublease, and an equipment lease with Respondent Love's. However, this arrangement ended in December 1973, and the Hesperian Boulevard restaurant was operated thereafter, until its closure on September 26, by Respondent Love's as a company-owned restaurant.

During the period in 1973 when the Hesperian Boulevard restaurant was being operated by the franchisee, a memorandum agreement was executed with Culinary Workers and Bartenders Union, Local 823 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called Local 823.[4] Under the terms of the memorandum agreement, "The Employer agrees to accept, adopt and observe all of the wages, hours and other terms and conditions of employment contained in the Collective Bargaining Agreement between the Union and the East Bay Restaurant Association, Inc., California Licensed Beverage Association, Inc., or its successors, as the same may be amended, renewed or extended from time to time during the term of this Agreement," as well as "the Restaurant and Tavern Health Fund Trust Agreement, the Southern Alameda Country Restaurant and Tavern Pension Trust Agreement, the health and pension plans established thereunder, and all amendments to said Trust Agreements and plans." The termination of the franchise agreement, in December 1973, did not affect the continued application of the memorandum agreement to the employees working at the Hesperian Boulevard restaurant. Nor did the 1975 merger which resulted in the substitution of the Union for Local 823 as the employees' bargaining representative.[5]

On September 26, Respondent Love's closed the Hayward restaurant, terminating all of the employees who had been working there. On the following day, Respondent Kallmann executed a franchise agreement, equipment lease, and real property sublease.[6] Thereafter, Respondent Kallmann did not offer employment to any of the employees who had been working at the Hayward restaurant. Instead, it sought applicants for employment through advertisements in local newspapers and at local colleges, with the result that when Respondent Kallmann opened the restau-

[1] Unless otherwise stated, all dates occurred in 1977.

[2] A first amended charge in Case 32-CA-522 was filed on December 28 and a consolidated amended complaint was issued by the Regional Director for Region 32 on March 10.

[3] Certain errors in the transcript have been noted and are hereby corrected.

[4] Local 823 was a predecessor of Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union, herein called the Union, which succeeded Local 823 by virtue of a merger of three unions in July or August 1975. Since that time, at least, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

[5] The association agreement terminal date was August 6, 1978, with provision for reopening "on August 7, 1977 for wages only." However, the reopener was used as a vehicle for renegotiating an entirely new agreement between the association and the Union, with the result that on August 6, they executed a new collective-bargaining agreement having an expiration date of August 6, 1982.

[6] Even if, as is argued, these documents may have been signed earlier in September, that would not affect the substantive issues presented for consideration in the instant case.

rant for business, on October 20, an entirely new complement of employees was employed there. In protest of the failure to reemploy any of the former employees and of Respondent Kallmann's failure to recognize it as the collective-bargaining representative, the Union commenced picketing the restaurant on the following day, October 21.

In the context of this factual framework, the General Counsel makes the principal allegation that the entire transaction, whereby Respondent Love's ceased operating the Hayward facility as a company restaurant and Respondent Kallmann commenced operating it as a purported franchisee, was no more than a subterfuge designed to eliminate the Union as the bargaining representative of the employees working there and to terminate any further obligation by Respondent Love's to observe the terms of the applicable collective-bargaining agreement. To support that principal contention, the General Counsel advances several subsidiary allegations. First, it is contended that the decision is close, and the incident termination of all employees working at the Hayward facility, had been the product of unlawful considerations. Second, it is argued that Respondent Love's has remained the employer of the employees working at Hayward, either because Respondent Love's remains the true employer of the Hayward restaurant employees or because Respondent Love's has remained at least a joint employing entity of those employees. Third, it is alleged that the refusal to rehire any of the former employees, once the restaurant was reopened on October 20, was the product of the same unlawful considerations that had purportedly motivated closure of the restaurant almost 1 month earlier. Thus, it is argued that, at the very least, Respondent Kallmann is a successor. Fourth, it is asserted that by withdrawing recognition from the Union, by repudiating the collective-bargaining agreement, by refusing to bargain with the Union, and by unilaterally changing rates of pay and benefits, Section 8(a)(5) and (1) of the Act was violated.

Finally, the General Counsel contends that Section 8(a)(1) was independently violated, during the picketing that followed reopening of the restaurant, when employees were told that they would be rehired at wage rates and with benefits comparable to those contained in the collective-bargaining agreement if they were willing to forego representation by the Union, and, further, when surveillance was engaged in or when the impression of surveillance was created by assistant manager David Sebban.

Respondents deny these subsidiary allegations, as well as the principal contention. Instead, Respondents contend that the transaction between them was a straightforward one whereby Respondent Kallmann replaced Respondent Love's as the sole employer at the Hesperian Boulevard restaurant. Moreover, Respondent Kallmann denies that the volume of its business will be such, during the first year of operation, that it will satisfy the Board's discretionary standard for asserting jurisdiction over retail enterprises.

B. *Respondent Love's Relationship with the Hayward Employees*

The record discloses that disputes arose between the Union and Respondent Love's during the time that the latter operated the Hayward restaurant. For example, Respondent Love's had retained the employees of the original franchisee following termination of that franchise in December 1973. However, it announced that their seniority would be dated from when the restaurant became company-operated, rather than from the inception of their employment there. One of the employees, bartender Peggy Turner, challenged that announcement, pointing out that the Union's positive was that seniority commenced from the dates that employees started working at the restaurant. Respondent Love's then reversed its field and acquiesced in the Union's view of the matter. So far as the record discloses, no further mention was ever made of this incident.

Similarly, as a result of Respondent Love's requirements that bartenders do certain tasks other than tending bar, Turner had sought the intervention of then business agent Steven K. Martin who, in 1976, secured Respondent Love's agreement that bartenders would not be required to perform duties other than those set forth in the collective-bargaining agreement. Commencing in July 1976, Turner and other female bartenders periodically had been told that they should wear dresses. On each occasion, they had said that they would not do so and, while Respondent Love's never retracted this requirement officially, it was never enforced and female bartenders continued to wear whatever they desired.

Most of the more serious conflicts between the Union and Respondent Love's centered around two officials of the latter: Fred Choy, who had served as manager at the Hayward restaurant from October 1976 until May 3, and James Patterson, who had served as area operations coordinator during 1977, at least until closure of the Hayward restaurant in September.[7] The first such dispute involved head cook James Steven Porter[8] and Choy. Early in 1977, Choy, in the presence of then Area Operations Coordinator Grant Naylor,[9] had given Porter a warning notice because of the latter's absence on the prior day and had told Porter, "Now, you can call your Union if you want to." Porter replied none too clear,[10] it appears that Choy reacted in a manner leading Naylor to intervene between the two men because he believed that they might fall to blows, ultimately telling Porter to return to work and that everything would be all right. There is no evidence that anything further was ever heard of this incident.

[7] The parties stipulated that during the above-mentioned respective periods, Choy and Patterson had been supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent Love's. Under Respondent Love's chain of command, Clarence Palmer is president. Beneath him are three vice presidents, one of whom is Ronald Mesker. Mesker is responsible for overall operating functions, including being ultimately responsible for operations at restaurants. Beneath Mesker is Director of Operations John Spence to whom the area operations coordinators, each of whom is responsible for evaluating operations at a number of restaurants, report.

[8] There is no contention that Porter had been a supervisor within the meaning of Sec. 2(11) of the Act while employed as head cook.

[9] The parties stipulated that Naylor had been a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent Love's from January to May, when he had been employed as area operations coordinator, responsible for Respondent Love's Bay Area restaurants and for one restaurant in Sacramento.

[10] Only Porter testified concerning this incident. Choy and Naylor were not called as witnesses. Neither was employed by Respondent Love's at the time of the hearing. No explanation was advanced by any party for failing to call them as witnesses.

Employee complaints regarding conditions at the restaurant, primarily of an operational nature, and concerning comments by Choy, to the effect that he intended to bring in people from outside the Union who would do a good job, led Martin to meet with Choy in the late winter or early spring.[11] Martin testified that he had opened the meeting by saying that he had received complaints and wanted to know what was wrong. Choy had replied that he was tired of being harassed by the Union, but then had retracted that assertion, when asked by Martin who in the Union had been harassing him, saying "Well, no, it's not the Union. It's the employees saying that they will go to the Union if I don't straighten up some problems." After reviewing the substantive complaints concerning operating conditions at the restaurant, Martin had inquired why Choy had told the employees that he was going to bring people from "the City"[12] to take jobs. Choy had replied that he had thought about it, but was not going to do it.[13] There is no evidence that the meeting had been conducted with any acrimony, nor is there evidence that it ended with any animosity. So far as the record discloses, Choy's superiors has not been aware that it had taken place.

Although this meeting seemingly resolved the sources of employee dissatisfaction, Turner testified that about 2 days afterward, Choy had summoned her to the office where he had said "that he would try to work with us," but that he was tired of the employees "running to the Union" every time that he turned around and that from "now on, we are going to go strictly by the book." According to Turner, Choy then had issued a new employee craft book to her and had given "me what I call the 12 commandments. He had 12 items written down there. He went over them item by item, and they were primarily house policy, house rules." Turner testified that when he had come to item 7, "all female employees shall wear a dress," Turner had said that it had been agreed that she would not have to do so. She testified that Choy "got all hot about that," but ultimately had agreed to delete this requirement. Turner further testified that as the meeting drew to a conclusion, Choy had asserted that he "was tired of all the babies around here. He was going to bring in his own people that weren't union and that would do what they were told to do . . . ."

Turner further testified that approximately 2 days later, she had overheard Choy discussing the guard on the dishwasher with employee Jerry Gutfield and that Choy, after saying that he could not "help it," had walked across the restaurant and, in a tone which Turner characterized as "threatening," had hollered back. If you didn't like it, go to the Union."[14] Turner claimed that she had responded, "Hey, Fred, I thought you didn't say 'If you don't like it, go to the Union,' " but that Choy had not replied to her comment.[15]

Martin, who became secretary-treasurer and business manager of the Union in January, and Mike Branco, who had replaced Martin as business agent for the territory encompassing the Hesperian Boulevard restaurant, each testified that there had been continued complaints from the Hayward employees following their meeting with Choy. However, neither testified that these complaints pertained to Choy or to comments concerning employees going to the Union or about replacing employees, as had been the case prior to their meeting with Choy. Rather, they testified that in addition to complaints regarding operating conditions at the restaurant, the employees had complained of their treatment by Patterson.

Accordingly, another meeting had been arranged for May or June to confer about these problems. Respondent Love's had been represented by Patterson and by Herschel Chubb, a labor consultant who had been representing Respondent Love's, as well as I.H.O.P. Corporation, for several years. Representing the Union were Martin, Branco, then Secretary-Treasurer Joseph Medeiros, and two or three shop stewards from the Hayward restaurant.[16] The discussions had been conducted almost exclusively by Martin and Chubb, who reviewed the problems listed by the Union one by one. Chubb had agreed that most of them would be corrected. There is no evidence either that the meeting had been acrimonious or that there had been any dispute left unresolved at its conclusion. Among the matters listed by the Union had been the assertion that Patterson had been referring to employees, particularly the younger ones, as "boys," and had been saying that he did not intend "to change their diapers." There is no evidence that there had been any references by Patterson to employees' union sympathies. Thus, the complaints regarding Patterson had been of a quite different nature than the earlier ones about Choy.

Turner had been on sick leave from April 15 until June 3, during which time Patterson had become area operations coordinator. According to Turner, when she did return, she discovered that, contrary to her prior schedule, she had been assigned weekend work. When she broached Patterson regarding this assignment, he had replied, according to Turner, that while he had never met her, he had heard a lot about her and that he had changed her schedule because he needed a good bartender on weekends. Turner testified that when she had inquired how he had known that she was a good bartender, in view of the fact that he had never seen her tend bard, Patterson had replied that he had talked to Betty Ramsey,[17] who had assured him that Turner was a

[11] While Turner claimed that she had been present at this meeting, this was not confirmed by Martin, who testified only that "Mike Branco was there, and Mr. Choy, and myself." Though he testified, Branco did not describe this meeting. Consequently, Turner's claim that she had been present was uncorroborated.

[12] A colloquialism for the city of San Franciso.

[13] Turner, in recounting her version of this meeting, which she claims to have attended, testified that during the meeting, Choy had denied saying "Every time you turn around, if you don't like it, [you] go to the Union" and had "also denied he had said he would bring in his own people."

[14] Gutfield was not called as a witness to corroborate Turner, nor was the failure to call him for that purpose explained.

[15] Turner described Choy as being "a small man."

[16] Only Martin and Branco testified concerning this meeting. Martin testified that the shop stewards who had attended the meeting had been Debbie Barker and two male employees, Eddie and Brian, whose last names he did not recall. Branco could recall only Barker's name.

[17] Ramsey, whose supervisory and agency status is disputed, came to work for Respondent Love's in late 1973 or early 1974, and was a field operations representative, a position primarily filled by people who have demonstrated an ability to train and to refine the skills of employees working in the restaurants. However, field operations representatives also fill in as replacements

(Continued)

good bartender. He then described his reasoning concerning the economic motivation for assigning Turner to work on weekends. There had been further discussion, pertaining to Turner not doing work not covered by her classification and regarding her view that Respondent Love's break policy was "ridiculous," and the conversation had terminated with Patterson pointing out that Turner did not make policy decisions. So far as the record discloses, there were no further incidents between Turner and Patterson regarding these subjects.

C. *The Discussions Regarding the Closure*

It was no secret that Respondent Love's planned to close the restaurant and that at least one reason was the high wage rates mandated by the collective-bargaining agreement. Respondent Love's officials had told this both to the employees and to the Union. With respect to the former, Turner testified that in December 1976, then Assistant Manager Mike Garrison[18] had told her that Naylor had said that because of the union wages, Respondent Love's never made any money at Hayward and, accordingly, intended to get rid of the Union.[19] Turner also testified that in March or April, then Assistant Manager Bruce Gordon[20] had said that Naylor had told him that Respondent Love's was going to try to get out of the Union as soon as the collective-bargaining agreement expired in August.

In April and May, bartender Susan Kruger had been working at the Walnut Creek, California, restaurant,[21] where she had been attempting to interest employees in representation by the Union. Area operations coordinator Naylor had summoned her to the office one day where, she testified, he had mentioned hearing a rumor concerning her activities and had asked why she was seeking representation. Kruger testified that when she had responded that her purpose was to obtain more money and better benefits, Naylor had said that he did not think that it would be a good idea as Respondent Love's would close the Walnut Creek restaurant before letting it be unionized and, in fact, that Respondent Love's was thinking of closing the Hayward restaurant.[22]

Hostess-cashier Clotilde Roy and her husband, John, were personal friends of Choy. Roy testified that approximately a month before Choy had left Respondent Love's employment at Hayward on May 3, he had been angry and had said, "Don't be suprised that the store closes by August." Roy further testified that when she had asked Choy for a reason as to why the restaurant might close, he had responded "Well, first all the problems we are having with the Union and besides that the Restaurant is not making enough money to pay the high wages that the Union has." In response to a further question by Roy, Choy had said that the closure would occur in August "because, you know, that is when they have to sign the new contract and I don't think they will do it," adding again that the reason was because of "the high wages of the Union."

Both Roy and her husband described comments made by Choy, pertaining to the closure, during a dinner conversation. However, certain portions of their accounts do not correspond. Mrs. Roy testified that this event had occurred about a month after Choy had left, that he had come to her house for dinner, and that he had said that the restaurant was not making enough to pay the high wages of the employees and that the employees went to the Union for everything, with the result that "there are a lot of problems right now between the Union and the employees." However, her husband testified that the conversation had occurred shortly before the restaurant had closed, that Choy had cooked dinner for he and his wife, and that he recalled only that Choy had said that the restaurant would close because Respondent Love's felt that the wages rates required under the terms of the collective-bargaining agreement were too high.[23]

Porter testified that in approximately the last week of August, then Assistant Manager Robb Washer had told him that he felt that the Union would go. The statement, according to Porter, was made during the course of a private conversation and Porter testified that he had promised never to repeat the remark so long as Washer was an employee of Respondent. However, in his pretrial affidavit, given on November 18, after the Hayward restaurant had closed, Porter stated: "I do not recall anyone in management ever saying that the employer was attempting to get rid of the Union." He admitted that the statement in his affidavit was inconsistent with his testimony concerning what Washer assertedly had told him. In an effort to explain the inconsistency, Porter testified that he felt that what he had said in his affidavit had been the truth inasmuch as "there are different stipulations in it" and further, that "I said that I would never mention that as long as he

whenever needed in Respondent Love's operations. In that capacity, Ramsey had filled in for restaurant managers when necessary. For example, she had served as temporary manager at Hayward on one or two occasions for 2 or 3 week periods. During the time that Patterson had been area operations coordinator in Northern California, Ramsey had reported to him when working in the area. She was salaried and was reimbursed by Respondent Love's for work-related expenses which she incurred. At the time of the hearing, she was no longer employed by Respondent Love's.

[18] While there was no apparent dispute concerning the fact that Garrison had been assistant manager at Hayward and, during that time, had been a supervisor and an agent of Respondent Love's, the latter contended that his employment there had terminated in July 1976.

[19] While Turner testified that steward Barker and a couple of waitresses had been present when Garrison had made these remarks, no one else was called to corroborate her account of this conversation.

[20] The parties stipulated that Gordon had been assistant manager at the Hayward restaurant from January to May 1, and that during that time, he had been a supervisor and agent of Respondent Love's.

[21] Walnut Creek is located approximately 25 miles form Hayward.

[22] For purposes of analysis, I have assumed that Naylor's comment referred to the Union as the reason for closing the Hayward restaurant. However, another interpretation is possible, based upon Naylor's remark as related by Kruger. He had warned Kruger that the Walnut Creek restaurant might be closed. So far as the record discloses, Respondent Love's had not closed restaurants with any degree of frequency. Consequently, his reference to closing the Hayward restaurant may have been designed to allay any doubt that Kruger might harbor that Respondent Love's would be willing to close a restaurant. In other words, his point may have been to emphasize that closure, itself, was not inconceivable, without regard to the reason for closing the Hayward restaurant.

[23] John Roy also testified that during a conversation on July 8, 1978, Choy had said that Respondent Love's had closed the restaurant because it had wanted the Union out, that the decision had been made at a higher echelon, that the Union had been viewed as a problem, and that Respondent Love's attorneys had felt that by franchising the restaurant, the employees who supported the Union could be terminated, thereby shutting out the Union.

was an employee." Porter quickly pointed out that Washer was "no longer an employee" at the time of the hearing and, accordingly, "[t]hat's the word I gave a friend of mine, and that's the word I kept."

With respect to Respondent Love's discussions with the Union concerning closure, on May 12 Chubb met with Medeiros to discuss the economic condition of the Hayward restaurant. Chubb carried to this meeting a letter from Lyle Fackrell, I.H.O.P. Corporation's director, Industrial Relations, containing a breakdown of the comparative costs of the Hayward restaurant with those of another of Respondent Love's restaurants, in LaMirada, California. Medeiros did not deny that this letter had been shown to him during the course of this meeting. Moreover, he conceded that both at this meeting and at a subsequent meeting on June 1, Chubb had said that without financial relief, the Hesperian Boulevard restaurant would be closed. Thus, at the may 12 meeting, testified Medeiros, Chubb had asked if the Union could make any concessions in the contract to keep the restaurant open and if the Union would be willing to afford Respondent Love's "some relief in certain classifications, in health and welfare and so forth." Medeiros, however, testified that he had viewed these comments as no more than a bargaining ploy inasmuch as it had been his experience, based upon past negotiations, that employers, in general, and Chubb, in particular, were "always crying poormouth and they are always trying to whittle something out of the organization and I just take it as a matter—I have been hearing this for thirty something years, I just take it as a matter of—I just take it as a grain of salt, the same old story."[24]

It is undisputed that at a dinner meeting with Medeiros on June 1, Chubb had renewed Respondent Love's plea for financial relief, pointing out that economic conditions at the restaurant had not changed since their last discussion of the matter. Medeiros conceded that, again, "Chubb pointed out to me the possibility of closing the place down if there wasn't anything that could be worked out," but claimed that he had continued to view this as no more than Chubb's typical approach designed to maneuver the Union into granting overly generous concessions. Nevertheless, when asked if Chubb had given any indication that the situation was "something different than just one of those ordinary situations," Medeiros acknowledged that, "Well, I think he was a little more—trying to push the things about maybe some more concessions, and at that time I told him, I'm starting the process of negotiations *of the master agreement* with the Restaurant Association and there is nothing in the world I can do right now." (Underscoring supplied.)[25] However, it was not until August 19, that that agreement was reached on the terms of a completely new associationwide collective-bargaining agreement.

In the meantime, Chubb testified that he had reported the results of his May 12 and June 1 meetings with Medeiros to Fackrell and Mesker, who had then made the final decision to close the Hayward restaurant, although no date for the closure had been set at that time. It is undisputed that Chubb then had met with Medeiros on July 21, had explained that the decision had been made to close the restaurant at some point, though no date had yet been established, and had asked if Medeiros had any suggestions that would avoid the lay offs of employees working there. Chubb testified, without dispute by Medeiros, that the latter had not offered any such suggestions, but had said that he would rather have the restaurant closed and that Respondent Love's should "make sure [it] didn't play around with his employees and that [it] gave them their wages that might be adjusted upwards because of the new contract that he might negotiate and bring up to date all his fringe benefits, health and welfare mainly and the vacation conditions."

Following the July 21 meeting, Chubb testified that he had been notified that Respondent Love's intended to close the restaurant during the last week of September and, on August 26, he had telephoned Medeiros, relating this information to him. Medeiros testified that he had no knowledge prior to September 26 that the restaurant would be closed on that date. Nevertheless, when asked about the August 26 telephone conversation described by Chubb, Medeiros conceded that, "I do remember him calling me sometime and said they were going to close the place." However, Medeiros claimed that he did not remember whether Chubb had given him a date for the closure.

By letter, dated September 22, Fackrell officially notified the Union, directly, rather than through Chubb as, it is undisputed, had been the case previously, that, "Due to economic conditions, International House of Pancakes, Inc. will close the [Hayward restaurant] as of business on September 25, 1977. All employees will be terminated as to this date. All pay and benefits due employees will be paid to them at this time."

D. *Negotiations Leading to Execution of the Franchise Agreement*

Karl Kallmann, herein called Kallmann, is the son of Herb Kallmann, herein called H. Kallmann, who, along with his partner, James Jackson, had operated a restaurant in Fresno, California,[26] for a number of years, under a franchise arrangement with Respondent Love's. Jackson had been the manager of that restaurant. Kallmann, who was 29 years old at the time of the hearing in this matter, and served as assistant manager there for 6 or 7 years. As a practical matter, he had regularly performed the functions of manager during that period, save for exercising control over cooks and bartenders which Jackson had retained.

By the beginning of 1977, however, Kallmann had been working for Far West Services at Rubin's No. 33 in Fresno

[24] Medeiros claimed that "[i]f the Company had sent me a written notice at that time, yes, I would have taken [Chubb] more seriously."

[25] As pointed out in footnote 5, *supra*, at some point, not disclosed by this record, the wage reopener became a vehicle for renegotiation of the entire associationwide master agreement which Respondent Love's was bound to follow by virtue of the "me-too" agreement signed originally in 1973 and which Respondent Love's had apparently agreed to follow when it began operating the restaurant. Thus, while Respondent Love's sent a letter to the Union on May 25, giving notice of intent to terminate its collective-bargaining agreement, it cannot be said whether that letter was generated by the events giving rise to the instant proceeding or whether it was sent in connection with the parallel associationwide negotiations for a new collective-bargaining agreement.

[26] Located in the Central Valley of California, approximately 150 miles from Hayward.

and was interested in acquiring a franchised restaurant that he could operate. In January, he had checked the costs of obtaining franchises for Uncle John's Pancake House and from Sizzler Family Steak House. When he had discovered that the former would cost him over $750,000 and that the latter would cost approximately $400,000, he had asked his father to check on the cost of a franchise from Respondent Love's. In light of his lack of finances, which necessitated that H. Kallmann act as a cosigner for any financial obligations which he incurred, Kallmann had suggested that possibly that two of them could become copartners in such a venture.

Mesker testified that during 1976, both H. Kallmann and Jackson had spoken with him concerning the possibility of their acquiring an additional restaurant franchised by Respondent Love's.[27] According to Mesker, in late February or early March. H. Kallmann had telephoned to inquire about the possibility of obtaining an individual franchise, without Jackson as a partner, and had indicated that his son would be available to serve as manager of such an enterprise. Mesker testified that during that conversation and during a series of subsequent telephone conversations the two men had discussed the cost items, such as the purchase of real estate, the construction of the restaurant and the acquisition of equipment. Apparently, at that time it had been H. Kallmann's intent to finance these items himself so that he would be the owner of the premises and would merely purchase a franchise from Respondent Love's.

At a meeting with Mesker during the first 10 days of April, according to Mesker, H. Kallmann and indicated that the cost of constructing a facility would be too great and he had expressed an interest in acquiring a franchise at an existing facility. Mesker testified that he had replied that there might be one or two existing franchisees, whose names Mesker had given to H. Kallmann, that might be interested in selling out. Mesker further testified that he had also mentioned "that there could certainly be a possibility of an existing company operation," but that there was nothing positive and that the possibilities were limited. According to Mesker, the meeting had ended with H. Kallmann saying that he would get back to Mesker after further consideration of the matter.

Mesker testified that this meeting had been followed by several telephone conversations with H. Kallmann during which the subject of franchising had been explored further, leading ultimately to another meeting on June 29. In the meantime, during the course of one of the telephone conversations in May, Mesker testified that, the subject of a franchise for the Hayward restaurant had been discussed for the first time. Mesker testified that he had told H. Kallmann that Respondent Love's was having very little success with its operation there and was not desirous of continuing its experience for the next several years. He claimed to have told H. Kallmann, "I would probably have to reach a point where the Restaurant would have to be closed if the present conditions continued" and, if that point were reached, "I would certainly consider franchising it as opposed to have to sublease it to someone else outside the Company that would operate it other than as a Love's."[28] He pointed out to H. Kallmann, testified Mesker, that under no circumstances would that restaurant be closed during the current fiscal year, which terminated at the end of August.

During May, Mesker met with Kallmann. Mesker did not describe the substance of their conversation, other than to say that it had not involved Kallmann personally acquiring a franchise.[29] Kallmann's testimony tended to confirm that of Mesker in this respect, for Kallmann testified that he had told Mesker that "My father and I would like to check into a franchise," but that he had not said directly that he wanted to be a cofranchisee with his father.[30] According to Kallmann, Mesker had outlined the terms of a franchise agreement, but when he had described the cost of constructing a new facility to be franchised, Kallmann had expressed the opinion that the cost would be too high. Kallmann testified that Mesker had then said that there was a "possibility" of franchising the Hayward restaurant[31] and, if that were not available, he might be able to put Kallmann into a different franchised operation if one came up. During this conversation, Mesker had informed Kallmann that Respondent Love's had a collective-bargaining agreement with the Union covering the Hayward restaurant and that negotiations were in progress for renewal of that agreement. However, Kallman denied that Mesker had said anything about there being problems with the Union or that he had been told that he would have any difficulties or problems with the Union should he become involved with operation of the Hayward restaurant.[32]

During the May conversation with Mesker, Kallmann testified that he felt that if he were ever to operate his own restaurant there were certain skills with which he would need to be familiar, such as cooking and bartending, and, accordingly, that he had asked if he could go into manage-

[27] Neither H. Kallmann nor Jackson appeared as witnesses in this proceeding. No explanation was advanced concerning the failure to call them.

[28] Mesker conceded freely that Respondent Love's had not done extensive franchising during the preceding 3 or 4 years, but he testified that this had been the result of a policy shift away from accepting individuals with minimal experience as franchisees in Respondent Love's operations and in favor of experienced, qualified restaurant operators who would be more likely to be capable of operating such a franchise. Of course, the paucity of recent franchising experience by Respondent Love's tends to support a conclusion that Naylor's reference to the Hayward restaurant, during his conversation with Kruger, had been intended as proof that Respondent Love's would close a restaurant, rather than a reference to the reason.

[29] Earlier in his testimony Mesker did testify that he had met with Kallmann in May to discuss acquisition of the franchise, but once the questioning disclosed clearly that reference was being made to Kallmann, himself, acquiring the franchise, as opposed to his father doing so, Mesker quickly pointed out that he had not participated in any conversations concerning Kallmann becoming the franchisee.

[30] Kallmann also testified that as between his father and himself, he had been the first to approach Mesker in May. This, of course, was the fact since Mesker had met H. Kallmann in April and did not again meet him until late June.

[31] In a pretrial affidavit, Kallmann had stated that "At the meeting in Los Angeles in about May 1977 I was told that I could take over the restaurant in 3 months." Confronted with this statement, Kallmann testified that it had not been a correct characterization of what Mesker had said. Rather, testified Kallmann, Mesker had talked only of a "possibility" without extending any guarantees at that time.

[32] Kallmann testified that he believed that the decision as to whether any restaurant that he operated would be unionized was his to make, since "I am from Fresno, we don't have those kind of problems. I have never run across those kind of problems and that type of problem is not familiar to me.

ment for Respondent Love's.[33] As a result, Kallmann was hired by Respondent Love's to be manager at a company-operated restaurant in San Jose.

At the June 29 meeting with H. Kallmann, testified Mesker, there had been a discussion of the specific details of financing a franchise for the Hayward restaurant and of how Kallmann was doing at the San Jose restaurant. Mesker characterized this as being "what you would consider the initiation of negotiations of the terms of the agreement." It was also Mesker's lasting meeting with H. Kallmann. In mid-July, he had sent H. Kallmann a letter summarizing the points made during the June 29 meeting[34] and there had been subsequent telephone conversations between them regarding the details of a franchise arrangement, resulting in a reduction of equipment rental to $50 per week for the first 52 weeks (with rent to be $160 per week thereafter) and of rent for the premises from 6 to 5 percent.

Thereafter, Respondent Love's attorneys had prepared a copy of the proposed franchise agreement, real property sublease, and equipment lease, and, as required by state law for franchise agreements which vary in any degree from existing franchise agreements, had transmitted them to the California Corporations Commission for approval at the end of August. Respondent Love's had received approval between September 10 and 12, at which point Mesker had transmitted copies to H. Kallmann and had left for his vacation on September 15. He testified that upon his return, on October 6, he had discovered that the documents had been signed by the younger Kallmann, rather than by H. Kallmann.[35]

Kallmann testified that he had been apprised generally by his father of H. Kallmann's negotiations with Respondent Love's as they had progressed, but that he had not seen the documents transmitted by Mesker until about a week before he had signed them. Instead, they had been given to his father's attorney when they had been received from Mesker and, according to Kallmann, when the attorney had approved them, he had told his father that he would sign them, although he did not know if his father had related that expression of willingness to sign to Respondent Love's. Kallmann further testified that on September 25, Spence had telephoned and had arranged for execution of the documents and transfer of the liquor license to take place on September 27 at the Hayward restaurant.

[33] In a pretrial affidavit, Kallmann had stated: "At our meeting in Los Angeles, Mesker outlined the terms of the franchise agreement to me. At that time it was agreed that I would pursue the franchise agreement, and I requested a temporary position as the manager of a Love's Restaurant, for a short period of time so that I might again familiarize myself with the management of this type of a restaurant." While acknowledging that he had made this statement and had read the affidavit carefully before signing it, Kallmann testified that the terminology "management" had been inaccurate, since his experience at Fresno, in his opinion, had taught him how to manage a restaurant, but had not taught him about such things as cooking and bartending. In reality, there is very little inconsistency here, since to be an effective manager, Kallmann would have to know about cooking and bartending. Else, how could he effectively supervise these areas of operation?

[34] This letter was never presented at the hearing.

[35] It appears that the Kallmanns, father and son, may have taken advantage of Mesker's vacation absence to substitute the son for the father as the franchisee.

E. *The Documents Signed by Respondent Kallmann on September 27*

The total agreement between Respondents involved the execution of three documents, with the primary one being the franchise agreement. It contains a series of provisions significant in analyzing Respondents' status once Respondent Kallmann commenced operating the restaurant on October 20. First, it recites that Respondent Love's has developed secrets for successful processes, copyrights and trademarks; new and distinctive policies for establishing, developing, and operating restaurants specializing in sale of its products, services, and related items; and, techniques for better promotion, sale, and merchandising of its products, services, and related items offered through restaurants operated under the name "Love's Wood Pit Barbeque." The agreement goes on to state that to enhance the value of its goodwill, as well as to better advertise and promote its trade name, products and services sold, Respondent Love's:

> has designed, developed, engineered and adopted a standard, unique and uniform plan and style for the construction and operation of Love's Wood Pit Barbecue restaurants which includes, among other things, and without limitation, engineering for highest efficiency of operations of said restaurants, complete design and programming of the equipment, paper products, operating methods, construction, control systems, accounting, delivery and freight systems, and for creating the greatest sales appeal, the design and programming of advertising, sales techniques, menu planning and decor, signs, interior and exterior design and decor, uniforms, and procedures and training of personnel and management.

Second, the agreement specifies that Respondent Kallmann's franchise term "shall commence on . . . possession, and shall terminate at midnight on February 24, 1993, unless extended by [Respondent Kallmann's] exercise of an option to extend that term," and so long as Respondent Kallmann "in the good faith judgment of [Respondent Love's], has operated his franchised restaurant in an effective manner . . . ."

Third, the agreement imposes a $50,000 franchise fee on Respondent Kallmann, with $10,000 payable upon execution and the remainder payable on weekly installments, commencing 53 weeks after operations commence, and with 7 percent annual interest payable on the outstanding balance. Default in payment of any installment, as well as a material breach of the agreement itself, results in the entire unpaid balance being due and payable. In addition, under the terms of the agreement, Respondent Kallmann agrees to pay Respondent Love's for all items purchased from it, on a weekly basis as well as the rent, taxes, insurance, assessments, and other changes specified in the realty sublease; the rent for fixtures, equipment, and signs required in the equipment lease; a weekly royalty of .3 percent of gross sales during the first 26 weeks of operation, 1.3 percent during the succeeding 26 weeks, and 4.3 percent thereafter; a weekly advertising payment of 2 percent of gross sales, commencing with the 27th week of operation;[36] and,

[36] During the first 26 weeks of operation, Respondent Kallmann is required to spend 1 percent of gross sales on local advertising.

$21,300 for Respondent Love's liquor license. In addition, Respondent Love's must give prior written approval for Respondent Kallmann to install any type of vending machine and the net receipts from such machines are to be shared equally between Respondents.

Fourth, the agreement requires Respondent Kallmann to obtain specified types of insurance, which must be suitable to Respondent Love's, in specified amounts: fire and extended coverage and vandalism and malicious mischief insurance on the building and all related furniture, fixture, and signs for 100 percent of replacement cost; blanket liability insurance with combined limit bodily injury insurance of at least one million dollars per occurrence, including products liability, and with property damage limits of at least $100,000 per occurrence; and, workmen's compensation and business interruption insurance providing a minimum of $5,000 coverage per month for at least a 4-month period. Respondent Love's is to "be named as a loss payee on all fire policies and as additional insured on all liability policies." However, by the terms of the agreement, Respondent Kallmann "is entitled and encouraged to secure on its own behalf any additional insurance deemed necessary or required by law."

Fifth, in what is one of the most crucial provisions for purposes of resolving the issues in the instant case, Respondent Kallmann is required to "operate the restaurant in strict compliance with all applicable laws, rules and regulations of duly constituted governmental authorities and in strict compliance with standard operating procedures and policies established by [Respondent Love's], now in existence or which from time to time may be revised, added to or subtracted by [Respondent Love's]." However, this provision of the franchise agreement continues by stating that it is understood that a franchise would not have been granted without Respondent Love's being "able to require such strict compliance with such procedures and policies," and then recites:

> By way of illustration, but without limitation, such standard procedures and policies will specify design, decoration and decor of the Love's Wood Pit Barbecue restaurant, the type and layout of equipment, minimum hours of operation, exact menus to be used (but not to include the prices to be charged on such menus), specific food items to be served, accounting procedures, operating procedures, sanitation facilities and, in general, will govern all other matters which in Francisor's (sic) judgment require standardization and uniformity in all Love's Wood Pit Barbecue restaurants.

Respondent Love's judgment is binding in such matters under the express terms of the agreement. Finally, in addition to agreeing not to manufacture or make substitutions of any of Respondent Love's "proprietary secret formula products," Respondent Kallmann is bound not to sell any item not listed in Respondent Love's Operations Manual, without the latter's prior written consent.

Sixth, "in order that the uniformity in advertising may be maintained throughout the franchising system," the agreement provides that Respondent Love's will conduct all advertising publicity and promotional campaigns, and that its decision is final with respect to such matters. Respondent Kallmann is prohibited expressly from advertising "in any manner whatsoever" and may not erect or display any signs or notices without Respondent Love's prior written consent. In turn, Respondent Love's agrees to establish and maintain a "multi-regional advertising fund," to which it will contribute 0.3 percent of the gross sales of company-operated and franchised restaurants. The selection and implementation of advertising and promotional compaigns conducted under that fund is to be made by Respondent Love's "in its absolute discretion and shall be binding on all parties."

Additionally, should Respondent Love's and a majority of the franchises in the San Francisco Bay Area counties agree to establish an "advertising cooperative affiliation," Respondent Kallmann must join and participate fully in all of its endeavors, including financing by a percentage of gross sales established by agreement of gross revenues. However, such an affiliation cannot be established unless a majority of the restaurants in the Bay Area are franchised.

Seventh, while Respondent Love's agrees to provide all equipment, fixtures, and signs needed for sufficient operation of the franchised restaurant, Respondent Kallmann can elect, prior to August 15, 1979, to purchase these items for a price equal to "the then present value of the capitalized lease receipts as reflected on [Respondent Love's] books of account," with payment to be made within 30 days of Respondent Kallmann's exercise of that option.

Eighth, under the terms of the agreement, Respondent Love's has no duty to furnish any accounting services to Respondent Kallmann who, states the agreement, has been granted a royalty reduction of 0.4 percent of weekly gross sales for electing not to avail itself of any accounting service provided previously by Respondent Love's. However, Respondent Kallmann is required to deliver "operating statements, gross sales reports and other data which may be required" by Respondent Love's on forms provided by the latter, on weekly or such other basis as Respondent Love's may require, and in accord with Respondent Love's "standard procedures and policies." Further Respondent Kallmann is required to maintain its records in the manner specified by Respondent Love's, which has "the right to examine and photocopy and books and records maintained by [Respondent Kallmann]."

Ninth, the agreement recites that "it is essential for the successful operation of the . . . restaurant chain . . . that the public receive the same high quality of products and services in each and every . . . restaurant." Accordingly, the agreement provides that maintenance of Respondent Love's standards of quality for food products and services is a material convenant, and that Respondent Kallmann agrees to purchase food products only from purveyors who can consistently deliver products of the quality required by Respondent Love's. In addition, Respondent Kallmann is obliged to stock those "items which will, or may be, capable of providing identification of the franchise with the national franchise program of [Respondent Love's]" and these products must bear "distinctive markings and the name 'LOVE'S" in order to insure uniformity of all franchise operations."

Tenth, another crucial provision requires that the manager of the restaurant be a full-time employee, without involvement in other endeavors while employed as manager.

and that Respondent Love's has no obligation to discuss restaurant operations with any other person. The name of the manager, in this case Kallmann, is inserted in the franchise agreement which provides that should he cease to operate the restaurant on a full-time basis, Respondent Kallmann must designate a new manager, acceptable to Respondent Love's, within 10 days. The agreement recites that this provision is so critical to success of the restaurant that it is a material convenant under which Respondent Love's is given the option to terminate the entire agreement in the event of its breach.

Eleventh, the agreement recites that the franchisee is an independent contractor, that no employees of Respondent Kallmann shall be deemed employees of Respondent Love's, and that "nothing herein contained shall be construed as to create a partnership, joint venture, agency or any other business relationship other than that of an independent contractor." Neither party is liable for the debts or obligations of the other.

Twelfth, Respondent Kallmann may not assign the agreement without prior written consent of Respondent Love's, and any effort to do so without such consent is declared void, with Respondent Love's having the right to terminate the agreement. However, Respondent Love's may not withhold such consent "unreasonably," though the withholding of consent is not to be deemed "unreasonable" if the proposed assignee does not qualify to receive a franchise under the standard set by Respondent Love's for all prospective franchisees. If Respondent Kallmann decides to dispose of any rights subject to the agreement, Respondent Love's has a right of first refusal and, accordingly, Respondent Kallmann must afford it written notice of its intent to transfer and of the terms and identify of the proposed transferee. The agreement provides a procedure for verifying the market value of any tangibles or intangibles specified in the notice, culminating in a final and binding decision by a "disinterested umpire," and accords Respondent Love's 30 days after the fair market value has been established to accept the franchisee's offer. Should Respondent Love's fail to do so, the franchisee can consummate the sale, but only on the terms contained in the original written notice sent to Respondent Love's.

Thirteenth, there is a detailed provision concerning breach of the agreement. This provision first recites that strict performance of all terms of the agreement is required for the protection of all other franchisees, as well as for Respondent Love's, "to best preserve, maintain and enhance the reputation, trade name and good will built up for the franchising system, the establishments adopting and using the same, the products sold and dispensed therefrom, and the trade name and/or trademarks used in conjunction therewith."

It then lists various grounds for default: commencement of bankruptcy, debtor, or insolvency proceedings by or against the franchisee; as assignment or purported assignment by franchisee for the benefit of creditors; appointment of a receiver or placement of a keeper in possession of the business or assets; transfer by the franchisee, voluntarily or involuntarily, or a substantial part of the business without prior written consent and approval of Respondent Love's; and, "default in the performance of any of the terms of this Agreement, the Sublease or the Equipment Lease," or failure to "maintain full and complete compliance with the provisions of the Franchise Agreement"—especially those provisions pertaining to the franchisee's financial obligations (the third item, *supra*), compliance with laws, rules, and regulations (the fifth item, *supra*), maintenance of the standards of quality (the ninth item, *supra*), and the provision under discussion as this, the thirteenth, item—which cannot be cured within specified periods after written notice from Respondent Love's to the franchisee.

The concluding sections of the franchise agreement pertain to prohibition of use of Respondent Love's trade name, goodwill, operating procedures, or trade secrets at other locations; Respondent Love's right to market its product through retail outlets; interrelation of the terms of the sublease and equipment lease with those of the franchise agreement; locations at which notices are to be served on the parties to the agreement; divisibility; arbitration of controversies arising under the agreement; effect of the captions in the agreement on its interpretation; and, a provision regarding the self-contained nature of the agreement as to the extent of the understanding between the parties.

The second document signed on September 27 by Kallmann was the sublease. By its terms, Respondent Kallmann adopted all terms of Respondent Love's realty lease, and its amendments, and agreed to pay as rent the greater of $666.92 per week or 5 percent of its weekly gross sales, as well as the taxes, insurance premiums, and other costs as required by the master lease to which Respondent Love's is a party.

The third document signed by Kallmann was the equipment lease. It specifies the items being leased in an attached exhibit; provides that these items remain Respondent Love's property; limits use of these items to the restaurant and to the purposes contemplated by the parties' overall agreement; provides for a term concident with that of the realty sublease and franchise agreement; obliges Respondent Kallmann to pay rent of $50 per week for the first 52 weeks and $160 per week for the remainder of the term, as well as for all personal property, sales, and/or use taxes; requires Respondent Kallmann to maintain, repair, and replace, when needed, the equipment at its "sole cost and expense"; accords Respondent Love's the right to pay unpaid taxes and repair unrepaired or improperly maintained equipment at Respondent Kallmann's expense, with 10 percent annual interest if Respondent Kallmann fails to reimburse Respondent Love's within 10 days of written notice of the latter's expenditure; gives Respondent Love's the right to enter the restaurant at any time to inspect the leased items; and accords Respondent Love's the right to obtain, on Respondent Kallmann's behalf, fire and extended coverage and burglary insurance, for the full replacement value of the leased property, which Respondent Kallmann must keep in force during the term of the lease.

In addition, the equipment lease obliges Respondent Kallmann to continue rent and tax payments notwithstanding damage or destruction, and, to insure that such payments continue, require Respondent Kallman to obtain business interruption insurance, naming Respondent Love's as a co-insured, in an amount sufficient to cover rent and taxes for at least 16 weeks; prohibits Respondent Kallmann

from assigning, pledging, transferring, or removing the equipment from the premises, or allowing anyone else to use it, without Respondent Love's written consent; and gives Respondent Love's the right to terminate the lease and to remove the personal property for default in any rent installment, breach of any other condition of the lease, commencement of bankruptcy, or insolvency proceedings by or against Respondent Kallmann, appointment of a receiver for the business, or discontinuance of Respondent Kallmann's business at the premises, but in such case Respondent Kallmann is still obligated for damages and other accrued obligations. All warranties which Respondent Love's possess on the personal property are assigned to Respondent Kallmann, with Respondent Love's agreeing to cooperate fully in any action for redress and recovery thereunder, though Respondent Love's has no further obligation concerning such defects.

The final document signed by Kallmann on September 27 was a promissory note, whereby Respondent Kallmann became obligated to pay $40,000 to Respondent Love's, plus interest on the unpaid balance at the rate of 7.0 percent per year, in weekly installments of $125, commencing during the week ending October 29, 1978, with each payment to be credited first on interest then due. The note provides that if default occurs in any installment when due, the entire principal and interest become immediately due at Respondent Love's option. By check dated September 28, Respondent Kallmann paid the $10,000 down payment on the franchise fee as required by the franchise agreement. This $10,000 was paid from the proceeds of a $40,000 loan, from a Fresno branch of Security Pacific National Bank, made to Kallmann and his father. Of the remaining $30,000 loaned to the Kallmanns by the bank, $21,300 was used to purchase Respondent Love's liquor license[37] and $7,500 to purchase Respondent Love's inventory. These amounts were paid into escrow.[38]

On the same day, Kallmann journeyed to the Alameda County Courthouse where he filed the necessary papers required by law for Respondent Kallmann to commence operations of the restaurant.

F. *The Closing of the Hayward Restaurant*

Events at the restaurant had continued normally prior to the closure. Thus, Respondent Love's paid the increased health and welfare contributions for the Hayward employees during August and September, as required by the newly negotiated collective-bargaining agreement. Although the newly negotiated wage increases were not paid to any of the Hayward employees prior to the closure, Turner and Porter each described August and September conversations with Respondent Love's officials—the former with Ramsey, then-manager Dobson and then-assistant manager Washer, and the latter with Ramsey, Dobson, and Patterson—in which these officials had said that the retroactive increases called for by the new agreement, would be paid and that only preparation of the paperwork at Respondent Love's Los Angeles headquarters was delaying receipt by the employees of the retroactive amounts.

Two other conversations during this same time are significant. Clotilde Roy testified that in August she had heard rumors that the restaurant was going to close and, so, one evening she had asked Dobson about them. In reply, testified Roy, Dobson had said, "Oh, those rumors have been going on for quite a bit now, but I don't think we will close because, you know, close the Restaurant costs a lot of money, and besides that we just spent $2,000 repairing things around the Restaurant." According to Roy, when she had inquired what was being repaired, Dobson had responded the dishwasher and the ovens, and when she had then asked why these things were suddenly being repaired, Dobson had replied, "I don't know."

The second conversation was one between Patterson and Ramsey, approximately 2 weeks before the restaurant closed. Alice Pingree testified that she had overheard Patterson telling Ramsey that "this is the filthiest, dirtiest store he ever saw and . . . if and when the store closes, anybody that is working there will never work in another Love's store."

Respondent Love's did close the restaurant on the evening of September 25. The decision to close was not that of Mesker, who claimed that it had been made by Spence with the approval of Respondent Love's president Palmer. Neither Spence nor Palmer appeared as witnesses. The first that most of the employees learned of the closure was the following morning when Ramsey telephoned them with notification of the closure, telling that they could pick up their final paychecks between noon and 3 p.m. that same day. When the employees arrived at the restaurant for their checks, they discovered that all windows and doors, save one, had been boarded up. They were given numbers and were admitted to the restaurant, when their numbers were called, to obtain their checks from Ramsey and Patterson. Most of the employees gave a uniform account of these events. Turner and Porter, however, chose to make some additions.

Turner testified that when she had entered the restaurant, at approximately 2:30 p.m., Ramsey had been crying and, in response to Turner's question, had said that she could not talk. According to Turner, after she had gotten her check from Patterson, Ramsey had been "really crying," but when she had tried to comfort Ramsey, Patterson had screamed to get out of the restaurant. Porter testified that when Ramsey had telephoned him that morning, she had been "kind of sniveling" and had indicated that she could not talk because Patterson was in the office. When he later was admitted to the restaurant, for his paycheck, at approximately 2 p.m., he claimed that Ramsey "was shaking and she was crying, had been crying a lot . . . ."

Yet, five other former employees—Pingree, Hansen, Logan, Bishop, and Wadsworth—each testified to having been in the restaurant that afternoon. Three of them—Pingree, Hansen, and Logan—testified that they had come there in response to telephone calls from Ramsey. Three of them—Pingree, Hansen, and Bishop—specifically described Ramsey as having been present during the times that they had been in the restaurant. Pingree and Hansen both described

[37] Respondent Kallmann then operated under a temporary liquor license until late December.

[38] The escrow for the Hayward restaurant opened on September 27 and closed in late December.

conversations in which each had participated with Ramsey that afternoon. Yet, not one of them described Ramsey as having been crying when they had seen and spoken with her. Rather, Pingree testified that Ramsey had said merely that it was a shame this had happened as Pingree was the best waitress that Respondent Love's had ever had. Hansen testified that she had been told by Ramsey only that she did not know if the restaurant would reopen and that Hansen had been a good employee.

That same afternoon, in response to telephone calls made to him by the employees, Branco had gone to the Hayward restaurant where he had spoken twice with Patterson. During their first conversation, Branco testified that he had asked what was going on, that Patterson had said that the restaurant had been closed, and that the employees would all get paid, and that he (Branco) had "expressed concern that there was no notice informing them that the people that had showed up for work who were regularly scheduled to work under our contract should receive show-up pay for that day. I wanted to make sure everybody received the proper amount of pay . . . ." According to Branco, when Patterson had assured him that the employees would be paid properly, he had gone outside the restaurant, but had gone back inside upon discovering that some employees had not been paid correctly. However, he testified that when he had broached Patterson about the discrepancies, the latter had replied that it was out of his hands and that there was nothing that he could do.

Thereafter, Branco contacted Chubb and, ultimately, a meeting was conducted, shortly before Respondent Kallmann opened the restaurant, at which Chubb represented Respondent Love's and the Union was represented by Branco, Mike Salerno, and attorney Stemerman. Branco testified that at this meeting, he had given Chubb a list of employees who had not been paid correctly and had received a promise to correct any inaccuracies. According to Branco, the Union had also taken the position that Respondent Love's was still under contract, that Respondents were the same entity, and that the Union wanted a meeting with Respondent Kallmann before the restaurant was again opened. Branco testified that Chubb had promised to set up such a meeting. The parties stipulated that, if called as a witness, attorney Stemerman would testify that Chubb had offered to set up such a meeting. Chubb, however, testifed that he had said only that Branco should contact the franchisee himself because Chubb did not represent him. He specifically denied having said that he would arrange or set up a meeting between Respondent Kallmann and the Union.

G. *Respondent Kallmann Prepares To Reopen*

Initially, Kallmann had been told that the restaurant would be closed for only 2 weeks to be cleaned, but later he had been told that more time would be needed. The result was that he did not open until October 20. In the interim, he undertook several measures to prepare for the opening.

First, since Respondent Kallmann was purchasing Respondent Love's inventory at Hayward, Patterson and Kallmann each had taken an independent inventory of all items on the premises. As a result, when the escrow closed, Respondent Kallmann had gotten back approximately $3,500 of the money that had been deposited in escrow to pay for the inventory.

Second, he began contacting purveyors to establish a relationship between them and Respondent Kallmann. For example, he arranged for credit from Niles Meat Company, Avard-Garth/Distribuco Inc.,[39] Carnation Foods Company, Columbo Baking Company, and C.E. Rhodes Company. He signed a rental agreement with Exchange Linen Company for such items as shirts and vests. He contacted Coors Distributing Company and arranged for it to change the tap on his draft beer, as well as for credit, so that Coors been would be sold, rather than Michelob beer that Respondent Love's had been selling. He agreed to Oakland Cigarette Machine Company's proposal for retention of the cigarette vending machine that had been in the restaurant. He made a $2,000 utility deposit with Pacific Gas and Electric Company and a $430 deposit with Pacific Telephone Company. Respondent Kallmann also obtained an employee identification number from Internal Revenue Service and a City of Hayward business license.

Third, Kallmann reserved two rooms at a nearby Vagabond Motel, the cost of which he paid, so that he could interview applicants there. In an effort to attract applicants, he contacted the placement services at Cal State Hayward and Chabot College and, additionally, placed advertisements with the Oakland Tribune and the Hayward Daily Review. According to Kallmann, he had placed these advertisements with these two newspapers on Friday, September 30, but the Review apparently had lost his advertisement. When it was not published, he had postponed his motel reservation and had cancelled the Tribune advertisement, believing that it, alone, would not generate a sufficient number of applicants. Subsequently, he again had placed advertisements with both newspapers, the one in the Review to commence on October 12 and the one in the Tribune to begin on October 13. In both newspapers, the advertisement had stated simply that a new, but unidentified, restaurant was hiring in specified classifications[40] and that those interested should apply in person at the motel on Wednesday, October 12, or on Thursday, October 13.

Kallmann testified that he had conducted interviews at the motel for 2-1/2 days, starting on October 12, and had then changed the situs to the restaurant. That shift is reflected in the advertisements in which, for the first time, the

[39] Which supplies Respondent Kallmann with products bearing the Love's label, such as canned beans, sugar packets, place mats, coasters, etc., as well as with other grocery and paper products. Kallmann testified that he had become familiar with both Niles and Avard-Garth while managing Respondent Love's San Jose restaurant during the summer.

[40] The initial advertisements specified that the classifications for which applicants were being invited were those of waitress, bartender, hostess/cashier or cashier, dishwasher, cook, and bus personnel. However, by October 14, the classification dishwasher had been deleted from the advertisements. It was later restored in the Review advertisement of October 18, but the bartender, cashier and bus personnel classifications had been deleted by then. There were no advertisements in the Tribune after October 16. While Kallmann testified that he had deleted classifications from the advertisements when he had finished hiring and had sufficient additional applicants in those classifications, he did not explain why the dishwasher classification had been restored to the list in the Review advertisement of October 18.

name of "Love's Barbeque Restaurant," along with the Hesperian Boulevard address, is substituted for the name and address of the motel in the Review advertisements of October 14 and thereafter, and in the Tribune advertisements of October 15 and 16. Kallmann instructed the motel operator to refer applicants, who came to the motel, to the restaurant.

H. *The Interviews and the Initial Employee Complement*

Both Mesker and Kallmann testified that, as part of the franchise fee paid by Respondent Kallmann, Respondent Love's had been responsible for providing personnel to assist Respondent Kallmann in beginning operations. Among the personnel assigned to do this were Southern California Area Operations Coordinator Key Kyle and Diane Crosby, an employee in Respondent Love's Los Angeles industrial relations department. They had assisted Respondent Kallmann in conducting the interviews. Kallmann testified that they had confined their activities to distributing application forms, assisting applicants in completing them, and collecting the completed forms from those who did not wish to wait to be interviewed.

Kallmann claimed that he had been the only official to interview applicants and that he had conducted all interviews. This testimony was contradicted by assistant manager David Sebban, who testified that his employment for Respondent Kallmann had commenced on October 14, that he had "started interviewing the day I started there," and that he had interviewed probably 20 applicants.

Kallmann testified that he had hired approximately 30 employees to start work in the restaurant when it had opened on October 20. However, he claimed that the selection of applicants to be hired had been made earlier, as does indeed appear to have been the fact inasmuch as a 3-day training program, described *infra*, had commenced on Monday, October 17. According to Kallmann, by the second day of interviewing, on October 13 or 14, all three dishwasher vacancies had been filled; by October 14, the three hostess-cashier positions had been filled; by approximately October 15, all three bartenders' positions had been filled; and, by the morning of October 17, the six cooks' and four busboys' positions had been filled. He believed that he had hired nine waitresses, but gave no approximation as to when those positions had been filled.

Of the employees originally hired, the applicants of 28 of them were produced. Assuming that the dates listed thereon are accurate, two had applied on October 12, nine on October 13, seven on October 14, one each on October 15 and 16, seven on October 17, and one on October 18. Of the eight applications filed on October 17 and 18, three list waitress only as the position sought by the applicants, three list waitress or hostess-cashiers as the positions sought, one lists cook and kitchen helper or waitress, and the application of David Keneth Dugan, filed October 17, lists dishwasher and cook or cashier as the positions for which he sought employment. The significant point about Dugan's application is that it bears the notation "Dish," apparently written by Kallmann, in the left margin, indicating that Dugan had been hired as a dishwasher. If so, this would mean that Kallmann's testimony that all dishwashers had been hired by October 13 or 14 was inaccurate.[41]

None of these employees had ever worked at the Hayward restaurant. However, Respondent Kallmann did receive seven applicants from former Hayward employees: that of Linda Malone-Morris dated October 13, for the position of hostess-cashier; that of Porter, dated October 14, for the position of cook or waiter; that of Hansen, dated October 14, listing no position; that of John Boyd, dated October 17, for the position of busboy or dishwasher; those of Richard Logan and David Wadsworth, dated October 17, for the positions of cook and D.M.O. (dishwasher); and, that of Richard Bishop, which is undated, but which he testified that he had filed 4 days before Respondent Kallmann opened the restaurant, for the positions of dishwasher or busboy. There was no testimony regarding the applications of Malone-Morris or Boyd. Each of the other five former Hayward restaurant employees described the circumstances under which they had filed their applications.

Porter testified that he had been "desparate for a job" and that on approximately Friday, October 10, he had seen an advertisement, in the Review, which had listed the Vagabond Hotel, but which had "read almost identical to the ad that I had answered for Loves in 1972 . . . ." Suspecting, he testified, that the advertisement had been placed by Respondent Love's, Porter had telephoned the motel and had been told that the interviewer had moved to the restaurant. He then had gone there that same day, where he had completed an application and had been interviewed by Kallmann.

According to Porter, in reviewing the application, Kallmann had noted orally that Porter was an ex-employee of the restaurant and when Porter had replied, "Yes, sir, I am," Kallmann had responded, "Hum." Porter testified that he had quickly "said, 'Well, I know there have been a lot of problems here,' and I said, 'I know this store can function as a Union store and I know we can make it work and I feel that I can help you make it work,' type thing. I don't know if I said those exact words." In response, testified Porter, Kallmann had said that he would be hiring for the rest of the week, and that he would "take" Porter's application, thanking Porter "for being so honest with me." However, Porter testified that while Kallmann had promised to telephone to report Respondent Kallmann's decision on Porter's application, Kallmann had never called him thereafter.

On cross-examination, Porter denied specifically that Kallmann's promise to telephone had been predicated only on a decision by Respondent Kallmann to hire Porter. Porter was then shown his pretrial affidavit in which he had stated: "Kallmann said he would review my application and call me by Sunday if I was hired." After reading this statement, Porter testified that he did "not believe at this time that that is what Mr. Kallmann told me," and that "I feel that he told me he would call within the week." An even more significant inconsistency between Porter's testi-

[41] Further support for the conclusion that Kallmann had been wrong when he had testified that all dishwasher positions had been filled by October 14 is found in the reinsertion of that classification in the Review advertisement of October 18, as mentioned in fn. 40, *supra*.

mony and his affidavit was the statement in the latter that "During the interview the Union was not mentioned at all." Porter testified that this had been written in response to the Board Agent's question as to whether the Union had been mentioned *to* Porter during the course of the interview, "and that's what I wrote and that's what I said."

Kallmann recalled that he had spoken with Porter, had reviewed his application, and had considered him to be "a fairly good employee if I was able to hire him." However, he testified that following the interview, "I started thinking how filthy the kitchen was. I mean absolutely filthy. We had to use drills to clean out the grease, and I didn't really want that type of employee working for me."[42]

Wadsworth and Logan applied at the same time. Since he had been the first to complete his application, Logan had been interviewed by Kallmann before Wadsworth. According to Logan, Kallmann had inquired if Logan went to school and Logan had said that he did, from 9 to 11, but that he could arrange his schedule so that he could work full time on nights or days. Logan testified that as Kallmann had read down the application, he had arrived at the part where Logan had written that he had worked previously at the restaurant.[43] At that point, testified Logan, Kallmann had said that "there were no positions open except for maybe a dishwasher job that he wasn't certain about, that a boy was supposed to call him." Logan testified that he had told Kallmann that he would accept work as a dishwasher, but that Kallmann had replied that he was pretty certain that the position "was taken also." Like Porter, Logan testified that Kallmann had promised to telephone him so that Logan would have noticed whether or not he had been accepted, but had never done so.[44]

As had Logan, Wadsworth had written on his application that he was applying for a job as cook or D.M.O., and had worked at the restaurant for Respondent Love's as a "DMO/Cook." He testified that he had not been going to school at the time and had been available to work at any hours of the day. According to Wadsworth, as Kallmann read over the application, he had come to the part where Wadsworth had written down his prior employment at the restaurant, at which point Kallmann had asked if Wadsworth had worked there before and Wadsworth responded affirmatively. Kallmann, testified Wadsworth, had then said "that there was only one job available and he doesn't know about it." However, in contrast to Logan, Wadsworth testified that the job which Kallmann had mentioned had been that of a busboy. Initially, Wadsworth began to deny that Kallmann had offered him a position, but, after hesitating, he acknowledged that, "well, they offered me a busboy position and I said that I felt—that I had worked my way up in seniority because I was working there before and I told him I would not be interested in working the busboy position."

Kallmann agreed that he had interviewed Logan and Wadsworth during the afternoon of October 17. However, he testified that he had told them that there might be a position available in the future, but that at the present all positions were filled. He denied specifically having told Logan that there was a dishwasher position available, "because I had hired quite a few days previously." But he testified that he probably had told Wadsworth that there might be a busboy position available in the future.[45] He denied that Logan had said anything about arranging his school schedule so that he could work at any time of day. He testified that the only reason that neither Logan nor Wadsworth had been hired was because of the absence of openings and not due to any conflicts with school schedules that either may have had. Yet, in his pretrail affidavit, Kallmann had stated: "The only other former employee applicants I interviewed were, I believe, two bus boys. I did not hire them because they were not available to work days. Both indicated to me that they were attending school during the day. I needed employees for the day shift." Kallmann agreed that the last two sentences had been added to the affidavit, presumably by his attorney. However, he was not asked to explain the inconsistency between these sentences in his affidavit and his testimony concerning his reason for not hiring Wadsworth and Logan at the time that they applied.

The fourth former Hayward employee to apply had been Hansen, who testified that after completing her application, she had been interviewed by Kallmann at the food counter. She testified that he had asked her name, age, and job for which she was applying, and had inquired about her experience, saying that Respondent Kallmann was seeking experienced people. However, when it became apparent to Kallmann that Hansen had been working at the Hesperian Boulevard restaurant at the time that it had been closed, she testified that he had remarked, "oh, you were one of them." According to Hansen, Kallmann had said that he would check with Ramsey concerning her and would let her know. She never heard from him again. Kallmann testified that he did not believe that he had interviewed Hansen, although he later testified that a certain mark made by him on her application indicated that she was an experienced employee.

The fifth former Hayward employee to testify about filing an application for work with Respondent Kallmann was Richard Bishop. He testified that, approximately 4 days before the restaurant had been opened by Respondent Kallmann, he had entered and had gone to the office used formerly by Respondent Love's manager, where a man whom he did not know at the time, but whom he later learned was Richard Sawyer,[46] was present. According to Bishop, when he had asked to speak to the manager, Sawyer had replied that he was the manager and, at Bishop's request, Sawyer had given him an application to complete.

[42] Kallmann testified that, during the interview, Porter had said that he had been head cook at Hayward. Porter acknowledged that he had become head cook at the Hayward restaurant in mid-July and his application so stated.

[43] On that part of his application, Logan had written that he had worked for Respondent Love's at Hayward as a "DMO, COOK."

[44] Kallmann testified that he had received approximately 200 applications and had interviewed approximately 125 applicants.

[45] Kallmann testified that this had been a standard comment which he had made to most applicants, "because the turnover rate in the Restaurant work is around 300 percent or so, and so if they come back at the right time, in the right place type thing, then there could be a good possibility of his being hired."

[46] An area operations coordinator for Respondent Love's who normally services restaurants in Southern California, Arizona, Colorado, and Texas.

When returning the completed application to Sawyer, Bishop testified that he had asked if he would get the job, pointing out that he felt that he should be hired inasmuch as he had worked at the restaurant before it had closed and that it was unfair to hire new, rather than former, employees. Sawyer, testified Bishop, replied that he would give Bishop a call and would try hard to get him a job.

Sawyer did not appear as a witness nor was there any explanation for the failure to call him. However, Bishop's pretrial affidavit omits any mention of Sawyer having identified himself as the manager of the restaurant. Rather, it states only that "I went up to the manager, he was also in the restaurant the day I picked up my check. I asked him for an application and told him I had worked there before." At no point in the affidavit does Bishop state that his impression had been based on anything other than his own assumption based upon the location (what had been the manager's office) where he had spoken with the man.

There is one other employee who applied for employment with Respondent Kallmann and whose testimony is significant at this juncture.[47] That was Tara Blaylock. Her application bears the date October 13. It is undisputed that she had been interviewed by Kallmann and ultimately had been hired as a hostess-cashier. She testified that during the course of the interview, Kallmann had described the restaurant's background, saying that it used to be union before it had been closed, but that he had taken over and "now since he is hiring new people, he is going to go non-Union." Kallmann denied specifically having discussed the Union with Blaylock during the interview, having told her during the interview that the restaurant had been union before it had been closed, and having made any statement to her to the effect that since he was hiring all new employees, the restaurant would now be nonunion.

1. *The Restaurant Reopens and Picketing Commences*

On October 20, Respondent Kallmann opened for business. On October 21, the Union began picketing the restaurant and was still doing so during the hearing in this matter. During the early phase of the picketing, two incidents occurred which form the basis of allegations of independent violations of Section 8(a)(1) of the Act.

The first incident involved comments made to pickets Pingree and Turner by Kallmann and Sebben. Pingree testified that Kallmann had approached them in front of the lounge door, had asked why they did not "lay your picket signs downs," and had said to her (Pingree) that he would hire her immediately, because he needed experienced waitresses, at the same wages and hours as before, "but it will not be Union." According to Pingree, Turner had then interjected, asking if Respondent Kallmann would hire her, but Kallmann had "looked at her a few minutes and [had said], no, I don't think so, I hear you are too radical." Pingree also testified that during the course of the conversation, Kallmann had not mentioned needing experienced help in any classification other than waitress, but that he had said that three experienced persons had applied for employment with Respondent Kallmann, although he had not hired the two who applied to be hostess-cashiers "because they acted like they owned the place and the other was a cook and he wouldn't hire him because the kitchen was too dirty."[48]

Turner testified that this conversation had begun with Kallmann asking the pickets why they were picketing him. According to Turner, she had replied that they wanted their jobs back and when Kallmann had asked why they did not then picket Respondent Love's in Los Angeles, she had responded that they did not work in Los Angeles. Then, testified Turner, the pickets had given "Karl a bad time about his inexperienced help" in the restaurant and Kallmann had agreed that he needed experienced help, since his experienced people would not cross the picket line. Turner testified that Kallmann had then offered to hire Pingree, if she would put down her picket sign, and had offered to pay her union scale and health and welfare, adding that she would not have to pay union dues because there would be no union. When, testified Turner, she had then asked if she could have her job back, Kallmann had replied that he had been told by Ramsey that Turner was a good bartender, but that "after the things he had seen [Turner] do on the picket line, [she] was too radical" to be hired by Respondent Kallmann. Turner further testified that, during the course of the conversation, Kallmann had said that he felt that when he came in, he was allowed to decide whether or not the restaurant would be unionized. She testified that she had challenged him, saying that it was the employees, not management, that made that decision and had added that there were 33 experienced employees ready to return if Respondent Kallmann wanted an experienced crew.

Kallmann denied having told Pingree and Turner that he would hire them immediately for the same wages and hours, but that the restaurant would not be unionized. He denied having invited them to lay down their picket signs denied having said that he had not hired two hostess-cashier applicants because they had acted like they owned the restaurant. He also denied having ever checked with Ramsey about hiring any employees. Rather, he testified that Pingree had asked why Respondent Kallmann did not hire her, as she was a good waitress, and that he had responded that he could possibly have hired her, but that she had never applied[49] and, in any event, could not cross her own picket line. Kallmann further recalled that Turner had asked, "Well, would you hire me too, Karl?" He testified that he had replied only "Peggy, you have been pretty nasty." Finally, he testified that Pingree had said something to the effect that the employees had not received all of their wages, which had led him to ask why they were picketing him, rather than picketing Respondent Love's in Los Angeles, since Respondent Love's and he were not the same persons. This was all that Kallmann recalled of the conversation.

[47] Clotilde Roy also applied for employment with Respondent Kallmann, as discussed *infra*.

[48] Pingree testified that although she had not known to whom Kallmann was referring at the time, she had later learned that he was referring to Hansen, Roy and Porter. She did not say how she had learned this.

[49] Pingree testified that while she had been aware that Respondent Kallmann had been accepting applications, she had never applied because she felt that she would be wasting her time in light of the comment that she had overheard Patterson make to Ramsey.

The second incident pertained to Sebben having taken a photograph of Logan and Wadsworth, sitting in the latter's car, after the picketing had been concluded one day. Sebben acknowledged having done so. He testified that, "I was actually right behind the car at the time and I looked inside and I saw two guys there and I noticed that they had a cellophane bag full of some green substance which I believed at the time to be marijuana and I saw them rolling some up so I decided to take their picture."[50] He testified that he had been carrying the camera to take pictures of any violations of the temporary restraining order issued in connection with the picketing.

The two pickets both testified that after the picture had been taken, Logan, who had been seated on the passenger side of the vehicle, had begun to roll down the side window and open the door, in the process asking Sebben why he had taken the picture. According to Logan and Wadsworth, Sebben had retorted that Logan would learn how to do that someday when he got older. Sebben testified that after having taken the picture, he had walked away. He denied having made any statement to the effect that Logan and Wadsworth would know how to do that when they got older.

Finally, Kallmann agreed that during the early phase of the picketing, the Union's agents had advised him that the Union wanted a contract with Respondent Kallmann and that he had declined to discuss the matter further with them.

J. *The Relationship Between Respondents*

1. The operating manual

Respondent Love's furnished Respondent Kallmann with "Love's Barbecue Restaurant Operations Manual," which is divided into 18 sections, lettered A through R. The first section, headed "Preface," admonishes the operator that its "success in working with others in the pursuit of customer acceptance and satisfaction is the key to LOVE'S future in the restaurant business," and that Respondent Love's "policies and standards have been developed into a system which . . . [i]t is consummately important for [the operator] to learn . . . thoroughly and . . . apply rigidly . . . ." Section B, "The Love's Story," contains a brief history of Respondent Love's, emphasizing the reputation that it has established and assuring the operator "that the policies and instructions set forth in this manual have evolved through careful and proven analysis of each situation." Section C is entitled "Standard Operating Procedures" and lists a number of rules pertaining to employees. It is reproduced as Appendix B to this Decision.

Section D, "Craft Performance," contains a list of employee classifications, with a brief description of the general responsibilities of employees in each classification and their relation to the overall success of the restaurant. For example, with respect to the waitresses, this section states that "[t]he word Waitress is synonymous with service. From the time the guests are seated, to the time they leave her care, good service should always be paramount. The Waitress is our number one public relations representative. The impression she creates will determine the LOVE'S image in the minds of our clientele." This section concludes with the admonition that all restaurant personnel should be prepared to "take on the responsibility of many crafts," followed by a listing of examples of interchangeable and combinable duties, i.e., "The duties of the Busboy and DMO at times may be interchanged or combined," and with an appeal for teamwork to ensure the restaurant's success.

Section E, "Personal Appearance & Uniform," contains a list of "what is expected in the way of personal appearance from employees of LOVE'S," covering general matters for all employees—such as hair length and style, appearance of hands and fingers, facial hair in the case of men, and make-up, stockings, and jewelry in the case of women—and specific appearance requirements for employees in each classification. An example of the latter is that the cooks are required to wear a "standard white, collared, button front" shirt with short sleeves, standard "cook's checks" or "whites" uniform pants, "square waist type" aprons affording "four changes per apron," "heavy duty commercial type" shoes "with substantial arch supports and rubber soles and heels" which must have "closed toe and heel," a "red cloth high crown Chef's style uniform hat" worn in the manner specified, and a red scarf "around the neck, tied or looped in front." Section F, "Craft Duties and Responsibilities," lists specifically the functions to be performed by employees in each classification.[51] An example of the manner in which the duties of each classification are delineated in the section pertaining to the classification hostess, which is reproduced in Appendix C.

Section G contains a list of abbreviations for items sold in the restaurant, i.e., "Rib D" for Pork Rib Dinner, which "must be taught all new personnel." Section H, "Guest Check Procedure," lists a control procedure for handling of guest check books, i.e. "Partially used guest check books are to be used up first," including a detailed description of the manner in which they are to be completed and processed.

Section I is entitled "Product Specification." It provides at the outset that the "specifications are presented in order to ensure the proper maintenance of Love's Restaurant's high standards of food preparation and presentation," noting that it is "absolutely imperative that we maintain a single entity image in the presentation of food and service to our patrons" and, further, that deviation "from these specifications may cause considerable damage to the reputation of not only your individual restaurant, but to that of other operators throughout the chain." It then lists private label products, ranging from "Love's Meat Basting Sauce" to "Love's Special Children's Bibs," which are to be carried, followed by meat, produce, baked goods, dairy, and grocery specifications. Each of specification categories is subdivided into appropriate items with a specific description of the requirements for that item. By way of illustration, for frankfurters, the manual specifies "All beef (4/1) four to the

[50] Logan testified that he and Wadsworth had been discussing a slip of paper that had been given to him by Patterson on the day that he had received his final check. Wadsworth testified merely that they had been "looking over some papers."

[51] Some classifications have been subdivided. Thus under the general heading of Cook is included wheel man, board man, broiler man, and "to go" man.

pound 6" long X 1-1/2" round. Ordered by weight, usually comes in 10 pound boxes. All meat franks are not acceptable." For grocery items, both a pack and a brand are specified, e.g., for Au Jus Gravy Mix, "2/5 lbs. Per Case" Pack and Lawry's Brand.

Section J, "Ordering Suggestions and Usage Guide Lines," contains a list of "suggestions" for ordering merchandise and for handling and stocking it after its receipt. In the preface to this section, Respondent Love's states "we will provide some tips which if utilized should help you maintain closer control over your product usage and, therefore, guarantee better profits. It is important to remember that regular inventories and strict product control procedures are imperative in minimizing theft, waste and general employee inefficiency."

Sections K and L are devoted to food production. They contain, in essence, recipies for the preparation of each item and, in the case of the items listed in section L, for placing the items on plates for service to customers. Section M, "Dining Room Operation," carries this process to the next stage by describing how waitresses should prepare the table settings and serve customers. Section N describes the same procedure for service in the cocktail lounge.

Section O lists "several steps to be followed in order to avoid unnecessary cash losses which in the final analysis means diminished profits." Section P, "Accounting," incorporates by reference the "Accounting Reporting Procedures" published in a separate manual.[52]

Section Q contains several forms to be used for such matters as recording payment of C.O.D. invoices from the cash register, accounting for broken liquor bottles, and recording daily sales. Among the instructions accompanying these forms, specific mention of their use by franchisees and owners occurs with respect to the Accounts Payable Schedule (form L-101), Cash Removal (form L-104), Employee Record Card (form L-108), and Employee Termination (form L-109) forms. Conversely, the instructions accompanying certain other forms refer specifically only to manager: Liquor Breakage (form L-103), Waitress Reconsideration Forms (form L-110), Registration Correction Form (form L-113), Daily Restroom Inspection Form (form L-116), and Starting Bank Form (form L-117). No reference is made specifically to franchisee, owner or manager for the following forms: Cash Payout (form 2), Application for Employment (form L-102), Daily Report (form L-106), Employee Payoff (form L-107), Work Schedule Form (form L-119), and Transmittal Form (form L-132).

The final section of the manual, "Miscellaneous Operating Procedures," sets forth detailed procedures to be followed for telephone etiquette, injuries and emergencies, robbery, counterfeit money, and lost and found.

Both Mesker and Kallmann testified to the applicability of these sections of the manual to franchised operations. Kallmann testified that he never had been told that he had to follow any portions of the Manual save for sections I, K, and L, and that part of section M pertaining to the portions of each item that must be served to customers. He further testified that he had been told that the reason for requiring adherence to these sections was to preserve the quality and uniformity of products served throughout the chain. In addition, Kallmann testified that he was obliged to prepare the Daily Report Form (form L-106), but was not required to prepare and maintain any of the other forms in section Q of the manual. Further, testified Kallmann, though never instructed to do so, he had followed some of the uniform provisions of section E.

Mesker testified that franchisees are required to follow the product specifications of section I and some of the portioning requirements of section M, such as glass sizes and amounts of various ingredients used in chef's salads, but that many other items in that section, such as desserts, are not readily susceptible to consistency. In addition, testified Mesker, franchisees were obliged to adhere to the uniform provisions of section E, "Personal Appearance & Uniforms," because food and the physical appearance of the restaurant were "probably the two things that constitute the restaurant's image more than anything else . . . ." Explained Mesker, "People relate a chain to its appearance as well as its food, and the reason that the uniform procedure is one that we wish to enforce in all restaurants is that it has to do with our image and what you are selling when you sell a franchise is image." Finally, Mesker testified that the only form that franchisees are required to use is the daily report form.

All other sections of the operating manual, testified Mesker, are merely suggestions and guidelines, insofar as franchisees are concerned, for more effective operation, being the product of common sense in some cases and of past success and failures in other cases. For example, with respect to section C, "Standard Operating Procedures," Mesker testified that it "contains suggestions and guidelines" evolved from experience with successful and unsuccessful operations. Regarding section D, "Craft Performance," Mesker testified that it was not required that franchisees adhere to the duties specified for each classification, but that inasmuch as common sense dictated that certain duties be performed by waitresses, cooks, etc., it was a requirement, though not to "the point of this being a rule or regulation that is enforced to the letter by the Company." Similarly, Mesker characterized section F, "Craft Duties and Responsibilities," as "purely a guideline that is in the opinion of Company management, if followed the restaurant would be operated more effectively and it is to be used by the franchise as a guideline."

Mesker testified that none of these sections would ever be used as a basis for attempting to disenfranchise a franchisee and, further, that none of them had ever been relied upon to do so. Thus, while area operations coordinators prepare call reports, evaluating the efficiency of operations at the restaurants on the basis of periodic visits and inspections, for both franchised restaurants and for those operated by Respondent Love's, Mesker testified that franchisees are not required to do anything as a result of these reports and they are "simply a tool that is provided by the area coordinator as an objective professional's point of view to provide the franchisee with assistance in evaluting the efficiency of his operation, the effectiveness of his operation." Similarly, whenever customer complaints are received by Respondent Love's concerning a franchised operation, Respondent Love's, according to Mesker, conducts no investigation of

[52] Not introduced in the instant matter.

that complaint, but instead automatically sends a letter of apology to the customer, accompanied by a gift certificate for which Respondent Love's reimburses any franchisee at whose restaurant the certificate is redeemed.

Indeed, Respondent Love's has only ever attempted to disenfranchise two franchisees in the past 5 years: one for nonpayment of rent and royalties, and the other for nonpayment of royalties and for failing to comply with the proprietary food specifications contained in the operating manual. Mesker testified that based on his experience, "I don't believe you could possible prevail in disenfranchising a franchisee for alleged failure on his part to maintain the service standards," due to the difficulty of proof and, further, that bad service at a franchised restaurant would be self-correcting, since it "would very quickly result in diminished sales which would result in the franchisees inability to maintain his business."

2. The craft books

Respondent Love's training department has prepared a series of craft books for each employee classification, i.e., waitress, busboy, cook, etc. Each of these books, regardless of classification, contains a list of Respondent Love's standard operating procedures, taken from section C of the operating manual and reproduced in Appendix B to this Decision, and, also, a list of the personal appearance and uniform requirements set forth in section E of the operating manual. In the book for each specific classification is reproduced that portion of the operating manual pertinent to the classification covered by the book. For example, in the craft book for busboys, that portion of section F, "Craft Duties & Responsibilities," and that portion of section M, "Dining Room Operations," describing the functions and duties of busboys are reproduced verbatim. Similarly, a comparison of every other classification's craft book with the operating manual discloses that provisions of the former for each craft are taken from the latter.

Mesker testified that although Respondent Love's trainers are supposed to use these books when training new employees, Respondent Kallmann had not been required to accept nor to use these books at Hayward. Indeed, if it does desire to use them, it is required to purchase them at the price of $1 per copy. Kallmann testified that copies of these books had been among the inventory which he had purchase from Respondent Love's. He testified also that they had been passed out to waitresses, who had been told that they would be tested on them, but that as far as he knew, this had been the only classification of employees to whom this had been said. Thus, while the appropriate books had been distributed to busboys, Kallmann testified that he had not told them that they would be tested on their contents, but, instead had told them to "take with a grain of salt . . . ." Kallmann also testified that to his knowledge, books had not been distributed to the initial complement of hostess-cashiers, cooks, or bartenders.[53] Indeed, neither bartender Deborah Dawson nor waitress Carol Totman claimed that craft books had been issued to them, though both were hired by Respondent Kallmann.

With regard to employees hired subsequent to the restaurant's opening, Kallmann testified that he had purchased new craft books from Respondent Love's only for waitresses, but that when they had been distributed, "I usually verbatim said 'take it with a grain of salt, because there are so many things in those craft booklets that we don't do, that I don't do, and I gave it to them as a brief outline." Kallmann also testified that he did not distribute any other books or other documents to employees describing what their jobs entailed.

3. The training period

During Respondent Kallmann's initial period of operation, certain officials of Respondent Love's had worked at the Hayward restaurant. Both Mesker and Kallmann testified that their functions had been to train Respondent Kallmann's initial employee complement and that their services had been included in the franchise fee which Respondent Kallmann had paid to Respondent Love's. Initially, the training team had consisted of Ramsey, Fred Kroeger, and Ken Kyle, with Kyle being in charge of the training team.[54]

Kallmann testified that Sawyer had arrived at noon at Saturday, October 22, to replace Kyle, remaining until early November when he, in turn, had been replaced by McIntyre who had remained until late November. Kyle, Sawyer, and McIntyre, according to Kallmann and Mesker, and all performed the same functions, each, of course, for different periods. Those functions, according to Kallmann, had been to assist Respondent Kallmann in training hostess-cashiers and bartenders, and to be certain that Ramsey and Kroeger were training employees in other classifications, as well to answer Kallmann's questions about such matters as the identity of purveyors who could provide certain products and to point out licensing and other requirements and matters that Respondent Kallmann needed to accomplish to commence business. Mesker testified that, in general, Kyle had been dispatched to Hayward "as the head of the training team, to supervise the total training thrust with Mr. Ramsey and Mr. Kroeger," and "to assist Mr. Kallmann in getting his business structure organized,"[55] as well as "to

[53] As described *infra*, it had been primarily officials of Respondent Love's who had trained Respondent Kallmann's initial employee complement and, consequently, Kallmann would not necessarily possess firsthand knowledge of all that had transpired during those training sessions.

[54] Kallmann testified that Ramsey and, apparently later, Kyle had been working at the restaurant during the period that it had been closed, supervising the personnel who had been cleaning the restaurant, as well as performing some of the cleaning themselves. Mesker and Kallmann testified that Spence had been at the restaurant on October 21 and 22, representing Respondent Love's at Respondent Kallmann's opening. Martin testified that while on the picket line, he had observed discussions among Kallmann, Sawyer, Sebben, Ramsey, and Spence taking place at one of the tables, with Spence appearing to act as leader or moderator of these discussions. He testified that these meetings had occurred during the first week of picketing, with the first one being on the first Saturday or Monday of the picketing, but that he had not seen any such meetings thereafter. Martin also testified that he had seen Spence at the restaurant during its first and second weeks of operation. Though it is argued that Spence had been giving directions to all present, including Kallmann, during these meetings, it is equally inferrable that Kallmann, the franchisee, had been simply listening to what Spence told Respondent Love's personnel conducting the training.

[55] That it was, in fact, Respondent Love's practice to provide training assistance to franchisees is shown by Porter's testimony that he had received

(Continued)

terminate [Respondent Love's] responsibility from the standpoint of various governmental agencies, utility companies and vendors." No explanation was advanced for the replacement of Kyle with Sawyer, nor for the latter's replacement by McIntyre.

With respect to Ramsey and Kroeger, Kallmann testified that the former had been responsible for assisting in training waitresses, busboys and, to some extent, hostess-cashiers, while Kroeger had helped to train the kitchen personnel. Both Kallmann and Mesker testified that these five individuals, particularly Ramsey and Kroeger, had not been assigned to do craft work and had not done so, except to the degree necessary to demonstrate to newly hired employees how to perform their duties. As Mesker testified, "[w]hen you are involved in training, show and tell is the way you do it, so quite often it would include doing it to demonstrate how it is done to new people."

However, several of the picketing former employees described occasions when they had observed Ramsey, by herself and with no one else around, performing craft duties. For example, Pingree testified that she had seen Ramsey, by herself, waiting on tables during the first week of the picketing.[56] Turner, who had picketed until early December, testified that she had seen Ramsey, every day during that period, "washing tables, taking customers' orders, hanging tickets, running cocktails, cleaning menus, seating customers, taking cash, cutting pies, fixing salads, making milkshakes, everything." Likewise, Porter testified that from the commencement of picketing until November 7, he had regularly seen Ramsey performing work normally performed by employees:

> I saw her sweeping the floor. I saw her filling mints at the hostess station. I saw her taking cash. I saw her running cocktails. I saw her hanging orders. I saw her making salads. I saw her cutting pies, marking cheese cakes, making sundaes and milkshakes, dishing soups, bussing off tables, using the vacuum sweeper to clean up the floor. On one occasion I even saw her cooking, putting beans in the bean cook and turning over bread, this type of thing.

In addition to Ramsey, Turner and Porter described work which they purportedly had seen Kroeger performing in the restaurant while the picketing was in progress. Thus, Porter testified that he had observed Kroeger seating people, occasionally taking cash, and, while standing at the door from where he could see "straight in" to the kitchen, "I could see him putting buns in the toaster. I could see him buttering breads and I could see him down at the other end of the kitchen filling bean cups, and I could see him using the slicer." However, while Porter denied that other personnel of the restaurant had been near Ramsey when she had been performing the tasks which he had described, he did not similarly testify that Kroeger had been alone when purportedly performing these tasks. Turner claimed that she had seen Kroeger cooking, seating customers, and, once, sweeping the floor. Like Porter, however, Turner did not testify whether Kroeger had been alone when performing these tasks or whether restaurant employees had been with him. Turner also testified that she had observed Kyle seating people, taking cash, and directing the busboys by "taking to a busboy and pointing over there and the busboy would go over there."

While the foregoing testimony tends to contradict that of Mesker and Kallmann that Respondent Love's personnel had not performed the duties of employees while at the Hayward restaurant, certain other testimony tends to confirm that of Mesker and Kallmann. Thus, Pingree testified that she had observed Ramsey at the wheel[57] and showing waitresses how to serve the food. Hansen testified that in addition to having observed Ramsey standing alone at the podium—straightening out menus, arranging the podium, and writing with a crayon—she had also seen Ramsey standing in front of the wheel talking to the cooks who, of course, did have work contacts with waitresses. Bishop testified that he had observed Ramsey working the cash register, on which employees needed to be trained, as evidenced by Turner's testimony that she had previously trained employees to operate it, but he did not claim that she had been alone at the time. Finally, Roy testified that "most of the time I saw [Ramsey] was with waitresses, where the waitresses' station is, and many times I saw her cleaning around in there where the salad bar was and like telling the waitresses something, like showing the tables or something like that." Like Hansen, Roy testified that she had observed Ramsey at the hostess' stand, but she described Ramsey as having been "[j]ust standing there."

On rebuttal, the General Counsel produced three witnesses who had been hired by Respondent Kallmann: Totman, Dawson, and Blaylock. Both Totman and Dawson claimed to have been interviewed and hired by Kyle, apparently at the same time,[58] without having seen or met Kallmann until after they had commenced working for Respondent Kallmann. Kyle did not dispute having spoken with them when they had filed their applications. Indeed, he conceded that when Dawson had applied for employment, he had noted on her application certain information supplied by her.[59] However, Kallmann testified that he had later telephoned Dawson and "she could work the hours that I needed and she had experience as bartender, so I hired her," Kallmann further testified that he had hired Totman to replace Blaylock, when the latter, having been accepted for employment and having gone through the October 17 to 19 training session, had declined to cross the picket line, thereby necessitating her replacement. Thus, according to Kallmann, Totman had not been hired until after the picketing had commenced on October 21. In resolv-

training at one of Respondent Love's restaurants to enable him to begin work at the Hayward restaurant once it was opened in 1973 by the original franchisee.

[56] Pingree further testified that following the first week of picketing, Respondent Kallmann had "pulled the drapes and you couldn't see her . . . ."

[57] A circular object, suspended from the ceiling, over the counter separating the kitchen from the public area of a restaurant and on which customer orders are hung by waiters and waitresses so that, by spinning the wheel, the cooks can ascertain the items which have been ordered.

[58] Of course, if there had been a hiatus between these two events (interview and notification of hiring) then it cannot be inferred that Kyle had notified these two employees that they had been hired without consultation with Kallmann.

[59] Some applicants had merely left their completed applications without waiting to speak with Kallmann. Kyle placed Dawson as having been among this group of applicants.

ing the dispute as to who had hired Totman and Dawson, it is noteworthy that neither of them testified as to the date on which they had been interviewed. Dawson's application bears the date October 13. Kyle testified that it had been on that date that he had spoken with her. Seemingly, therefore, had she been hired by Kyle in the manner that she described, Dawson would have been among the employees who had undergone the 3 day training session. Yet, she did not testify to having been among the group that had participated in that training. Further, the General Counsel subpenaed an extensive number of documents from Respondent Kallmann, among which were the "payroll and personnel records, showing the names . . . of all persons employed" at the Hayward restaurant on October 20. During the fifth day of the hearing, the General Counsel selected and confronted Kallmann with a set of timecards, securing Kallmann's agreement that these were the timecards of the employees hired originally by Respondent Kallmann. Had Dawson been hired following her interview, as she claimed, her card should have been among that group of timecards presented to Kallmann by the General Counsel. Yet, it was not.

Similarly, while Totman did not specify a date on which she had been interviewed, her application bears the date October 17. That is the first date on which the training session had been conducted. But, as was the case with Dawson and in contrast to other employees whose applications also bear the date October 17 (Beverly Steward, Denise McDonald, Deborah Davis, David Dugan), no timecard was presented for Totman. Nor did she claim to have participated in the training session which had commenced that day and which had extended over the following 2 days, though Steward, McDonald, and Davis had apparently done so, since their timecards were among those shown to Kallmann.[60]

Blaylock, the third employee called by the General Counsel who had been hired by Respondent Kallmann, gave testimony in three specific significant areas. First, she testified that after lunch on Tuesday, October 18, Ramsey had distributed craft books and had reviewed their contents, page by page, saying that "this is the way Love's does things and we are to follow the book." According to Blaylock, craft books were given to all waitresses, all hostess-cashiers and all bartenders.

The second facet of Blaylock's testimony pertained to an incident where a woman, apparently Clotilde Roy, had spoken to Ramsey and then had left the restaurant. According to Blaylock, Ramsey had then told the group being trained "that she knew the girl from previous Love's training and she worked here before the store had closed with the Union. The girl wanted to know if she could come and have her job back and Betty told her no, because this wasn't a Union shop anymore, it was non-Union, they had hired all new employees." Not only was there no corroboration of Blaylock's account of what Ramsey had purportedly said that afternoon,[61] but Roy's own description of her inquiry concerning employment at the restaurant casts doubt on Blaylock's description.

Roy testified that after entering the restaurant, she had observed Ramsey in the dining room with 10 or 12 other women and that she had spoken with Ramsey privately, inquiring if Respondent Kallmann was taking applications. Ramsey, according to Roy, had replied that Respondent Kallmann was taking applications and that Roy could obtain one and talk to the new owner in the manager's office if she so desired. According to Roy, "I said, yes, I will, and then she said, okay, it was nice to talk to you and probably see you around, and that's all."[62]

The final subject about which Blaylock testified specifically pertained to comments made about the nonunion status of the restaurant, assertedly by Respondent Love's officials, during the training sessions. She claimed that on Monday—in the presence of the bartenders, cocktail waitresses, hostess-cashiers, and waitresses—Kallmann had reviewed the history of the business, had mentioned Respondent Love's restaurants at other locations, and had said "that the restaurant used to be Union and now it was non-Union, that's why we were there." Similarly, testified Blaylock, that afternoon, when speaking to the group, Kyle had also reviewed the history of the business, saying "you might well know that Karl mentioned the fact that we are non-Union, we are a non-Union store now, but it was Union before. He said we hired all new employees and this is the way we are going to run the Love's now—he stressed on 'we.' According to Blaylock, the following morning, Ramsey had begun to train the waitresses and hostesses, during which time she too had told the employees that the restaurant "used to be a Union store and it had went under remodeling, they closed for remodeling purposes and it was now a non-Union shop and they had hired all new employees."

Not one other witness was called to corroborate Blaylock's testimony concerning these remarks. Kyle testified that he had addressed the employees on Monday and that, during that address, he had described Respondent Love's history. However, both he and Kallmann, who had been present when Kyle had spoken to the group, denied specifically that Kyle had made such remarks pertaining to the Union during the course of his address. Both also denied specifically that Kallmann had made the comments concerning the Union that Blaylock had attributed to him. Further, Kyle testified that he had heard Ramsey's speech to the employees on Tuesday morning. He denied specifi-

[60] Dugan did not participate in the training sessions, but he was only a part time employee.

[61] Respondents produced Linda Bodas, originally a waitress and later a hostess-cashier for Respondent Kallmann, who testified that she had been present at these training sessions and who denied that Ramsey had made the remarks that Blaylock attributed to her concerning Roy. Yet, as the General Counsel points out in his brief, there is doubt as to whether Bodas had even been present at these training sessions in light of the fact that, as had been true with regard to Dawson and Totman, no timecard was produced showing that she had worked on October 17-19.

[62] To finish this sequence, it appears from her description that Roy had then spoken with Sebben, who had given her an application and, when Roy had said that she had worked as a hostess-cashier before, had said that "it was good" that she had experience. According to Roy, Sebben had then asked where she had worked and when Roy had replied at the Hayward restaurant for almost 2 years, Sebben had said something to the effect that the new crew was already filled, but that she could complete an application and leave it and "if sometime later we need somebody we can give you a call." Roy testified that she had taken the application with her, had completed it and, on the day that the restaurant had reopened, had left it with a hostess at the restaurant, asking her to give it to the manager.

cally that she had made any of the above-described comments which Blaylock claimed that Ramsey had made.

4. Comparative operations

Kallmann testified that he alone has been responsible for all personnel decisions at the Hayward restaurant since Respondent Kallmann had become the operator there, although he has delegated some of his authority to Assistant Manager Sebben and Head Waitress Beverly Stewart. Kallmann testified that he was responsible for and had posted some labor relations policies. Introduced were three documents which Kallmann acknowledged having posted and which list instructions for employees to follow. Two of them are printed on Respondent Love's letter head and make no mention of either Respondent Kallman or of Kallmann, by name.[63] The third is typed on Respondent Love's memorandum form, but states that it is from Kallmann to "All Employees." It pertains to "General Employment Policies." On it are typed a list of rules with respect to the general categories of timecards, breaks, shift-trading, meals, and the lounge.

Respondent Love's provides a group health, major medical health, and life insurance program for its employees, as well as a participatory long term disability program for any employee who make more than $800. Respondent Kallmann provides only life insurance and only for approximately 10 employees who were chosen for coverage by Kallmann. Both Respondents use Walter Kaye Insurance Agency which had an office in Los Angeles. However, it is one of the primary insurance brokers servicing the food service industry in the United States. Kallmann testified that he had become familiar with the firmly by virtue of the fact that his father had used it at the Fresno restaurant of Respondent Love's. Whereas Respondent Love's and the restaurants that it operates in California bank at Security Pacific National Bank, Respondent Kallman, though it obtained its initial loan from the Fresno branch of that bank, maintains its commercial bank account at Crocker National Bank because of the proximity of its Hayward branch location to that of the Hesperian Boulevard restaurant.

Respondent Love's wage rates are determined by a committee which normally meets on a quarterly basis and sets ranges, subject to Mesker's approval, within which individual restaurant managers can set the specific rates for particular employees. This process, testified Mesker, has no application to Respondent Kallmann which, both he and Kallmann testified, sets its own wage rates for employees at the Hayward branch. Employees at Respondent Love's restaurants receive 2 weeks' paid vacation at the end of 1 year of employment, 3 week's paid vacation after 5 years of employment, and 4 week's paid vacation after 5 years of employment. It is Respondent Kallmann's intent to provide 1 weeks' vacation after 1 year of employment, 2 weeks' vacation after 2 years employment, and 3 weeks' vacation after 5 years employment. Kallmann testified that it had been his decision to establish this vacation policy for Respondent Kallmann.

With respect to meals for employees at the Hayward restaurant, Respondent Kallmann allows employees to purchase them at half-price for all items, save steak and shrimp, under a policy established by Kallmann. Respondent Love's policy was set by Mesker and under that policy all employees, except cooks, pay full menu price for food consumed in company-operated restaurants. Grievances at Respondent Kallmann are the responsibility of Kallmann, as manager, and, similarly, at Respondent Love's restaurants, they are ultimately the responsibility of the manager.

With regard to hours of operation, Mesker testified that Respondent Kallmann must stay open 7 days a week, except for Thanksgiving and Christmas Day, from 11 a.m. until 11 p.m., though on Friday and Saturday nights it must remain open until midnight. According to Mesker, those hours can be adjusted, either extending or reducing them, to account for local business conditions. However, Mesker agreed that he did not believe that those hours of operation were included as a specific term of the franchise agreement with Respondent Kallmann. That is the fact. Moreover, Kallmann testified that when Respondent Kallmann had taken over the Hayward restaurant, there had been a sign on the door specifying the hours of operation as 11 a.m. to 10 p.m., but that he had taken it off, had extended the hours to 11 p.m., and then later had changed the closing time back to 10 p.m., all without seeking Respondent Love's approval.

There is no evidence that any interchange or temporary transfers of employees have occurred between Respondent Kallmann's restaurant and other restaurants operated by Respondent Love's franchisees or Respondent Love's directly. Although a few employees who formerly worked at other restaurants operated by Respondent Love's have worked for Respondent Kallmann, the record disclosed that these were employees with whom Kallmann had been familiar by virtue of his past association with Respondent Love's and that, based on that familiarity, he had chosen to hire them. There is no evidence that Respondent Love's has ever participated in such decisions or that it has ever notified Respondent Kallmann of the availability of employees for hire.

Although Respondent Kallmann must sell all items listed on Respondent Love's menu, it has considerable discretion as to the prices that may be charged for these items. Thus, Respondent Love's has established three sets of prices for its menus and Respondent Kallmann is free to select whichever of these price ranges it wishes to charge. More significantly, it may disregard these sets of prices altogether and set its own prices for the items listed on the menus. Further, while Respondent Kallmann may purchase these menus from Respondent Love's, it is also free to purchase them from any printer so long as the format is consistent with that of Respondent Love's restaurants. Thus, in being able to purchase menus from any printer, Respondent Kallmann can set prices of which Respondent Love's has no knowledge.

[63] The instructions contained on one of these documents concerns the opening and closing duties of the hostess (e.g., "Turn on light and music," "Try and have everything clean before you leave!"). None of these matters are listed in either the operating manual or the craft book for hostesses. The second document lists the sidework duties of waitresses upon closing (e.g., "Make sure everything is wiped clean" and "Clean ice tea machine"). Again, none of these matters are in the operating manual or waitresses' craft book.

With regard to suppliers, Kallmann testified that he selected the purveyors and that Respondent Love's did not require that Respondent Kallmann use any particular suppliers. Respondent Kallmann used many of the same suppliers as had been used when Respondent Love's had operated the Hayward restaurant. However, this appears to have resulted simply from the fact that it was these suppliers with whom Kallmann had become familiar during his past affiliation with Respondent Love's. There is no evidence that Respondent Love's dictated his choice of suppliers. Further, although Respondent Kallmann must carry certain products bearing Respondent Love's label, Kallmann testified that he was free to purchase them from suppliers of his choice.

Mesker testified that managers at restaurants operated directly by Respondent Love's must file a number of reports, e.g., daily bank deposit slips, weekly lists of invoices of vendors from whom products are purchased, and weekly managers' reports. Respondent Kallmann is not required to submit any of these reports to Respondent Love's. Instead, it need only submit weekly summary reports—showing the daily sales figures, subdivided into various categories, and the amounts to be paid to Respondent Love's for royalty, equipment lease, etc.—and, attached thereto, the daily sales reports, containing the daily sales figures in these categories, the register totals, and cash amounts paid. So far as the record discloses, Respondent Kallmann makes no report to Respondent Love's concerning labor costs. Moreover, while Respondent Love's employees are paid on a weekly basis, Respondent Kallmann pays its employees on a semimonthly basis, with its payroll, as well as other financial documents, being prepared with the aid of a certified public accountant in Hayward selected by Kallmann to perform such work.[64]

Analysis

A. *Introduction*

While there is a degree of overlap in the factual setting underlying the issues presented in the instant case, the issues, themselves, are susceptible of consideration in the following order. First, will the evidence establish that Respondent Love's closed the Hesperian Boulevard restaurant for reasons unlawful under the Act? Second, if not, did Respondent Love's observe the bargaining obligation imposed upon employers who close a facility where its employees are represented?

Third, if no violation occurred with respect to the closure, was Respondent Kallmann truly an independent employing entity or did Respondent Love's, regardless of its motive, retain so much control over Respondent Kallmann's operations that the latter has not been an employer within the meaning of Section 2(2) of the Act? Fourth, if Respondent Kallmann has been an employer within the meaning of Section 2(2) of the Act, was it nevertheless operated in reality as an *alter ego* of Respondent Love's? Fifth, if Respondent Kallmann has independent employer status and has not been an *alter ego*, did Respondent Love's, nonetheless, exercise sufficient control over the restaurant's operations to qualify as a joint employer of the employees working there on and after October 20? Sixth, if there has been no joint employer relation between Respondents, did Respondent Kallmann refuse to hire former employees of the Hayward restaurant for considerations unlawful under the Act and was it, therefore, a successor of Respondent Love's, obliged to continue recognizing the Union as the representative of the employees employed there?

Seventh, did the conduct of the Kallmann and Sebben during the early stages of the picketing violate Section 8(a)(1) of the Act? Finally, if Respondent Kallmann violated the Act in any manner, has the volume of its operations been of sufficient magnitude to warrant the assertion to jurisdiction over it based upon the Board's standard for asserting jurisdiction over retail operations.

Before turning to consideration of these issues, it is important to note that during the course of this proceeding, I felt that a number of witnesses abandoned any effort to accurately describe events as they had taken place and were, instead, making every effort to tailor their accounts of events to buttress the positions of the sides that they favored. Thus, while I felt that union representatives Martin and Branco, Vice President Mesker[65] and former employees Kruger, Pingree, and Hansen were attempting to testify honestly, I felt that other witnesses, to a greater or lesser extent, were not being completely candid, even though, in some cases, their testimonies were not contradicted. "A trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false. It is well settled that a witness' testimony may be contradicted by circumstances

[64] Although the franchise agreement provides for a 0.4 percent reduction in the royalty which Kallmann has to pay because he "elected not to avail himself of accounting services heretofore provided by the Franchisor," Mesker testified that this clause has not been revised since Respondent Love's ceased to provide such service to franchisees and that, in fact, Respondent Kallmann could not have elected to use Respondent Love's accounting service.

[65] Mesker was called initially as an adverse witness. While a review of the record discloses some testimony that appears at odds with other evidence presented by Respondents, it was my impression that he had not always fully comprehended what information was being sought from him while he was testifying as an adverse witness, with the result that some of his answers appeared to have been based upon his own impression of what was wanted, rather than, as shown by the arguments made, the information that was sought. Even for the ablest counsel, the technique of asking questions of an adverse witness is one which must be done carefully inasmuch as the witness is not familiar with counsel's technique of asking questions, counsel may have less than perfect knowledge of the facts about which the witness is testifying, and lack of familiarity frequently gives rise to misunderstandings. One example of such a misunderstanding by Mesker is described in footnote 29, *supra*. Seemingly, another example of this occurred when Mesker testified about the decision to close. Asked if Respondent Love's had *ever* wanted to terminate the contract with the Union, he replied "inasmuch as we ultimately reached a decision to close the restaurant which would result in the termination of the contract, yes." The question that elicited this response did not refer to a specific contract and two collective-bargaining agreements were referred to during the course of the hearing: the original one that had governed conditions at the restaurant for most of the time that it had operated and the successor agreement, negotiated during the summer. Though the General Counsel and the Charging Party both argue that Mesker was referring to the original contract, neither the question nor the answer so confined the matter. In any event, as discussed on page 59, *infra*, it is not the making of a decision that is the material issue, rather, it is the employer's openmindedness and willingness to bargain about that decision that is the significant issue in determining whether there has been a violation.

as well as by statements and that demeanor may be considered in such circumstances. [Footnote omitted.]" *Operative Plasterers' & Cement Masons' International Association, Local 394 (Burnham Brothers, Inc.)*, 207 NLRB 147 (1973). Of particular note in this regard were Porter and Turner.

Porter displayed eagerness to testify in a manner injurious to Respondents' position. As a result, his testimony collided with statements in his own pretrial affidavit with respect to significant matters. For example, even though his pretrial affidavit stated that he did not recall any management personnel having ever said that Respondent Love's was attempting to get rid of the Union, Porter testified that in August, then Assistant Manager Washer had commented that he (Washer) felt that the Union would go. This testimony was given in response to a question on cross-examination as to whether it were not true that no one in Respondent Love's management had even said anything about trying to get rid of the Union. The question was obviously designed to secure an answer favorable to Respondent Love's and it appeared equally obvious that Porter was attempting to avoid giving such an answer.

In an effort to explain the inconsistency, Porter claimed that he had promised Washer, a personal friend, not to repeat the remark so long as Washer was employed by Respondent Love's. The difficulty with this explanation is that there is no evidence that Washer's employment with Respondent Love's had survived that September closure of the Hayward restaurant. Indeed, it appears to have ended even prior to that time. Yet, Porter's affidavit had been taken in November. Accordingly, any promise conditioned on Washer's employment status with Respondent Love's would not have been effective at the time that Porter had given his affidavit. Nor did Porter mention Washer's purported comment during direct examination, although counsel for the General Counsel's examination was painstakingly thorough and designed to elicit every instance where comments had been made to Porter regarding the Union.

The asserted Washer comment was not the only illustration of Porter's tendency to embellish his testimony in a manner that proved to be inconsistent with his affidavit. A similar inconsistency developed when Porter claimed that during his interview with Kallmann, he had raised the subject of the Union, assuring Kallmann that despite past problems, the restaurant could be successfully operated with a Union. In his affidavit, Porter had stated that, during the interview, "the Union was not mentioned at all." To explain this inconsistency, Porter maintained that the Board agent, taking his affidavit, had only asked if Kallmann had said anything about the Union during the interview. Though an ingenious explanation, it was at odds with both Porter's demeanor at the hearing and with his own account of how he had reacted during the events which occurred in the instant matter. For, Porter was not a reticent individual, reluctant to voice his opinions and positions. To the contrary, he appeared to be quite outspoken, as his January run-in with Choy demonstrates. Thus, it hardly seems likely that he would have answered a question concerning whether Kallmann had mentioned the Union to him without having volunteered that he had raised the topic during the interview, had he done so.

Moreover, he claimed that Kallmann had promised to call him when Respondent Kallmann had reached a decision as to whether or not to hire him, even though Porter's own pretrial affidavit recites that Kallmann's promise had been to contact Porter only were he to be hired. While a seemingly minor matter, the theory underlying the complaint is that Respondents had been acting with stealth and cunning to avoid continued representation of the restaurant's employees. One element of this theory is the refusal to rehire any of the employees who had worked there prior to the closure. In describing this incident, Porter appeared to be attempting to augment this theory by testifying in a manner that would give rise to the normal suspicion generated by a promise made and broken without apparent explanation. In so doing, he overlooked the fact that at the time, Kallmann had been attempting to handle all of the matters involved in opening for business. Having interviewed over 100 applicants for approximately 30 positions, it hardly makes sense that Kallmann would gratitiously be volunteering to take time to notify those who were not to be hired of their rejections.

While Porter's testimony tended to dwell on comments purportedly made by and to Respondent's officials, Turner's testimony took a somewhat different tack. She appeared to be concentrating on developing facts sufficient to establish that Respondent Love's had reason to be hostile toward the Union and did, in fact, habor such hostility. In her haste to achieve this apparent end, she testified in a manner contrary both to the accounts of other witnesses called by the General Counsel and to the objective realities of the very situations which she described. An example of the former was her claim that she had been present when Martin and Branco had met with Choy. Neither Martin nor Branco supported her testimony in that respect.

Her testimony that she had been present during that meeting, appeared to have been designed to create a vehicle for testifying adversely to Respondent Love's position. Which, indeed, Turner did do with regard to that meeting. For, she claimed that during the meeting, Choy had denied ever having complained about employees going to the Union with their problems and had denied ever having said that he wanted or intended to replace the existing employee complement with one of his own choosing. This was not corroborated by Martin and Branco. To the contrary, Martin testified that Choy had acknowledged having made those remarks and, in effect, had agreed to cease making them.[66]

Further, with respect to the one specific incident involving another employee which Turner did describe, that employee—dishwasher Gutfield—was never called to corroborate Turner's account of what Choy had assertedly said. It is, of course, accurate that corroboration, when possible, is not a condition precedent to crediting the testimony of a

[66] While it might be argued that Turner may have been referring to a separate meeting, she did testify that Martin and Branco had been in attendance at the meeting during which Choy had purportedly denied having made these comments. Neither Branco nor Martin described a second meeting with Choy, though Martin was called upon to testify in detail regarding his contacts with Respondent Love's during 1977. Moreover, it is unlikely that Choy would willingly acknowledge during one meeting having made comments that he would deny having made during another meeting.

witness. See *C. P. & W. Printing Ink Company, Inc.*, 238 NLRB 1483 (1978). Yet, the unexplained failure to produce a corroborating witness does allow an inference to be drawn that if called, that witness would not have supported the uncorroborated testimony given. See, e.g., *Golden State Bottling Company, Inc., formerly Pepsi-Cola Bottling Company of Sacremento* v. *N.L.R.B.*, 414 U.S. 168, 174 (1973), and cases cited therein.

In another area, most of the employees described what officials of Respondent Love's had been doing following the October 20 restaurant reopening in a manner that was not inconsistent with Respondents' position that they had been training Respondent Kallmann's newly hired employees. Only Turner and Porter went beyond this. In the most extreme testimony, given in the very broadest sweep, they described Respondent Love's officials as having performed virtually every act that employees could perform in the restaurant. Not only was their testimony in this respect uncorroborated, but it intended to be contradicted by Pingree's testimony that following the first week of picketing, Respondent Kallmann had "pulled the drapes" of the restaurant, with the result that the employees could not see what Ramsey and the other officials of Respondent Love's had been doing.

Had Respondents been attempting to operate as a disguised continuance of Respondent Love's, as the General Counsel and Union alleged, it hardly seems likely that they would have openly employed Respondent Love's supervisors, known to the employees, to perform the very work that those employees had been performing prior to the closure. Indeed, wholly apart from that consideration, it seems most unlikely that highly paid supervisors would be employed to perform work for which there were numerous applications on file with Respondent Kallmann. Certainly Respondents, even if their motives had been impure, would have gained nothing by so employing Respondent Love's supervisors. Conversely, by making it appear that Respondent Love's, through its supervisors, had been continuing to operate the restaurant, Porter and Turner could support the allegation that there had been a violation of the Act.

Both Porter and Turner described Ramsey as having been upset on the day of the closure. In so doing, they appeared to be attempting to create the impression that Ramsey had been reacting to evident wrongful conduct by Respondent Love's and had become emotionally distraught. Yet, this simply makes no sense Ramsey had not lost her job. There is no indication in the record that her relationship with the employees had been one of sufficient closeness that she would have become emotional as a result of any wrong directed at them.

Moreover, there is a singular absence of corroboration for Porter and Turner's account that Ramsey had been upset that day. Porter described Ramsey as having been "sniveling" when he had spoken with her on the telephone that morning. Both he and Turner described her as having been crying and upset when they had been admitted to the restaurant that afternoon to obtain their checks. Yet, seemingly other employees would have witnessed Ramsey's tears that day, had they been shed. But, none so testified, even though others did describe what had occurred on September 16 and even though four of them referred specifically to Ramsey during their descriptions of the events of that day. In short, Turner and Porter's insertion of a tearful Ramsey into the events of September 26 appears to be no more than an added effort to shore the case for a violation by creating the impression that Ramsey had been upset by the wrongdoing of Respondent Love's.

In sum, I do not credit either Porter or Turner. Nor do I credit the testiomony of Tara Blaylock, who, "like Hairbreadth Harry in a Drury Lane melodrama,"[67] suddenly appeared as the General Counsel's final rebuttal witness to provide testimony in several new areas that lent significant support to the General Counsel's *prima facie* case. For example, she testified that during her employment interview, Kallmann, suddenly and gratuitously, had injected a description of the restaurant's background which, conveniently, had included the assertion that while it had been unionized, this would no longer be the case "since he is hiring new people, he is going to go non-Union." Other witnesses also described what had been said to them during their interviews with Kallmann. Not one of them described a similar comment having been made by Kallmann. So far as the record discloses, there was nothing so unique about Blaylock's interview that it would have been natural or plausible for Kallmann to have directed such a remark to her. To the contrary, it seems most likely that if, as is contended by the General Counsel and Union, Respondents had been attempting surreptitiously to continue operating the restaurant on a nonunion basis, as a disguised continuance of Respondent Love's, Kallmann would so willingly have volunteered such damaging information, for no apparent reason, to a total stranger whose union sympathies, so far as the record discloses, had been unknown to him at the time.

A similar consideration governs an assessment of Blaylock's uncorroborated testimony that during the first 2 days of the training session, various officials of both Respondents had made comments to the effect that the employees had been hired as part of an effort to switch the status of the restaurant from one where the employees were represented by the Union to one where the employees would not be represented. It appeared that in advancing this testimony, Blaylock, like Porter and Turner, was making an effort to construct a case against Respondents by creating conversations purely out of whole cloth. For, accepting *arguendo* the contention that the entire transaction between Respondents was no more than a carefully crafted plan designed to exclude the Union as the representative of the restaurant's employees, it hardly makes sense for Respondents to admit as much publically in front of a large group of potential witnesses, all of whom were relative strangers and whose union sympathies were unknown to Respondents. Moreover, Blaylock's own description of the seriatim admissions made by the various officals who addressed the assembled employees seemed highly artificial and contrived, although, of course, it lends good support for establishing an unfair labor practice, if credited.[68]

[67] *Sherman Distributing Company, Inc. d/b/a Schroeder Distributing Company*, 171 NLRB 1515, 1526 (1968).

[68] So obious was the artificiality of Blaylock's testimony in this regard that even she appeared to preceive as much and she atempted to supply an explanation for why Ramsey would have repeated what Kallmann and Kyle pur-

(Continued)

Aside from the absence of any support for Blaylock's descriptions of what had been said to the newly hired employees during the training session, Clotilde Roy's testimony concerning her conversation with Ramsey tends to refute Blaylock's account that following that conversation with Roy, Ramsey had rejoined the group and had announced that she had refused to permit Roy to have her job back "because this wasn't a Union shop anymore, it was nonunion, they had hired all new employees." Roy's testimony, of course, was to the contrary. She testified that Ramsey had said that Respondent Kallmann was taking applications and had invited her to speak with the new manager if she so desired.

Of course, it is possible that Ramsey had said one thing to Roy, to avert Roy's suspicion, and then had said the converse to the newly hired employees. Yet, this is a somewhat inconsistent scenario. For, if Respondents had intended to avoid hiring the restaurant's former employees, it seems likely that Ramsey would have immediately discouraged Roy from even filing an application. Indeed, a pretextuous excuse was readily at hand, since the newly hired complement of employees was then being trained. It would have been a simple matter for Ramsey to have merely pointed out to Roy that all positions were taken. On the other hand, if her comments to Roy had been designed to avoid generating suspicion and to construct a plausible defense to not hiring her, by simply permitting her to apply and then, as happened, not hiring her, it hardly seems likely that Ramsey would them promptly destroy the basis for this somewhat sophisticated defense by immediately admitting the unlawful underlying motive to a group of relative strangers. See, e.g., *Los Angeles Marine Hardware Co., Division of Mission Marine Associates, Inc., et al.*, 235 NLRB 720, 733-734 (1978).

Therefore, as was the case with Turner and Porter, I do not credit Blaylock. Neither do I feel that Wadsworth and Logan were fully candid regarding Kallmann's remarks during their interviews. Wadsworth made this obvious by his reluctance in admitting that Kallmann had offered him a position, that of busboy,[69] and that he had rejected the offer. Moreover, inasmuch as Logan had been interviewed on the same occasion as Wadsworth, the latter's concession regarding Kallmann's offer casts doubt on Logan's testimony that Kallmann had refused to offer him a position. Surely, since Logan and Wadsworth had come to the restaurant together and had applied for the same positions on their applications, it seems unlikely that, for reasons unlawful under the Act, Kallmann would have been willing to offer a position as busboy to one, but not the other. Indeed, Logan omitted any mention of a possible position as busboy, claiming, instead, that Kallmann had mentioned only a possible dishwasher's position. In the final analysis, it appears that Logan, like Wadsworth, had been simply unwilling to accept employment as a busboy, but, unlike Wadsworth, had not been willing to admit that fact.

Similarly, neither Dawson nor Totman were impressive when each testified that she had been hired by Kyle. Nor does the content of their testimonies conform to other circumstances in this proceeding. For, had Dawson been hired when she gave her application to Kyle on October 13, she seemingly would have been included in the group trained on October 17-19. Yet, she did not testify that she had participated in this training. Nor was her timecard among those selected by the General Counsel from among those obtained as a result of his subpoena for the timecards of all employees included in the initial employee complement. Consequently, there is a very real basis for doubt that Dawson had even been hired prior to the opening of the restaurant by Respondent Kallmann.

Of course, it could be that she had been notified of her hire on a date later than October 13. It could even be that notification of her hire had been given to her by Kyle. If so, this would not be inconsistent with Kallmann's testimony that he had been the one to select the employees who were to be hired by Respondent Kallmann. For, if, as the General Counsel argues, it can be inferred by virtue of Kyle's notification that he had been the one to select Dawson for employment, it is equally inferrable that Kallmann had made the selection and Kyle had served merely as the conduit for its communication to Dawson.

In a like vein, though Totman did not testify about the date on which she had been interviewd by Kyle, her application bears the date October 17. Presumably, therefore, it had been on that date that she had been interviewed. If so, however, she should have been a participant in the training session as were other applicants interviewed and hired that day. Yet, a timecard showing that she had been in attendance was not handed to Kallmann and, further, Totman did not claim that she had attended the training session. Moreover, Kallmann's account of how Totman came to hire was uncontroverted. Thus, he testified that when Blaylock had refused to cross the picket line to work, he had needed a replacement and Totman had been the applicant hired to replace Blaylock.

Consequently, I do not credit the accounts of Dawson and Totman regarding how they came to be hired by Respondent Kallmann and I find that the evidence will not support a finding that it had been Kyle who had been the one to hire them.

Nor do I credit Bishop's account that 4 days before the restaurant had opened, he had filed an application with an individual who had identified himself as the manager and who, Bishop testified, he had later learned was Sawyer. In his pretrial affidavit, Bishop made no mention of that individual having identified himself as the manager, but merely stated that "I went up to the manager, he was also in the restaurant the day I picked up my check." More significantly, aside from Bishop's testimony, it was undisputed that Sawyer had not even arrived at the Hayward restaurant until the Saturday after Respondent Kallmann had

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portedly had already said by testifying, "Ken and Karl weren't around right then so I guess she didn't know that they had already told us." Of course, Ramsey is the supervisor who, were Turner and Porter to be believed, had been reduced to tears by Respondent Love's closure of the restaurant. Yet, Blaylock portrays her as, shortly thereafter, having joined the antiunion bandwagon by admonishing employees not to become involved with the Union since Respondents had a master plan to preclude it from representing employees at the restaurant.

[69] Inasmuch as the bargaining unit had included busboys, as well as cooks and dishwashers, it would make no difference in the General Counsel's theory what position Wadsworth had been offered. The fact that he had been offered a bargaining unit position at Respondent Kallmann weakens the argument that the latter had been unwilling to hire any of the former employees of the restaurant.

opened, when he had replaced Kyle as head of the training team. In fact, though the affidavit had been taken during an investigation begun after Sawyer had been at the restaurant, Bishop still did not identify Sawyer by name in the affidavit. In short, Bishop's testimony appears to be no more than another effort by a witness to link the two Respondents by embellishing descriptions of events.

In addition to the foregoing witnesses who appeared on behalf of the General Counsel, I do not credit Kallmann's testimony with respect to his May meeting with Mesker and with regard to the manner in which employees were hired to staff Respondent Kallmann's initially. When testifying concerning the latter subject, Kallmann appeared nervous and, in both areas, his testimony was at odds with other evidence. Thus, while he claimed to have been the only official to have interviewed applicants, his own assistant manager controverted that testimony by testifying that he, also, had interviewed applicants. Moreover, it is clear that, at least with regard to Dawson, Kallmann had not been reluctant to hire an applicant without having personally interviewed that person. Moreover, Kallmann gave testimony at odds with his affidavit as shown, for example, when he recited a reason for not hiring Wadsworth and Logan that was inconsistent with his testimony that there had been no openings for them at the time that they had applied.

B. *The Motivation for Respondent Love's Closure of the Restaurant*

The General Counsel and the Union contend that in closing the restaurant on September 21 and in terminating all of the employees then employed there, Respondent Love's acted to dispose of the Union as the representative of the employees working there. Obviously, the issue presented is one where "the pivotal factor is motive." *N.L.R.B.* v. *Lipman Brothers, Inc.*, 355 F.2d 15, 20 (2d Cir. 1966). In assessing the evidence presented in the instant case, several factors emerge which operate to negate the contention that Respondent Love's acted on the basis of a motivation unlawful under the Act.

First, the relationship between Respondent Love's and the Union was not of recent origin. It had existed for almost 4 years prior to the closure, and, so far as the record discloses, was one which had been voluntarily entered into by Respondent Love's. Consequently, it can hardly be said that Respondent Love's had a history of hostility toward the principles of collective bargaining.

Second, while there is evidence that disputes had arisen between the Union and Respondent Love's, particularly during the year prior to the closure, there is no evidence that Respondent Love's had been opposed to meeting with the Union and to attempting to iron out the differences which had arisen. This was amply illustrated by Martin's description of his meeting with Chubb, for as Martin reviewed the matters that had given rise to employee complaints, Chubb had agreed to attempt to have them corrected. Neither at this meeting nor at the earlier meeting with Choy did Martin describe any acrimony that would form the basis for inferring that Respondent Love's had been upset or hostile toward the Union because it had chosen to meet and discuss these matters.

Third, many of the substantive matters listed by Martin and Branco as having led to employee complaints were not the types of items that would lead an employer to become hostile toward a bargaining representative. The majority of them involved operational matters that affected not only the employees, but were hurtful to Respondent Love's business as well. Seemingly by correcting these matters, Respondent Love's could improve both its operations and, concomitantly, its partronage. Such a result could hardly be one that Respondent Love's would find distressing. Moreover, with regard to other matters, it hardly seems likely that Respondent Love's would become so upset with the Union that it would decide to go to the trouble of closing the restaurant simply, for example, because there had been disagreements over whether Turner would wear a skirt when she tended bar, not because there had been a dispute over the duties that bartenders would perform during the year prior to the closure. In short, these were not matters of major moment.

Fourth, there was testimony concerning remarks made by supervisors to the effect that the restaurant might be closed because of high labor costs arising from the collective-bargaining agreement with the Union.[70] Yet, in the final analysis, that was the very reason that Respondent Love's did claim that it had closed the restaurant. Such a reason for closure is not unlawful. It cannot be found that "because a condition of employment imposed by a collective-bargaining agreement was the economic 'straw' which 'tipped the scale' in the decision to close, Respondents' motive for closing was to defeat employees' statutory bargaining rights and, therefore, was unlawful." *McLoughlin Manufacturing Corporation, et al.*, 164 NLRB 140, 141 (1967), enfd. as modified, 463 F.2d 907 (D.C. Cir. 1972); see also, *Los Angeles Marine Hardware Co., supra* at 733.

There was also testimony that certain supervisors had said that Respondent Love's intended to get out of the Union and that Respondent Love's was having problems with the Union which would lead it to close. For example, Turner testified that in 1976, then Assistant Manager Garrison had said that Respondent Love's intended to get out of the Union because the restaurant never made any money due to the union wage rates, and, also, that in March or April, then Assistant Manager Gordon had said that Respondent Love's was going to try to get out of the Union when the collective-bargaining agreement expired in August. Clotilde and John Roy described various remarks by Choy. Thus, Clotilde Roy testified that, in the spring, Choy had said that the restaurant might close by August and, asked for a reason by her, Choy had replied that it was because of "all the problems we are having with the Union

[70] Both the General Counsel and the Union assail Respondent Love's for having sent a letter to the Union on May 25, providing notification of intent to terminate the then effective collective-bargaining agreement, on the ground that since the agreement did not expire until 1978, Respondent Love's notification was untimely. Such an argument plays somewhat loosely with the facts. For, the agreement was associationwide and, while there is very little testimony regarding how it came to be entirely renegotiated in 1977, there is no evidence that Respondent Love's had been responsible for this turn of events.

and besides that the Restaurant is not making enough money to pay the high wages that the Union has." He also said, according to Roy, that Respondent Love's would close in August because that was when it would have to sign the new contract and he did not think that it would do so because of the high wages.

Both Roys described a dinner conversation in which Choy had assertedly stated reasons for the closure. However, aside from the discrepancy between the Roys as to when and where this had occurred, Clotilde Roy testified that Choy had attributed the closure both to high wage rates and the "problems" between Respondent Love's and the Union occasioned by the employees going to the Union for everything, while John Roy testified that Choy had said only that the closure would be because of high wage rates. Finally, of course, there was Naylor's comment to Kruger that Respondent Love's would close the Walnut Creek restaurant before letting it be unionized and was thinking of closing the Hayward restaurant.

To find that terminations are unlawful under the Act, it need not be shown that the unlawful motive had been the sole cause of those terminations. Thus, if, in fact, Respondent Love's terminated its restaurant operations at Hayward because of problems with the Union or in an effort to get rid of the Union, in addition to the economic reason of high wage levels arising from the collective-bargaining agreement, then there would be a basis for finding a violation of Section 8(a)(3) and (1) of the Act. But, see, *Hambre Hombre Enterprises, Inc., d/b/a Panchito's* v. *N.L.R.B.*, 581 F.2d 204, 207, fn. 4 (9th Cir. 1978). Yet, certain factors are present which belie the conclusion that this testimony of the former employees should be relied upon in appraising Respondent Love's motivation for the closure. For, it was the less than credible Turner who had attributed the foregoing closure statements to Garrison and Gordon. Similarly, on the one occasion when it was possible to ascertain if Clotilde Roy's testimony pertaining to Choy's remarks could be corroborated, it was not. While she claimed that, at the dinner conversation, Choy had attributed the closure both to high wage rates and to the Union, her husband testified that Choy had listed only the wage rates as the reason for the closure.

Furthermore, the substance of these statements attributed to the supervisors is at odds with objective considerations present in Respondent Love's relationship with the Union. As found above, Respondent Love's had a substantial bargaining history with the Union. There is no evidence of "problems" between the two that would cause Respondent Love's to harbor that degree of hostility reasonably warranting the inference that it would go to the trouble and cost of closing the restaurant and, thereafter, operating it in a disguised manner.

Moreover, as discussed in the following subsection, Respondent Love's did attempt to negotiate a reduction in wage rates so that its operation of the Hayward restaurant, and the represented status of the employees working there, could continue. Indeed, even when it proved impossible to secure a wage reduction from the Union and after the decision to close had been made, it is undisputed that Respondent Love's, through Chubb, had approached the Union about the possibility of avoiding the layoffs of employees working there only to be rebuffed again by Medeiros. Such overtures are hardly the hallmark of an employer anxious to clandestinely dispose permanently of the employees and of their representative.

I credit Krugger's account of Naylor's comment at Walnut Creek and it is, of course, possible that Choy did make the comments attributed to him by Clotilde Roy. Moreover, it is undisputed that in July 1978, Choy had told John Roy that Respondent Love's attorneys had devised the franchising scheme as a device for Respondent Love's to rid itself of the Union, which had been viewed as a problem. Yet, it is clear that of all the managers and assistant managers who had been assigned to the Hayward restaurant, Choy had been the one who had harbored an intense dislike of the Union because the employees took their complaints to it. Indeed, prior to his first meeting with Martin and Branco, the object of some of these complaints had been comments made by Choy. Choy was characterized as "a small man" and it is not unlikely that, given his hostility toward the employees for their efforts to obtain the Union's protection, he had simply used the closure as a touchstone for, in effect, taunting them by saying that their terminations had been the result of their own efforts to attain the protection of their bargaining representative.

In any event, the decision to close the restaurant had been one made at a very high level of management hierarchy. There is no evidence that the reasons for closing the Hayward restaurant had been communicated to or discussed with the assistant managers, managers, and area operations coordinators of Respondent Love's. To the contrary, the comments of Dobson, the last manager at Hayward prior to the closure, to Roy in August—to the effect that the rumors of closure could not be true because, argued Dobson to Roy, Respondent Love's had recently spent $2,000 to repair things and closure would cost money—tends to indicate that lower supervision had not been made privy to the decisions being made by Mesker. Consequently, their sources of information concerning the possibility of closure and the reasons therefor would have been no better than the rumors which had served as indicators of closing to the employees. Indeed, had Ramsey been crying on September 21, as claimed by Porter and Turner, it would only confirm the conclusion that these lower level supervisors had been caught unaware when the closure decision had been announced.

Further, it is significant that most of the comments attributed to Choy were made made after he had ceased being employed by Respondent Love's. Accordingly, there is even less basis for concluding that he had been speaking with knowledge of Respondent Love's actual motive at the time that he had dinner with the Roys or, in 1978, when he had described to John Roy how the closure and franchising of the Hayward restaurant had been a device employed by Respondent Love's attorneys to be shed of the Union.

Recently, the Board found that an agent's statements to employees regarding the relationship between the filing of a representation petition and the greater scrutiny accorded employees' work, while violative of Section 8(a)(1) of the Act, had been untrue and the reviews of work performance had not resulted from considerations unlawful under the Act, notwithstanding the agent's comments to the contrary.

Joint Industry Board of the Electrical Industry and Pension Committee, et al., 238 NLRB 1398, slip op at 6, fn. 4 (1978). The situation in the instant case appears to be similar, for a preponderance of the evidence does not show that dissatisfaction with the Union, in general, or with the particular complaints which the Union had brought to Respondent Love's attention, in particular, had been a factor leading to the closure decision.

The distinction between closing because of economic considerations arising from a collective-bargaining agreement and closing because of dissatisfaction with the bargaining agent is not one easily drawn, either when making or when listening to an explanation for a closure. Thus, it would not be surprising for Naylor and Choy—or for any other assistant manager, manager, or area operations coordinator—to confuse the two concepts in whatever they heard from higher management or when trying to explain the reason for the closure to employees. Nor would it be surprising for employees such as Kruger and Roy to confuse the two concepts in what they heard from Naylor and Choy, respectively. In any event, the other evidence in this matter does not support the truth of the remarks attributed to Naylor and Choy. Nor is there evidence that Mesker or any other official of Respondent Love's had been aware of their "mouthings." See *American Clay Forming Plant, Electro Division, Ferro Corporation*, 238 NLRB 1052, (1978). Therefore, I place no reliance upon these comments in resolving the issue of the reason for the closure of the Hayward restaurant.

Both the General Counsel and the Union point out in the briefs filed on their behalf that no documentary evidence was presented to support Respondent Love's contention that the Hayward restaurant had been financially unsuccessful prior to its closure. It is, of course, accurate, as they argue, that a failure to produce such evidence does tend to give rise to an inference that if produced, it would have been adverse to the party who controlled and failed to produce it. See e.g., *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 410 (1977), enfd. by memorandum opinion 582 F.2d 1289 (9th Cir. 1978). On the other hand, where, as here, a party has the burden of producing evidence of intent, his opponent's failure to prove the contrary may not be substituted as satisfaction of that burden. "The burden of establishing every element of a violation under the Act is on the General Counsel." *Western Tug and Barge Corporation*, 207 NLRB 163, 1 (1973). "The employer does not have the burden of disproving the existence of unlawful motivation . . . ." *Federal-Mogul Corporation* v. *N.L.R.B.*, 566 F.2d 1245, 1259 (5th Cir. 1978).

As found above, a preponderance of the evidence does not support the allegation that the closure had been motivated by other than economic considerations. Consequently, the absence of documentation to support the defense is not material here, for "until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to [decision] trusting solely to the weakness of the first party's evidence." *2 Wigmore on Evidence*, sec. 90, p. 179 (3d ed. 1960). Where an employer has closed a facility for assertedly economic reasons, the fact that less than comprehensive evidence is produced to support that defense does not mandate the conclusion that it is baseless nor does it *mandate* the conclusion that the motivation for the closure was one unlawful under the Act. See *Lori-Ann of Miami, Inc., et al.*, 137 NLRB 1099, 1109-1110 (1962); *Los Angeles Marine Hardware Co., supra*, 235 NLRB 720, 732, 733 (1978).

In the instant case, Mesker testified regarding the economic straits in which Repondent Love's had found itself at the Hayward restaurant and, further, testified that these difficulties had been such that Respondent Love's felt closure to be warranted, absent relief from the high labor costs which it was incurring under the terms of the collective-bargaining agreement. Prior to the hearing, the General Counsel had issued a *subpoena duces tecum* requiring Respondent Love's to produce certain documents, which, in total, included virtually, if not, all of Respondent Love's financial records pertaining to the Hayward restaurant from January 1976 until its closure.[71] As the record discloses, not only was Respondent Love's directed to produce the documentation, but seemingly it did so and a recess was taken for a time which the General Counsel felt adequate to review the material presented. Consequently, the financial documentation regarding the Hayward restaurant's financial status since January 1976 was equally available to the General Counsel who, nevertheless, did not challenge Mesker's testimony concerning the economic difficulties at that location.[72]

Where evidence is available to both parties to a lawsuit, some courts have said that *no* inference may be drawn against either side and others have held that "the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances." *2 Wigmore, supra*, sec. 288, p. 171. Under either test, however, it cannot be said that the General Counsel here is in the same position to argue the inference against Respondents as would be the case had Respondent Love's refused to produce the documentation.[73]

[71] See attachment to G.C. Exh. 1(u).

[72] There are two exhibits containing financial information pertaining to the preclosure finances of the Hayward restaurant. One is a set of weekly reports, listing financial information at Hayward for the period December 29, 1975, through September 25, 1977. These were offered for the purpose of adding the sales figures to compute the gross volume of business at Hayward prior to the closure. Accordingly, no evidence was sought or elicited regarding other facets of these documents, such as the specific meaning of other figures and the manner in which profits and losses were computed on the basis of these figures. Indeed, it is not even clear whether these forms contain all of the cost items needed to compute profits and losses. The second exhibit is the summary comparative cost breakdown which Chubb showed to Medeiros on May 12. It was received solely as having been part of conversation (transaction) which had taken place between these two representatives on that date. It was specifically pointed out, in response to objections, that it was not being received as substantive evidence of the matters contained therein. Again, no effort was made to analyze the figures shown on that document. Yet, arguments based on analyses of the substance of both exhibits appear in the briefs filed on behalf of the General Counsel and the Union. In view of the purposes for which these exhibits were received and in light of the very sparse explanations of their contents, based on those purposes, I am unable to derive any meaningful conclusions from the content of these exhibits. Had it been made known at the hearing that their contents were to be put in issue, more comprehensive explanations could have been elicited, thereby providing some basis for conclusions more firmly grounded in evidence and based upon other than speculation as to how they should be analyzed.

[73] This is not simply an abstract matter, involving nothing more than a theoretical allocation of who must do what to reach a particular result. The issue of whether the economics of a situation truly warrant a particular

(Continued)

In any event, I find that a preponderance of the evidence does not establish that Respondent Love's was motivated by an unlawful consideration when it made the decision to close the Hayward restaurant.

C. *The Bargaining Obligation Owed to the Union by Respondent Love's*

Both the General Counsel and the Union assail the notification afforded by Respondent Love's to the Union regarding the closure and the manner in which Respondent Love's attempted to bargain concerning that subject. Yet, a review of the facts leads to the conclusion that Respondent Love's acted reasonably with respect to the bargaining obligation owed to the Union.

If "a union has sufficiently clear and timely notice of an employer's plan to relocate, close or subcontract and thereafter makes no protest or effort to bargain about the plan, it waives its rights to complain that the employer acted in violation of Section 8(a)(5) and (1)." *International Ladies' Garment Workers Union, AFL-CIO* v. *N.L.R.B.*, 463 F.2d 907, 918 (D.C. Cir. 1972). Here, Chubb met with Medeiros on May 12, alerted him of Respondent Love's financial difficulties with its labor costs and of the possibility of closure without relief, and sought relief. Medeiros admittedly turned a deaf ear. On June 1, Chubb again broached Medeiros with a renewal of that message and plea for relief. Again, Medeiros rebuffed Respondent Love's overatures for negotiation of the matter. Further, it is undisputed that in mid-July, Chubb again met with Medeiros, at which time he notified Medeiros that a final decision to close had been reached[74] and he sought suggestions to avoid having to lay off the employees then working at the restaurant. Rather than negotiate with regard to the effects of the closure on the employees, Medeiros simply dismissed further consideration of the issue, saying that he would rather have the restaurant closed[75] and admonishing Chubb to be certain that the employees received the full wages and benefits to which they were entitled.

In sum, Respondent Love's provided full notice to the Union of its financial situation and of its intentions if that situation were not corrected. It offered the Union adequate opportunity to negotiate a solution to the problem. When the Union rejected the opportunity to negotiate about the economic problem, Respondent Love's then notified it of its decision to close and attempted to negotiate concerning the effects of that closure on the employees. In these circumstances, there is simply no basis for finding that Respondent Love's acted to foreclose bargaining about either the decision or its effects on the employees. See *The Lange Company, a Division of Garcia Corporation*, 222 NLRB 558, 562-564 (1976); *Los Angeles Marine Hardware Co., supra*, 235 NLRB 720, 732-733 (1978).

Yet, several arguments are advanced in support of the contention that Respondent Love's should have done more to satisfy the bargaining obligation imposed upon it by the Act. First, it is urged that Respondent Love's should have emobodied its notification to the Union of financial difficulties and of the possibility of closure in a written document because Medeiros was aware that Chubb and a history of pleading financial distress as a tool for extracting unwarranted concessions from labor organizations. Whether the latter is accurate or not is hardly the point, for there are means available under the Act to check such spurious contentions. See, e.g., *N.L.R.B.* v. *Western Wirebound Box Co.*, 356 F.2d 88 (9th Cir. 1966). Moreover, Chubb did provide Medeiros with the cost comparison document, signed by Fackrell. While this did not spell out every detail of Respondent Love's financial plight and did not state *in haec verba* that the restaurant would be closed absent relief, it certainly should have served as notice to Medeiros that something other than Chubb's individual bargaining technique was involved. Indeed, when the restaurant was closed, the Union showed no surprise nor did it protest the fact that it had closed. Branco's only complaints concerned the shortness of notice to the employees and the amounts that they were paid. No charge was filed until after the restaurant was opened by Respondent Kallmann.

Second, it is argued that Respondent Love's failed to prepare a set of written proposals identifying the precise type of relief and the specific reductions that Respondent Love's wanted to negotiate. Yet, it is undisputed that during his May 12 conversation with Medeiros, Chubb had enumerated several areas—in classifications, health, and welfare—where such relief might be provided. Medeiros, however, was intransigent in his opposition to negotiating any reductions. Thus, Respondent Love's found itself in somewhat the same situation as does a union when an employer refuses to bargain: there is hardly anything to be gained by presenting specific proposals when faced with an adamant opposition to bargaining at all.

Third, it is urged that Respondent Love's offers to bargain with the Union were defective and pretextuous in that, so it is contended, Respondent Love's had already made the decision to close the restaurant even before Chubb had spoken with Medeiros initially. Even assuming, *arguendo*, that this is an accurate characterization of the evidence, the conclusion urged in this argument is not correct. For, "in no case has the Board held that an employer must defer making a decision concerning terms and conditions of employ-

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course of action by an employer is one that could occupy several days of hearing, if disputed and if litigated thoroughly. Where the General Counsel has available the same financial information as a respondent, but does not quarrel, based on that information and after an investigation has been conducted, with assertions of adverse financial circumstances, the situation is somewhat akin to one where hearsay evidence is offered without objection: "[I]t is a clear indication that the evidence is not disputed, hence the absence of [the presentation of controverting documentary evidence]." *N.L.R.B.* v. *International Union of Operating Engineers, Local Union No. 12 [Ledford Brothers]*, 413 F.2d 705, 707 (9th Cir. 1969). In this fashion, trial time and effort can be concentrated on those factual matters which are in dispute.

[74] That, as Mesker testified, Chubb had not been directed to contact the Union once the closure decision had been made does not mean that he did not do so. Chubb was a seasoned negotiator and had long been involved in handling matters under the Act, as shown by his testimony reciting his background. Thus, it hardly needed Respondent Love's specific direction for him to be aware of what had to be done. That he would notify the Union, without having to obtain Respondent Love's specific direction to do so, is simply part of the reason that he had been retained to represent Respondent Love's: to take those measures which were necessary in the labor relations area so that Respondent Love's satisfied the obligations imposed on it by law. In short, Chubb simply did the job he had been hired to do.

[75] Apparently, rather than negotiate an exception to the economic provisions of the associationwide collective-bargaining agreement.

ment until it has first conferred with the representative of its employees. The requirement is that, after reaching the decision, the employer must then notify the representative and afford the opportunity to discuss that decision and to consider alternative proposals." *The Lange Company, supra,* 222 NLRB at 563; see also *Joseph Macaluso, Inc., d/b/a Lemon Tree,* 231 NLRB 1168, 1175–76 (1977). There is simply no evidence present in the instant case showing that Respondent Love's had been unwilling to consider alternatives to closure had Medeiros, or any other official of the Union, been willing to negotiate concerning the situation.

In any event, a careful comparison of Chubb's statements to Medeiros with the substance of Mesker's remarks to the Kallmanns, father and son, discloses that no definite promise to franchise the Hayward restaurant had been made until after it had become clear that Medeiros did not intend to even consider Respondent Love's pleas for financial relief. Thus, as set forth above, prior to May, Mesker and H. Kallmann had generally discussed the possibility of the latter acquiring an additional franchise from Respondent Love's, but the Hayward restaurant was not even mentioned during these discussions. During May, when Chubb held the first meeting with Medeiros, Mesker had mentioned the Hayward restaurant to H. Kallmann during a telephone conversation. However, he had said only that Respondent Love's did not desire to continue losing money operating it and that Respondent Love's "would certainly consider franchising it" if "present conditions continued." Whether "present conditions" were to continue was, of course, a matter then being determined by Chubb's efforts to negotiate a cost reduction with Medeiros.

Also in May, Mesker had met with Kallmann. It appeared to me that the latter, apparently imbued with a desire to protect Respondent Kallmann's position, was less than totally candid about what had transpired at that meeting. Thus, there were inconsistencies between his testimony describing the meeting and his description of that same meeting in his pretrial affidavit, as noted in footnotes 31 and 33, *supra.* Yet, these inconsistencies, as well as Kallmann's overall description of the substance of the meeting, do not suffice to refute Respondent Love's basic position that it had been willing to continue operating the restaurant had Medeiros been agreeable to concessions that would reduce the costs of operation. Thus, while Mesker did mention the "possibility" of franchising the Hayward restaurant, the subject had arisen only after Kallmann had said that he felt that the cost of constructing a new facility would be too high. The fact that Mesker also had said that the restaurant would be available in 3 months is not inconsistent with Respondent Love's expressions of willingness to bargain with Medeiros, for Mesker had been speaking to Kallmann only in terms of a "possibility" and he had earlier told H. Kallmann that the availability of the restaurant for franchising had depended on whether "present conditions continued."

Nor is the fact that during Mesker's May conversation with Kallmann the latter had secured a job with Respondent Love's inconsistent with the latter's expressions of willingness to negotiate regarding continued operation of the Hayward restaurant. For, following the references to the Hayward restaurant, Mesker had said that other existing franchised operations might become available. Accordingly, it would have been logical for Kallmann, as he testified, to accept a position with Respondent Love's so that he would be positioned to accept any franchise that might become available.

Finally, it is argued that Respondent Love's failed to satisfy the bargaining obligation imposed on it by the Act by failing to specifically advise the Union that the restaurant would be franchised. While this is an accurate factual assertion, Medeiros had displayed no interest in what happened to the employees as a result of the closure and there is no evidence that Respondent Love's had made any effort to conceal the fact that it intended to franchise the restaurant. Indeed, Medeiros' own reaction to Chubb's efforts to negotiate about the future of the restaurant's employees certainly implied that the Union was bidding farewell to the entire situation and had no interest in pursuing the matter further. In these circumstances, there is no basis for finding that Respondent Love's somehow violated its bargaining obligation by failing to specifically tell a representative which had displayed no further interest in the matter that the premises would be franchised.

D. *The Relationship Created Between Respondents*

1. Whether Respondent Kallmann is an independent employing entity

Though a preponderance of the evidence will not, as found above, support the conclusion that Respondent Love's had been closed for considerations unlawful under the Act, there remains the question of whether Respondent Love's continued to remain, at least, an employer, whether or not intentionally, of the employees employed at the Hayward restaurant on and after October 20. In arguing for an affirmative answer to this question, the General Counsel and the Union first argue that the relationship created between Respondents was such that Respondent Kallmann was not "an independent employer" nor "in any sense [an] entrepreneur." *Transcontinental Theaters, Inc.; Douglas Krutilek and Robert Shaw, a partnership d/b/a Cynatron Enterprises,* 216 NLRB 1110, 1113 (1975), enforcement denied, 568 F.2d 125 (9th Cir. 1978).

In *Transcontinental Theaters,* the Board concluded that there had "been no arms-length removal of the operation . . . [but instead] what has been accomplished is merely an arrangement in which [the lessor] was able to control the operations . . . , receive the benefits of substantially lower labor cost, and not be deprived of the profits which might result." *Id.* at 1113. No question but what the motivating factor behind the transaction in that case—high labor costs—is the same as was present in the instant case. Beyond that, however, there are significant differences.

First, in *Transcontinental Theaters,* the Board made the subsidiary finding that the lessor had "not relinquished its economic control and interest . . ." (*Id.* at 112), inasmuch as the lessees had not been required to pay any money nor to make a deposit on the equipment; the profit that the lessees could make was clearly circumscribed by requiring, in addition to rent and commissions, payment to the lessor of 75 percent of net profits, unilaterally determined by the lessor, every 4 or 5 weeks; the lessor provided the forms on which

the lessees had to maintain its daily reports and which tied in the lessee's bookkeeping system with that of the lessor; and, the lessor had reserved the right to assist the lessee in buying and booking films and in determining programs.

In the instant case, Respondent Love's does provide forms which Respondent Kallmann must file showing its daily receipts (form L-106) and summarizing its weekly transactions. However, there is no evidence that as a result of filing its reports on these forms, Respondent Kallmann's bookkeeping system is thereby tied into that of Respondent Love's. To the contrary, Respondent Love's specifically rejected the opportunity to achieve such an end by declining to allow franchisees to avail themselves of its accounting services. Respondent Kallmann, accordingly, uses its own accountant and there is no evidence that its bookkeeping system corresponds to that of Respondent Kallmann.

More significantly, in contrast to the situation in *Transcontinental Theaters* Respondent Kallmann did make a significant initial investment in the business which it operates. Thus, it obtained a $50,000 loan,[76] 10,000 of which was used to pay 20 percent of the franchise fee which, under the franchise agreement, Respondent Kallmann was obligated to pay to Respondent Love's, in full and with interest to be paid on the outstanding balance.[77] In addition, Respondent Kallmann had been obliged to purchase the inventory of the restaurant and, further, to pay $21,300 to buy the liquor license from Respondent Love's. Consequently, unlike the situation in *Transcontinental Theaters,* Respondent Kallmann had been required to incur significant financial obligations to initiate operations.

Although Respondent Kallmann is also obliged to make periodic payments to Respondent Love's, over the life of the agreement, this obligation does not accord Respondent Love's the control over Respondent Kallmann's profits that characterized the situation in *Transcontinental Theaters.* For, while Respondent Kallmann must pay, in addition to rent, a "royalty" to Respondent Love's based on a percentage of profits, at the highest amount this will not exceed 4.3 percent of Respondent Kallmann's gross sales—a substantially smaller amount than the 75 percent of net profits which the lessee had to pay every 4 or 5 weeks to the lessor in *Transcontinental Theaters.* In addition, it is Respondent Kallmann, not Respondent Love's, that is responsible for payment of taxes, insurance and assessments on the property which it uses under the realty sublease and equipment lease between Respondents.

Indeed, Respondent Kallmann's ability to control the extent of its own profits is shown most graphically in two related areas. In the area of prices, while Respondent Kallmann is obliged to serve meals and other items specified by Respondent Love's, there is no restriction on its discretion to charge the prices that it desires. Accordingly, Respondent Kallmann is free either to charge high prices to obtain more profit from each item sold, or to set reduced prices in an effort to increase overall profit by hoping to attract greater patronage. The second area is that of sources of supplies. Again, while Respondent Love's has set qualitative standards, a matter discussed in greater detail *infra,* there is no evidence of any restriction on where Respondent Kallmann obtains those supplies.[78] Nor is there any indication that the qualitative standards established by Respondent Love's are such that only specific purveyors could qualify as satisfactory sources of supply. Consequently, Respondent Kallmann is free to take advantage of price discounts and rebates which particular suppliers may provide. Consequently, combining Respondent Kallmann's ability to select the most advantageous suppliers with its ability to set prices as it sees fit, it has considerable lattitude to increase its profits, only a very small portion of which must be submitted to Respondent Love's as a royalty and, under limited circumstances, as rental payments.

These circumstances show that the situation in the instant case is very different than was that in *Transcontinental Theaters,* where it was found that there had been no relinquishment of "economic control and interest" by the lessor. Here, Respondent Kallmann has made a significant investment to initiate operations, has obligated itself to pay significant additional amounts over the term of the agreement, is not required to submit substantial portions of its profits to Respondent Love's, and, most significantly, can improve its profits through its combined ability to establish price levels and select suppliers. While the franchise agreement accords Respondent Love's authority to require Respondent Kallmann to furnish data required periodically by the former, there is no evidence that this requirement is based on other than the business need of insuring that Respondent Kallmann makes proper payments, as opposed to being a mechanism for controlling Respondent Kallmann's labor costs.

A second significant distinction between *Transcontinental Theaters* and the situation of Respondents pertains to the term of the relationship created. In the former, the sublease

[76] It is argued that since Respondent Kallmann purchased nothing from Respondent Love's, it lacks a proprietary interest and, accordingly, will have nothing left to alienate once the term of the franchise agreement expires in 1993. Such an argument, however, misses the mark, for, as pointed out *infra,* the Board has found licensees in retail stores to be employers within the meaning of the Act though they did not purchase the premises on which they operated. To accept this argument—that to qualify as an employer there must be a purchase of the premises and assets which can be alienated at all times—would be to impose a requirement that would preclude all lessees from qualifying as employers within the meaning of Sec. 2(3) of the Act. Indeed, Respondent Love's leases the Hesperian Boulevard premises, but there is no dispute about its employer status. Moreover, Respondent Kallmann has purchased the inventory of the restaurant and, subject to a right of first refusal by Respondent Love's (which requires third party determination of any disputes over "fair market value"), Respondent Kallmann can, under article XI of the franchise agreement, "sell, transfer or otherwise dispose of any rights subject to this Agreement . . . ." In fact, article VI, B, of the franchise agreement accords Respondent Kallmann an election, available at any time up to August 15, 1979, to purchase the leased equipment.

[77] While Respondent Kallmann was not obliged to commence repayment until 53 weeks after initiating operations, this only affects the timing of that obligation. The obligation was, nonetheless, one which it had incurred and in the event of default by Respondent Kallmann in satisfying that obligation, the entire outstanding amount becomes "immediately due and payable" at Respondent Love's option.

[78] While it appears that Respondent Kallmann has chosen to obtain its supplies, for the most part, from the same sources as does Respondent Love's, Kallmann had been employed by Respondent Love's prior to coming to Hayward and it is not surprising that he would use those suppliers with whom he had become familiar during his prior employment experience. On the other hand, that does not establish that Respondent Kallmann has been compelled to continue using those suppliers. Indeed, there was no reluctance on Respondent Kallmann's behalf to change the supplier of draft beer and this was done without Respondent Love's knowledge and without securing its consent.

was for a term of 1 year. Further, the lessor was free to enter the premises at all times to determine whether they were being properly maintained and, additionally, could terminate the lease upon 7 days' notice if, in the lessor's judgment, operations were not being conducted in a "proper and businesslike" manner or were not producing sufficient revenue. No similar degree of control is vested in Respondent Love's. For, while Respondent Love's is accorded a right to inspect that premises, the franchise agreement is for a basic term lasting until "midnight on February 24, 1993"—"a not-insubstantial tenure." *Clark Oil & Refining Corporation*, 129 NLRB 750, 756 (1960).

Respondent Love's is accorded power to terminate the agreement sooner. However, that power, in contrast to the lessor's power in *Transcontinental Theaters*, is not unfettered. Rather, the conditions which enable Respondent Love's to exercise its power of termination are specified in the agreement: default in the terms of the franchise agreement, commencement of bankruptcy, debtor or insolvency proceedings against Respondent Kallmann, a purported assignment for the benefits of creditors by Respondent Kallmann, appointment of receiver for or placement in possession of an attachment or keeper, or voluntary or involuntary transfer, without Respondent Love's prior written approval, of a substantial part of the business.[79] None of these conditions possess the ambiguity of the "proper and businesslike" condition of *Transcontinental Theaters*. More important none of them pertain to the sufficiency of Respondent Kallmann's income generated from operation of the restaurant.

A third significant difference between the instant case and *Transcontinental Theaters* arises in the area of labor relations. Under the sublease in the latter, "by maintaining a right to impose a ceiling on operating expenditures, particularly labor cost, [the lessor] retained power to (supervise and) oversee the operation . . . ." *Id.* at 1112. The effect was to limit the number and kinds of employees who could be hired, as well as the labor budget. Moreover, it was conceded that the lessee had to seek and receive the lessor's approval to hire more personnel and to increase the cost of payroll. However, neither in the franchise agreement, itself, nor in the testimony and other evidence adduced during this proceeding has it been shown that Respondent Love's possessed similar authority over Respondent Kallmann.

While the agreement does provide that any new manager, to succeed Kallmann, which Respondent Kallmann appoints "must be acceptable" to Respondent Love's, the only power that the latter possesses in this respect is negative, being only the power to veto appointment of a particular person as manager, and is confined only to the initial appointment of a manager. Respondent Love's is not accorded authority to control the manner in which that manager, or any other official of Respondent Kallmann, hires, discharges, disciplines, or promotes employees. Nor, does Respondent Love's have authority to control the appointment of supervisors, the wage rates that are set for personnel employed at the restaurant, and the general labor policies determined by Respondent Kallmann to apply to employees working there.

Although the term "employer" is among those included under the "Definitions" subsection of the Act, no specification nor test is set forth in Section 2(2) of the Act to define that term. That was a deliberate choice of Congress "so the Board, in performing its delegated function of defining and applying these terms [employer and employee], [might] bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute." *N.L.R.B.* v. *E.C. Atkins & Company*, 331 U.S. 398, 403 (1947). In fact, the Board has performed its "delegated function" in this respect. "The decisive elements in establishing an employer-employee relationship are complete control over the hire, discharge, discipline, and promotion of employees, rates of pay, supervision, and determination of policy matters. [Footnote omitted.]" *Roane-Anderson Company*, 95 NLRB 1501, 1503 (1951). Indeed that control need not be absolute nor exclusive. For, control over significant aspects of the employment relationship, sufficient to enable the possessor to bargain effectively concerning those matters, suffices to establish an employment relationship and, accordingly, employer status under Section 2(2) of the Act. See, e.g., *Sun-Maid Growers of California*, 239 NLRB 346, (1978), and cases cited therein.

As found above, Respondent Kallmann does have the ability to increase profits, very little of which must be paid to Respondent Love's for royalty and rents. Respondent Kallmann does exercise control over significant aspects of the employment relationship of the employees working at the Hayward restaurant. Therefore, I find that Respondent Kallmann is an entrepreneur and an employer within the meaning of Section 2(2) of the Act.

2. Whether Respondent Kallmann has been an *alter ego* of Respondent Love's

Although an entity may occupy the status of an employer under Section 2(2) of the Act, it may still be the *alter ego* of another employer where it is no more than a "disguised continuance" of that other employer. See, e.g., *Circle T Corporation; Meat Men; Incorporated d/b/a Royal T Meat*, 238 NLRB 245 (1978). *Alter ego* relationships arise where there has been "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, etc.*, 417 U.S. 249, 259, fn. 5, (1974).

The factors significant in making an *alter ego* determination were reviewed in *Jersey Juniors, Inc.*, 230 NLRB 329, 333 (1977). There, no *alter ego* relationship was found to exist. However, using the same factors as guidelines, an *alter ego* relationship was found in *Circle T Corporation, supra* at 249. Applying these same factors to the facts presented in the instant case, the following conclusions emerge.

First, the decision to close the Hayward restaurant and to franchise its operations had not been involuntary in the sense that Respondent Love's had been compelled by outside forces to pursue these measures. Cf. *Jersey Juniors, su-*

[79] In this section, the only question being considered is whether Respondent Kallmann is an independent employing entity. The effect of the substance of these provisions on the relationship between Respondents is discussed *infra*.

pra. On the other hand, neither has it been shown that Respondent Love's took these actions capriciously and whimsically. The decision to close had been based on economic considerations. Having closed the facility, Respondent Love's could not simply walk away from the situation. It had continued to possess a leasehold, equipment and inventory. Thus, it chose to franchise the facility.

Of course, it may well be that it could have taken measures other than closure to resolve its economic difficulties or that it might have pursued some course other than franchising to handle disposition of the facility. Yet, to analyze the situation in such a manner would require second-guessing the decisions that were made by Respondent Love's and "Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position." *Grand Auto, Inc., d/b/a Super Tire Stores,* 236 NLRB 877, fn. 1 (1978). The point is that although Respondent Love's had not exactly faced the wolf at the door, as was the situation in *Jersey Juniors, supra,* neither had it been totally free to ignore the circumstances which confronted it. Its action in response thereto cannot be said to have been so irrational or extreme as to warrant the inference that it had been merely engaging in a charade.

Second, there is no evidence that Respondent Love's had been acting for a nefarious purpose, nor that it had acted in a nefarious manner. Although the closure had resulted from factors arising as a result of the collective-bargaining relationship, it had been the product of the economic factors in that relationship. As found above, there is no evidence that Respondent Love's was hostile either toward the Union or toward the concept of collective bargaining. Indeed, it had broached the Union twice in an effort to negotiate changes in the agreement so that the restaurant could continue to remain in operation. Rebuffed in these efforts, it then had attempted to bargain about the effects of the closure on the employees. In this area also its overtures were rejected. This latter point is significant, for it is undisputed that Chubb had offered to bargain about taking action to obviate the need to terminate the employees. Yet, had Respondent Love's sought to dispose permanently of these employees, it is unlikely that it would have initiated discussion of this subject. Surely, the evidence will not support a finding that Respondent Love's could have foreseen Medeiros' rebuff. In short, Respondent Love's motive was economic and it did not act to conceal its proposed course of conduct from the Union. Cf. *Republic Engraving and Designing Company, A Division of Nutter, Inc., et al.,* 236 NLRB 1150 (1978). There is simply no evidence of nefariousness on the part of Respondent Love's.

Finally, a preponderance of the evidence will not support the conclusion that Respondent Kallmann is being operated simply as a front for Respondent Love's. Instructive in this respect is the Board's recent decision in *Big Bear Supermarkets #3,* 239 NLRB 179 (1978), in which an *alter ego* relationship was found to exist in a franchise setting.

There, the franchisee was the son of "a major officer and shareholder" of the franchisor; the franchisor retained control over the product lines, as well as over the quantities and prices, carried by the franchisee; the franchisor reserved the right to provide the same level of supervision and technical assistance as it provided to other facilities which it operated directly; the franchisee's financing for the purchase of inventory had been obtained through the franchisor and the amount which the franchisee had deposited was virtually an insignificant portion of the value of the inventory received, with neither a limit on the time by which the remainder had to be paid nor interest charged on the outstanding unpaid balance; the franchisor directly paid all expenditures, including permit and license fees, insurance premiums, taxes and payroll expenses, and collected all of the franchisee's daily sales receipts, debiting, and crediting an "open account" which it maintained for the franchisee; no interest was charged by the franchisor for amounts advanced to cover the franchisee's operating debts, thereby creating a situation where the franchisor "in actuality advances interest-free all moneys required for the store's operation . . ." (*Id.* at 9-10); a significant percentage of the franchisee's net operating income, 40 percent, was payable to the franchisor; and, the franchisor paid a "Draw on Anticipated Profits" to the franchisee, in an amount comparable to salaries paid to managers at franchisor-operated stores and without regard to the profitability, if any, of the franchised store, with the result that the franchisee received "an open-ended salary guarantee with [the franchisor] again advancing these funds interest free." *Id.* at 12.

Not surprisingly, the Board concluded that "under the agreement Big Bear is committed to continue its general financing of the store's operation, by virtue of various provisions requiring it to pay all the bills, and by the fact that [the franchisee] pays no interest on these moneys advanced. Thus, any true entrepreneurial risks would appear to be borne in the first instance by *Big Bear,* rather than by [the franchisee]." *Id.* at 13.

By contrast, Kallmann was not related to any official of Respondent Love's. While the latter controls the items that will be sold, it imposes no requirements on the quantities that Respondent Kallmann has to stock. As found above, it is Respondent Kallmann which determines the prices that will be charged for the items, as well as the sources from which supplies will be obtained. Through the call reports, Respondent Love's periodically reviews the restaurant and makes suggestions for improvements. However, Respondent Kallmann is not obliged to follow these recommendations. More significantly, Respondent Love's has no authority, short of claiming a termination of the franchise, to replace Kallmann as manager nor to assign its own personnel to manage the restaurant.

As found above, Respondent Kallmann paid a substantial amount to acquire the franchise, inventory, and liquor license. The funds used were not obtained from Respondent Love's. Moreover, Respondent Kallmann must pay the remainder of the franchise fee at prescribed intervals with interest owing on the outstanding balance. Respondent Love's pays none of the operating expenditures of Respondent Kallmann. The latter must pay interest on any unpaid amounts which it owes to the former. Respondent Love's makes no payments, by way of "draw," to Respondent Kallmann whose only source of income is the revenue derived from operating the restaurant. Finally, most of the financial obligations owed by Respondent Kallmann to Respondent Love's are payable in absolute amounts, without

regard to the profitability of the restaurant's operations, and while the royalty and, under specific circumstances, the rent are based upon a percentage of sales, the percentage payable is relatively insignificant and certainly nowhere near the 40 percent amount that was payable in *Big Bear, supra,* or the 75 percent figure of *Transcontinental Theaters, supra.*

One other point is noteworthy in comparing the situation in *Big Bear* with that of the instant case. In the former, the franchisor had ignored the bargaining representative and had failed to give its employees any option to continue working at the store, notwithstanding provisions in its collective-bargaining agreement specifying that employees were to be given 7 days to choose between applying for employment with the new owner or transferring to another of the franchisor's stores. In the instant case, not only did Respondent Love's notify the Union of the problem and attempt to bargain about a reduction in costs sufficient to enable Respondent Love's to continue operating the restaurant, but it also attempted to bargain with the Union concerning the future of the employees then working in the restaurant. Since Medeiros terminated further discussion of the matter, it cannot be said what would have resulted from such bargaining. Indeed, it cannot even be said what Respondent Love's would have been unwilling to intervene on behalf of these employees with Respondent Kallmann to see if the latter would employ some of them, since the Union curtailed further discussion of the subject of continued employment of these employees.

In sum, a preponderance of the evidence will not support the conclusions that the transaction whereby the restaurant was closed and franchised had been a sham, that it had been intended as a vehicle for unlawfully disposing of the Union and of the employees that it represented, nor that Respondent Kallmann has been operating the restaurant as no more than a front for Respondent Love's. It is not a situation where there has been a "disguised continuance" of operations by Respondent Love's.

3. Whether Respondents are joint employers of the employees at the restaurant

Where two or more employers, organizationally and financially separate and distinct entities, each exercise areas of effective control over significant aspects of the employment relationship of a group of employees, they are considered joint employers and share the bargaining duty owed to the representative of those employees. See discussion, *Sun-Maid Growers of California,* 239 NLRB 346, 350-351 (1978). Before turning to consideration of this question, however, one related argument should be treated at the outset. An argument is made, based upon McGuire, "The Labor Law Aspects of Franchising," 13A *Boston College Industrial and Commercial Law Review,* 215 (December 1971), that the test for finding a joint employer relationship should be broader than the one formulated by the Board and should encompass a full analysis of the financial relationship between franchisor and franchisee, in effect taking into account the degree to which the franchisor benefits financially as a result of the relationship. Yet, the purposes of the Act are not to regulate financial relationships and to ascertain the degree to which various entities may benefit as a result thereof. Rather, they are to promote the free flow of commerce and to protect the rights of employees and employers. Seemingly, therefore, the Board would not be free to use the Act as a vehicle for ends which go beyond these purposes and create relationships solely on the basis of economic gain and general social welfare. See *Local 357 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los-Angeles—Seattle Motor Express]* v. *N.L.R.B.,* 365 U.S. 667, 676 (1961).

In the instant case, there has been no showing that the Act did not provide the Union with sufficient means to protect the interests of the employees which it had represented at the Hayward restaurant. Had it been more attentive to Respondent Love's overatures for negotiations concerning the financial situation,[80] and had it been more diligent in protecting the futures of the employees once the closure decision had been made and Respondent Love's had sought to bargain about the continued employment of these employees, the latter might still be employed and this entire proceeding might never have been commenced. Instead, the Union made no effort to avail itself of the means provided by the Act in such situations and displayed no interest in the matter until Respondent Kallmann opened for business. In sum, the Union had the ball but dropped it. Consequently, it is now in a poor position to argue that the Board should tailor its doctrines solely to ensure that it regains possession.

Returning to existing Board doctrine, there are principally two articles of the franchise agreement between Respondents upon which reliance is placed to establish that Respondent Love's continues to be an employer of the employees employed at the Hayward restaurant: Article V and article XII. As set forth in section I, E., *supra,* article V provides that Respondent Love's would not have granted the franchise unless it was able to require "strict complaince with" the "standard operating procedures and policies" which it has established and may establish in the future. It then continues by setting forth certain illustrations of those "standard operating procedures and policies." Among the illustrations listed are "operating procedures." The article then includes a catchall provision to the effect that such "standard operating procedures and policies" "will govern all other matters which in [Respondent Love's] judgment requires standardization and uniformity in all Love's Wood Pit Barbecue restaurants."

Article V is one of the articles specifically listed in article XII, "Remedies for Breach," as being one with which Respondent Kallmann "must at all times hereafter maintain full and complete complaince." Moreover, "default in the performance of any of the terms of" the franchise agreement, if not cured within 7 days of "mailing of written notice thereof by" Respondent Love's, affords the latter grounds for declaring the agreement terminated. It is these portions of these two articles, coupled with the very de-

[80] Which does not mean that the Union was compelled to make financial concessions. By asking for Respondent Love's books and records, it may have ascertained whether financial relief was actually necessary and, if so, may have been able to suggest a method whereby relief could be attained in other areas, without the employees having to suffer a reduction in pay and benefits.

tailed provisions of the operating manual and craft books, on which principal reliance is placed for the allegation that Respondent Love's possesses sufficient authority to exercise control over significant aspects of the employment relationship of the employees employed at the Hayward restaurant.

Yet, Respondent Kallmann is part of an integrated enterprise. As such, its position is quite similar, if not identical, to those of licensors and licensees in discount department stores where the Board has long recognized the need for the licensor to exercise a degree of control over its licensee's operations to ensure the overall success of the enterprise. For example, it is stated in the majority opinion in *Thriftown, Inc., d/b/a Valu Village, et al.*, 161 NLRB 603, 606 (1966):

> Experience has demonstrated that participants in discount store establishments, although retaining their separate corporate identities, strive to create the appearance of a single-integrated enterprise in order to obtain the mutual business advantages derived from this type of operation. Given this business arrangement, it is apparent that any disruption of operations, including that resulting from labor dispute involving an operator, will almost necessarily adversely affect the operation of the entire store. It follows, therefore, that the owner of the discount store in some manner will retain sufficient control over the operations of each department so that it will be in a position to take those steps necessary to remove the causes for the disruption in store operations.

Similarly, the dissenting Board members in that case agreed that a degree of control in such enterprises was necessary to satisfy "the parties' concern with creating the public impression of a unified enterprise." *Id.* at 610.

Yet, the Board has consistently pointed out that the need for uniformity of operation will not, of itself, suffice to establish a joint employer relationship. "[O]ur decision . . . is not based upon mere 'appearances' or upon whether the agreement of the parties 'as between themselves' establishes a particular type of business entity, 'in law.' " *Thriftown, Inc., supra,* at 607.[81] "The existence of such control, however, has not in and of itself been sufficient justification for finding that the licensor or lessor is a joint employer of employees of its licensees or lessees. Generally, a joint employer finding is justified where it has been demonstrated that the lessor is in a position to control the lessee's labor relations." *Disco Fair Stores, Inc., et al.*, 189 NLRB 456, 459 (1971).

Consequently, though the enterprise be integrated and while the public may perceive no difference between a unit operated directly by the owner and operated instead by a franchisee, such factors are not determinants of joint employer status. "In the absence of substantial control of labor relations by" a franchisor, it and its franchisee "are not joint employers of the employees of the [franchisee] . . . . *S.A.G.E., Inc., of Houston, and Its Licensees, Joint Employers,* 146 NLRB 325, 328 (1964).

In *Thriftown, Inc., supra,* the Board concluded that such control did exist where the licensor-owner retained a degree of control over selling space, shared overhead expenses, advertising, pricing policies, and items to be sold sufficient to affect the profits of the licensee-operator, where the latter was obliged, under the terms of the agreement, to "at all times in the conduct of its business strictly conform to the methods, rules, business principles, practices, policies and regulations which may be established and revised by" the licensor-owner and where the licensor-owner could "at any time, for good cause shown, terminate the agreement upon fifteen (15) days written notice," with both parties possessing the right to terminate the agreement at any time upon 60 days' written notice.

In *United Mercantile, Incorporated, a wholly owned subsidiary of Walgreen Co., d/b/a Globe Discount City,* 171 NLRB 830 (1968), the Board reached the same result where the agreement conferred upon the owner the authority to issue rules pertaining to "sales, operational, merchandising and pricing practices" of operators, as well as the right to require the discharge of operators' employees who, in the owner's opinion, conducted themselves improperly or were discourteous, and accorded the owner a right of termination for default on any of the covenants of the agreement or rules prescribed by the owner, as well as the right to terminate the agreement without cause, at a specified annual date. The Board reached its conclusion concerning the joint employer status in that case despite the fact that the owner had never exercised the powers accorded it by the agreement and in spite of a provision in the agreement stating that the operator had "complete responsibility for deciding its own labor policies." *Id.* at 831. However, with respect to the latter, the agreement explicitly exempted the owner's "discharge and rulemaking powers from this specific provision . . . ." *Id.* at 832.

Disco Fair Stores, supra, represents a further evolution of the doctrine of coemployership in the integrated enterprise context. Only it serves to mark the boundry of the breadth of that doctrine. Thus, the owner's control over the operators was reflected by a clause requiring the operator to:

> . . . abide by all rules and regulations which [the owner] may hereafter establish . . . for the mutual protection of the [owner] and [operator] and for the mutual welfare of all of the other [operators] . . . which in the sole judgment of [the owner] may be necessary for the safety, cleanliness, and preservation of good order in said building and for the efficient and harmonious operation of the Store . . . . [*Id.* at 457.]

Another provision of the agreement provided specifically that the objectives of the agreement could "be defeated unless [operator's] employees maintain a standard of courtesy and efficiency as shall be determined and set out by [owner]." Finally, the agreement provided that leases were terminable on 90 days' written notice if, *inter alia,* there was "any breach" by the operator.

As was true in *United Mercantile,* the owner in *Disco Fair* had never implemented these terms and the agreement disclaimed any intent to create a partnership or joint venture. Yet, the Board reached a contrary result based upon two factors. First, while the agreement gave the operator "sufficient authority over operational matters to permit the effi-

[81] This point was made by the majority in response to the dissenting members' concern that the "conformity requirements are quite clearly aimed at fostering the public appearance of a single-integrated enterprise. They have nothing to do with the employment relationship as such."

cient operation of the store and to give the appearance of an integrated retail operation, there is lacking any provision which explicitly or implicitly gives [the owner] control specifically over the labor relations of lessees." *Id.* at 459. Second, the lease contained "no provision denominating the lessees as in default of their obligations for failure to follow or conform to such rules and regulations as [the owner] may promulgate concerning personnel." *Id.* at 459.[82]

In the specific area of franchising, in 1968 the Board issued two decisions pertinent to consideration of such agreements: *The Southland Corporation, d/b/a Speedee 7-Eleven*, 170 NLRB 1332 (1968), and *S. G. Tilden, Inc., et al.*, 172 NLRB 752 (1968). Both relied on the absence of control by the franchisors over the franchisees' labor relations to find that the latter were the sole employers of the employees involved. Though it is argued that the sparsity of subsequent reference to *Tilden*, and inferentially to *Southland* as well, serves as an indicator that the trend of Board doctrine in this area has been away from the conclusions reached therein, such a conclusion does not follow. *Southland Corporation* was referred to specifically in both *Transcontinental Theaters, supra*, and *Big Bear Supermarkets #3, supra*. However, the Board did not hold that *Southland* was being overruled in those two later cases. It merely distinguished the factual situations in *Transcontinental* and *Big Bear* from that of *Southland*. Moreover, while most of the Board members who participated in *Southland* and *Tilden* are no longer members of the Board, Member Jenkins participated in *Southland* and then-Member, now Chairman, Fanning participated in *Tilden*. Neither has ever subsequently even intimated that his agreement with the decision of the case in which he participated had been improvident. Consequently, there is no basis for me to conclude that *Southland* and *Tilden* are not still operative as guidelines for resolving whether particular franchise agreements, such as the one in the instant case, give rise to joint employer relationships.

As found above, Respondent Kallmann is an employer within the meaning of Section 2(2) of the Act. However, as various portions of the franchise agreement show, particularly the prefatory sections described on p. 15, *supra*, Respondent Kallmann operates the Hayward restaurant as part of an integrated enterprise. Consequently, the true issue presented here is whether, as in *Thriftown, supra*, and *United Mercantile, supra*, the degree of control retained by Respondent Love's confers sufficient authority over a significant segment of Respondent Kallmann's labor relations to warrant finding that Respondent Love's continues to be an employer of Respondent Kallmann's employees. Or, whether a preponderance of the evidence shows no more than that control retained by Respondent Love's has no direct affect on Respondent Kallmann's labor relations and has been retained solely in an effort to maintain the uniformity of the integrated enterprise for the mutual benefit of Respondent Love's, Respondent Kallmann and the other franchisees.

While article V of the operating manual refers to "standard operating procedures and policies," article IX of the franchise agreement provides specifically that Respondent Kallmann is an independent contractor, that no employees of Respondent Kallmann are to be deemed employees of Respondent Love's, and that no "partnership, joint venture, agency or any other business relationship other than that of an independent contractor" is created by virtue of that agreement. Although "a conclusionary and self-serving disclaimer of control over labor policies cannot be sufficient by itself to determine the legal question whether [entities] are joint employers," *United Mercantile, supra*, 171 NLRB at 832, the fact that exclusive control over labor relations has been vested in franchisee is a factor to be considered in determining whether a joint employer relationship exists. See *Southland Corporation, supra; Transcontinental Theaters, supra*, 216 NLRB at 1113, fn. 2, item (3). The provisions of article IX are most specific while the phrase "standard operating procedures and policies" is general and ambiguous.

Moreover, that phrase is followed in article V by a list of illustrations, set forth on page 17, *supra*, pertaining to the matters affecting the uniformity of the enterprise, rather than to labor relations matters. For example, the specification of the "design, decoration, and decor of" the restaurant is hardly a matter that affects labor relations. Nor are such matters as the "exact menus to be used," "food items to be served" or "sanitation facilities." Indeed, the catchall provision, "All other matters which . . . require standardization and uniformity in all Love's Wood Pit Barbecue restaurants," make clear that the applicability of the phrase "standard operating procedures and policies" is not being used broadly, to apply to all facets of Respondent Kallmann's operation, but is applicable only to a specific type of "procedures and policies"—those which must be controlled to achieve uniformity throughout the chain.

Consequently, taken in context, as it must be, with the entirety of article V and compared with the restriction of article IX, it becomes apparent that the phrase cannot, of itself and without other evidence of its interpretation, be construed as broadly as the General Counsel and Union urge. Indeed, article XII, itself, states that the purpose for requiring "strict and exact performance" is to "best preserve, maintain and enhance the reputation, trade name and good will . . . for the franchising system," as a whole. There is no evidence that it is intended to control the labor relations of franchisees.

Of course, article V, on its face, does refer to "minimum hours of operation." Yet, this "provision in no way prescribes the hours that a particular employee must work . . . ." *S. G. Tilden, Inc., supra*, 172 NLRB 753. Moreover, Respondent Kallmann is free to increase the hours of operation and, in fact, has done so without obtaining Respondent Love's approval. Further, while article V also specifies "operating procedures" among the listed items modifying "standard operating procedures and policies," the former is as vague and indefinite as the latter, with respect to precisely what subjects are covered and, in any event, can confer no greater right on Respondent Love's than was conferred upon the franchisor in *S. G. Tilden, Inc., supra*, where the franchisees were "required to observe Tilden's pricing

[82] However, this case was not intended to overrule *United Mercantile* as shown by the Board's subsequent reliance on the latter as the basis for its decision in *Walgreen Louisiana Co., Inc., d/b/a Globe Discount City*, 209 NLRB 213 (1974).

policies, public relations, road testing, building maintenance, and housekeeping standards . . . ." *Id.* at fn. 2.

So far as the credible evidence discloses, Respondent Kallmann "alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the [restaurant's] employees." *Southland Corporation, supra,* 170 NLRB at 1334. While the craft books do describe the manner in which employees in the various classifications are to perform their duties, there is no mention of them made in the franchise agreement and there is no evidence that following the initial training provided newly hired employees, these books have been distributed to employees hired thereafter. To the contrary, neither Totman nor Dawson made any mention of having been issued craft books upon beginning employment with Respondent Kallmann. Moreover, of the initial employee complement, only the waitresses and busboys, so far as the record discloses, received these books and the busboys were instructed by Kallmann to take them "with a grain of salt."

Of course the information contained in the craft books is taken *verbatim* from the operating manual. Yet, there is no evidence that the manual has been made available to employees in lieu of the craft books, themselves, or that employees have been directed to familiarize themselves with and adhere to the appropriate provisions of the operating manual. Consequently, it cannot be said that the craft books and operating manual, insofar as they specify the manner in which employees are to perform their duties on a day-to-day basis, are other than "recommendations" which, as Mesker, corroborated by Kallmann, explained, are not mandatory. *Southland Corporation, supra,* 170 NLRB 1333.

In response to a question put to him while testifying as an adverse witness, Mesker testified that Respondent Love's standard procedures and policies were described in the operating manual "and various memos and letters published by Love's Enterprises, Incorporated." Though it is argued that this testimony is a concession that the manual embodies the "standard operating procedures and policies" of the franchise agreement and, therefore, that the two are synonymous, that is not a valid conclusion. For, as found above, article V pertains to "standard operating procedures and policies" necessary to maintain the uniformity of the enterprise. Mesker did not testify that every portion of the manual was needed to attain that end and both he and Kallmann testified that only certain portions of the manual—section I ("Product Specification"), sections K and L (the recipes for food preparation), and that part of section M relating to portioning and sizes in which items are to be provided—were obligatory—"those things which relate to the image, the historical image of the Love's chain." None of those sections, however, affect labor relations.

Of course, they do prescribe the manner in which items are to be cooked and the amounts in which they are to be served. Yet, as was true of the road testing, building maintenance and housekeeping standards of *Tilden,* these are no more than "elements of the business relationship" between Respondents that are established by Respondent Love's "to keep the quality and goodwill of [Respondent Love's] name from being eroded." *S. G. Tilden, supra,* 172 NLRB at 753. They accord Respondent Love's "sufficient authority over operational matters to . . . give the appearance of an integrated . . . operation . . . ." *Disco Fair Stores, Inc., supra* at 459.

True, employees at Respondent Kallmann's restaurant are obliged to wear the same uniforms as do employees at other restaurants operated by Respondent Love's. But, a similar requirement in *S. G. Tilden, supra,* was held not to establish a joint employer relation and, indeed, the wearing of a particular uniform, which is in reality a matter pertaining to uniformity throughout the enterprise, hardly seems to be such a significant term of employment that it could serve as the basis for creation of an entire joint employer relationship. Of greater significance is the fact that Respondent Love's has no control over the caliber of service provided by Respondent Kallmann's employees. Thus, there is no provision in the franchise agreement whereby Respondent Love's can demand the termination of discourteous or unsatisfactory employees. Cf. *United Mercantile, supra.* If Respondent Love's receives a complaint regarding service at Hayward, it will not conduct an investigation, but instead will merely send a letter of apology and a gift certificate to the complaining customer. No disciplinary action will be sought of Respondent Kallmann. Moreover, so far as the record discloses, Respondent Kallmann has every right to enter into a collective-bargaining agreement without Respondent Love's consent. *Disco Fair Stores, Inc., supra,* 189 NLRB at 459-460. Indeed, other than suggesting a course for Respondent Kallman to follow to resolve the current picketing of the Hayward restaurant, Respondent Love's has not, so far as the record discloses, become involved voluntarily in how Respondent Kallmann should handle the dispute with the Union.

While I credit the testimony that Chubb promised to arrange a meeting for the Union with Respondent Kallmann, during the course of the pre-opening meeting between Chubb and the Union's representatives, that does not show that Chubb had authority to speak for Respondent Kallmann. After all, Chubb is, himself, in business. Thus, it is not unlikely that he would make such a promise and then attempt to become Respondent Kallmann's representative, so that another employer could be added to the list of those whom he represented. In any event, there is no evidence that he made the promise to arrange for a meeting between the Union and Respondent Kallmann with the latter's authority or consent.

Several additional factors should be mentioned here, if for no other reason than to show that they have been considered and disregarded as evidence of the asserted joint employer relationship between Respondents. The fact that Respondent Kallmann has no ability to advertise independently and that only Respondent Love's can advertise on its behalf has been considered in *S. G. Tilden, supra,* fn. 2, and has been found not to warrant a joint employer finding. Similarly, in that case, the factors of the franchisor training the franchisee's employees and the fact that the franchisee used the same name, premises and equipment to supply the same products to the public, without the latter's knowledge of a change in management, were held not to warrant a joint employer finding. Significantly, Porter acknowledged that Respondent Love's had trained him for employment with the original franchisee for the Hayward restaurant. Yet, no contention is made that Respondent Love's had

been a joint employer with that franchisee.[83] Further, so far as the record discloses, Respondent Love's willingness to train employees extended only to the initial complement. Moreover, Respondent Love's ability to terminate the franchise agreement is much narrower than was the case in *Southland Corporation, supra*, arising only in specific situations set forth in the franchise agreement. Yet, as the Board pointed out there it had never held that, standing alone, the right of termination would negate the existence of independent status. *Id.* at 1333.

In sum, the only control that Respondent Love's exercises over Respondent Kallmann is that necessary to ensure the uniformity of operation and goodwill of the integrated enterprise of which Respondent Kallmann is a part. There is no provision according Respondent Love's control over, nor the right to participate in, Respondent Kallmann's labor relations policies. To the contrary, Respondent Kallmann signed a standard franchise agreement, was required to provide capital and to purchase the inventory at the restaurant, with 20 percent of the franchise fee being paid in cash, was made the sole employer of the restaurant's employees under the terms of the franchise agreement, is not subject to control by Respondent Love's with respect to prices set or suppliers chosen, is free to follow or not to follow those portions of the operating manual that do not affect the uniformity of the integrated enterprise, and is free of having the relationship terminated except under the conditions specified in article XII of the franchise agreement. See *Transcontinental Theaters, supra*, 216 NLRB at 1113, fn. 2. Therefore, I find that a preponderance of the credible evidence does not establish that Respondent Love's continued to be an employer of the employees at the Hayward restaurant following execution of the franchise agreement with Respondent Kallmann.

Although it is further argued that Respondents are a single employer, as found above, there is no centralized control over labor relations. Moreover, there is neither common ownership of Respondents nor are they commonly managed. Therefore, I find that there is no basis for using the single employer doctrine in circumstances such as those presented in the instant case. See *Los Angeles Marine Hardware Co., supra*, 235 NLRB 720, 732 (1978).

4. Whether Respondent Kallmann is a successor to Respondent Love's

It is also alleged that Respondent Kallmann is a successor employer to Respondent Love's with respect to the Hayward restaurant. However, none of the employees hired by Respondent Kallmann had ever been employed at the Hayward restaurant. Further, there has been no showing that a majority of the employees hired by Respondent Kallmann desired representation by the Union. However, both the Union and the General Counsel contend that this occurred only because Respondent Kallman deliberately had excluded the former Hayward employees from consideration for employment due to their affiliation with the Union, thereby violating Section 8(a)(3) and (1) of the Act.

It is, of course, accurate that Respondent Kallmann "could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. [Citations omitted.]" *Howard Johnson Company, Inc., supra*, 417 U.S. at 262, fn. 8, 94 S. Ct. at 2243, fn. 8. As found above, Kallmann was not a credible witness when testifying with respect to this very subject of the procedure followed to hire employees to staff the restaurant. Since in cases where discrimination is alleged "the pivotal factor is motive," *Lipman Brothers, Inc., supra*, normally where the employer advances a false reason for its actions, it is permissible to infer that the reason being concealed is an unlawful one. Yet, that inference need not be drawn blindly and without regard to other circumstances present in particular cases. Like all other inferences and presumptions, it is not mandatory.

To the contrary, where objective considerations refute a conclusion of illegal motive, then other explanations may be considered to ascertain the motive for the false testimony being advanced. In the instant case, several circumstances exist which tend to demonstrate that Respondent Kallmann did not plan and implement a campaign to avoid hiring former employees of the Hayward restaurant because of considerations unlawful under the Act.

First, as found above, prior to closure of the restaurant there had not been "problems" of the magnitude that would have naturally led Respondent Love's to become hostile toward the Union or toward the employees which the Union represented. No doubt Choy did harbor animus toward the employees for their complaints to the Union, which he apparently viewed as criticism of his management of the restaurant. Yet, there is no evidence that higher management of Respondent Love's had shared, or even known of, his viewpoint, nor of that of Naylor—assuming that the latter's comment to Kruger did, in fact, refer to the possible closure of the Hayward restaurant because of the Union, rather than being a remark intended to impress upon Kruger that Respondent Love's was not so committed to restaurants that it operated that it would never be willing to close one. To the contrary, Respondent Love's twice made efforts to bargain for more favorable contractual terms to avoid perpetuation of conditions that it felt would necessitate closure. Moreover, there is no evidence that Kallmann had contact with Choy or Naylor, or is there any basis for inferring that he would likely have learned of their attitude toward the Union. In these circumstances, there is no basis for concluding that any "problems" would have been brought to Kallmann's attention that would have led him to be reluctant to hire employees who had formerly worked at the restaurant because of their union sympathies.

Second, while Kallmann did not generally appear credible when testifying about his procedure for hiring the initial employee complement, he did appear sincere when he testified that it had been his belief, at the time that he had taken over the restaurant, that the choice as to whether or not it

[83] Although arguments are advanced based upon an effort to compare the franchise situation of Respondent Kallmann with that of the original franchisee of the restaurant, in 1973, the evidence concerning the initial franchisee is so sparse that no valid comparison can be based upon this record. Moreover, to argue, as is done, that other franchisees of Respondent Love's have incurred far greater liability than Respondent Kallmann in connection with obtaining their franchises is profitless. For, as Kallmann discovered when beginning consideration of acquiring a franchise, a considerable investment is required of franchisees who choose to construct and to own their own facilities.

would be unionized had been his to make. Not only at 29 years of age was he relatively young, but, as was pointed out during the hearing, his experience had been obtained largely in an area of California that is not heavily organized. Moreover, there was testimony describing remarks by him to the effect that he had a choice as to whether or not to be unionized and that he had chosen to be nonunion. Indeed, Turner described him as having made such a statement during his picket line conversation with Pingree and her. Consequently, there is objective evidence which supports Kallmann's testimony that when he had begun operating the restaurant, he had believed that the decision as to whether or not to be unionized had been his to make. This being the case, there would have been no reason for him to avoid hiring former employees of the restaurant to avoid being confronted with the Union as their representative, for he did not believe at the time that their desires would be taken into consideration.

Third, while Respondent Kallmann had not been "obligated by the Act to hire any of [Respondent Love's] employees . . . ," *Golden State Bottling Company, supra*, 414 U.S. at 184, fn. 6, 94 S. Ct. 425, it is simply not accurate that Kallmann did, in fact, refuse employment to all former employees of the restaurant. Although apparently only a handful of the former employees applied for employment with Respondent Kallmann, as set forth above, Wadsworth, and probably Logan as well, had been offered positions as busboys,[84] which were positions included in the bargaining unit when Respondent Love's had operated the restaurant. He also offered Pingree a job, even though at the time she had been picketing the restaurant. It is argued, however, that this offer had been *conditioned* on Pingree foregoing further support for the Union. But, that is not the manner in which Pingree related Kallmann's offer. Neither in tenor nor in substance, quoted above on page 29, were Kallmann's words—that the restaurant "will not be Union"—ones of condition. Rather, they were words of fact. And, they were consistent with Kallmann's belief at the time as to how unionization came about: Through determinations of employers, not employees. Accordingly, it is simply not a fact that no former employees of the restaurant had been offered employment with Respondent Kallmann.[85]

Fourth, much is made in the briefs of the fact that the initial newspaper advertisements had made no mention of the restaurant at which positions were available and of the further fact that the initial 2-1/2 days of interviewing had been conducted at a motel, rather than at the restaurant. These factors, it is argued, tend to show that Respondent Kallmann had been attempting to conceal the fact, from the former employees, that the restaurant was to be reopened in an effort to avoid being faced with their applications for employment. It is accurate that Respondent Kallmann did not advance any explanation for the omission of the restaurant's name from these advertisements nor for selecting a motel at which to conduct the initial interviews. But, how realistic is the theory advanced to explain the malevolent intent assertedly shown thereby? Surely, it must have been obvious to Kallmann that he would be reopening the same restaurant as Respondent Love's had closed and, once this happened, all and sundry would know of it. Moreover, as is shown most graphically by the offer of positions to Wadsworth and Logan when they had applied for employment at the restaurant, as well as by the fact that employees who applied for employment at the restaurant on October 17 were hired, not all positions had been filled by the time that Kallmann had shifted the situs of interviewing to the restaurant. Were there any substance to the troll created under the bridge of the argument regarding these factors, surely Kallmann would have at least ensured that all openings had been filled before beginning to interview at the restaurant.

Furthermore, as Porter pointed out, Respondent Kallmann had followed the format of Respondent Love's for the advertisements placed in the newspapers. Were Respondent Kallmann attempting to conceal the fact that it was accepting applications for employment at the restaurant, it seems unlikely that it would have used as a model for its advertisements, published in newspapers of general circulation in the area, the very format with which former employees of the Hayward restaurant, like Porter, would be familiar and would quickly recognize. In sum neither the omission of the restaurant name from the advertisement nor the use of a motel to conduct the first 2-1/2 days of interviewing tend to support the argument that Respondent Kallmann was concealing the fact that interviews were being conducted.

Finally, it is accurate that several former employees of the restaurant had applied for, but were not offered positions with, Respondent Kallmann. Yet, as Porter's situation shows most clearly, there was a valid business reason for Respondent Kallmann to exercise care when considering applications of employees who had been employed at the restaurant. For, Kallmann testified that while he had been favorably impressed with Porter's application, upon reflection he had concluded that the filthy condition of the kitchen, coupled with Porter's position as head cook prior to the closure, had led him to decide not to hire Porter. Notwithstanding Kallmann's general unreliability, there are certain objective considerations which tend to support his testimony pertaining to Porter specifically and that extend to all former employees of the restaurant in general.

That the restaurant had been in poor condition and that Respondent Love's had blamed the employees for that fact

[84] While Kallmann testified that there had been no openings for them when they had applied and, inconsistently, had stated in his pretrial affidavit that their school hours had conflicted with the only jobs that Respondent Kallmann could have offered them, it appears that these explanations were designed to protect his position by enhancing Respondent Kallmann's defense, a matter discussed *infra*. In any event, Wadsworth's reluctance in acknowledging that he had been offered a job at Respondent Kallmann, a fact which even he appeared to realize was not favorable to his position, leads me to credit his account as being an honest, albeit hesitant, concession of what had occurred during that interview.

[85] Turner did inquire if Respondent Kallmann would hire her and, according to Pingree, had been told by Kallmann that he would not do so because he had heard that she was "too radical." Yet, Turner acknowledged that the pickets had been giving Kallmann "a hard time" prior to her question and it is not altogether clear that her comment constituted an offer to go to work for Respondent Kallmann—nor, if so, that it had either been made or taken by Kallmann has having been a serious one—rather than simply being an extension of the "hard time" being given Kallmann. What is clear is that she never did fill out an application form nor otherwise seek employment with Respondent Kallmann as other applicants who had been and were to be hired.

is demonstrated by Pingree's testimony that she had *overheard* Patterson saying as much to Ramsey prior to the closure, as detailed on page 21, *supra*. Since there was no evidence that he had been aware of Pingree's presence when he had made this remark to Ramsey, it is reasonable to assume that his comment accurately reflected Patterson's attitude concerning both the condition of the restaurant and his belief that the employees had been responsible therefor. Certainly there is no evidence that would form the basis for concluding that he would have had any other reason for making such a remark to Ramsey.

Furter, Pingree did not describe Ramsey as having disagreed with Patterson's assertion that the employees were at fault for the dirty condition of the restaurant. Indeed, the restaurant had been closed, following Respondent Love's termination of business there, for almost a month so that it could be cleaned before Respondent Kallmann commenced operations. True, there is a distinct paucity of evidence on how the restaurant came to be closed and regarding the precise nature of the cleaning that had been performed during this period. On the other hand, it seems unlikely that, since the restaurant was going to have to be reopened, Respondents would have advanced any nefarious purpose by closing for a brief period for no reason whatsoever, thereby giving rise to, as the General Counsel points out in his brief, a "loss of revenues" during the period of the closure. To the contrary, Patterson's overheard comment certainly supports the contention that the restaurant had indeed been in need of cleaning at the time that it had been closed.

Further, Ramsey had remained at the restaurant following its opening by Respondent Kallmann to aid in training employees hired by the latter. Accordingly, despite Kallmann's denial, it is not unlikely that Ramsey—having been present daily while the restaurant had been closed, having been one of the two supervisors of Respondent Love's in charge of the cleaning, and having not disagreed with Patterson's description of either the filthy condition or the cause of that condition at the restaurant—would have made known to Kallmann[86] the opinion that the former employees had been responsible for the shabby condition of the restaurant when it had been closed. Indeed, this is supported by Turner's testimony that during her picket line conversation with Kallmann, the latter had mentioned that Ramsey had said that Turner was a good bartender.

In these circumstances, there are objective considerations present that tend to suggest, consistent with Kallmann's testimony regarding this reason for rejecting Porter for employment, that Respondent Kallmann's true reason for avoiding hiring former employees of the restaurant had not been their union sympathies, but rather the slovenly work habits attributed to them. Viewed against this background, the comment made to Hansen, "oh, you were one of them," by Kallmann and Sebben's abrupt change of attitude when it became clear that Roy's most recent experience had been at the restaurant are as explainable by the fact that Respondent Kallmann had been reluctant to hire employees who had been responsible for the dirty condition of the restaurant as by any potential problem that might have been posed by the fact that they were supporters of the Union.

[86] I do not feel that Kallmann's testimony to the contrary, was credible.

Of course, Kallmann did offer Pingree a job after the restaurant had reopened. However, as shown by Ramsey's remarks to her on the day of the closure, Pingree had been considered as Respondent Love's best waitress. When the offer had been made, Ramsey had still been at the restaurant, aiding in training newly hired employees. Since to every rule there is an exception, it would not have been inconsistent for Respondent Kallmann to have been willing to hire some of the former employees, like Pingree, who enjoyed good reputations while being reluctant to hire those who did not.

Yet, if Kallmann had been concerned with the condition of the restaurant at the time that it had closed, one wonders why he did not simply so testify, rather than attempt to construct a different defense. Possibly, the answer is contained in the circumstances confronting him. He was young and not well versed in labor relations matters. He had undertaken significant financial obligations which, under the franchise agreement and related documents, obliged him to make periodic payments for such matters as the franchise fee, rent, and insurance premiums. Should Respondent Kallmann be found to have violated Section 8(a)(3) of the Act with regard to the former employees, the backpay liability would have magnified these financial obligations substantially. Consequently, it is hardly surprising that, as pointed out above, he appeared nervous when testifying and, as is not uncommon with alleged discriminatees who attempt to embellish the extent of their union activities to ensure that they will be found discriminatees, as, for example, Turner did, he appeared to be attempting to construct a defense that would ensure that Respondent Kallmann would not be found to have acted for an unlawful motive. While that affords a valid basis for not crediting that defense, it does not provide a valid basis for ignoring all other evidence and, *ipso facto*, penalizing him for doing so by finding an unlawful motive without regard to whether a preponderance of the evidence supports such a conclusion.

In fact, a preponderance of the evidence does not support the allegation that Respondent Kallmann refused to hire former employees of the restaurant for considerations unlawful under the Act. There is no evidence that Respondent Love's had reason to harbor, or that it did harbor, hostility toward the Union and its supporters because of any asserted "problems" that would naturally cause it to communicate to Kallmann that he had best not hire any of its former employees. There is no evidence that either Naylor or, particularly, Choy had repeated their feelings about the Union to other officials of Respondent Love's or, more significantly, that they had ever spoken to Kallmann before Respondent Kallmann had commenced hiring employees. A preponderance of the evidence does indicate that Kallmann believed the choice as to whether the restaurant would be unionized was his alone to make, without regard to how the employees whom he hired felt about the matter. In fact, he did not uniformly refuse to offer employment to all former employees who applied for employment. Consequently, while he undoubtedly did not want to incur the same high labor costs that had occasioned Respondent Love's to feel that the restaurant could not be operated profitably, his view of how unions became bargaining representatives did not warrant undertaking a campaign to

preclude former employees from being hired by Respondent Kallmann. Finally, there is substantial evidence that the former employees of the restaurant had been considered responsible for its filthy condition when it had been closed and that Kallmann had desired to avoid perpetuation or recurrence of that situation.

Therefore, I find that a preponderance of the evidence does not support the allegation that Respondent Kallmann violated Section 8(a)(3) and (1) of the Act in choosing the employees that it would hire. Further, since it has not been shown that even a significant number of former employees of Respondent Love's had been hired by Respondent Kallmann, the latter was not a successor employer to the former. Finally, as it has not been shown that a majority of the employees hired by Respondent Kallmann had desired representation by the Union, I find that Respondent Kallmann's failure to observe the collective-bargaining agreement to which Respondent Love's had been bound, its failure to recognize the Union as the representative of the employees hired to work at the restaurant, and its institution of wage rates and benefits for those employees without prior notification to and bargaining with the Union did not violate Section 8(a)(5) and (1) of the Act.

E. *The Allegations of Independent 8(a)(1) Violations*

The complaint alleges two independent violations of Section 8(a)(1) of the Act by Respondent Kallmann. The first pertains to Kallmann's remark to Pingree that he would rehire her under the same conditions as she had been employed by Respondent Love's, "but it will not be Union." Although, above, I have found that the quoted portion was not a condition, it is, nevertheless, a clear statement to an employee that Respondent Kallmann did not intend to permit the employees to be represented. While, as also found above, Kallmann truly believed that this was a matter within his prerogative to determine, the determination of whether Section 8(a)(1) has been violated by an employer is an objective one which does not involve scrutiny of the employer's motive. See *American Lumber Sales, Inc.*, 229 NLRB 414, 416 (1977), and cases cited therein. Therefore, I find that Respondent Kallmann did violate Section 8(a)(1) of the Act by making this remark.

The second incident pertains to the photographing of Logan and Wadsworth, as the two of them sat in an automobile after picketing had ended for the day, by Sebben. While Sebben claimed that he had believed that the two strikers had been smoking marijuana, there is no evidence that they had been doing so and, more importantly, there is no evidence that Sebben had taken the picture in an effort to aid in the enforcement of marijuana laws. Indeed, there is no evidence that anything was done with the picture after it had been taken. "[T]he Board and courts have long held that in the absence of any proper justification therefor, photographing strikers engaged in picketing or employees engaged in other union activities constitutes illegal interference, restraint, and coercion." *Puritana Manufacturing Corporation*, 159 NLRB 518, 519, fn. 2 (1966). (Citations omitted.) In the absence of any explanation by Sebben to Wadsworth and Logan, they could only have concluded that Sebben had been attempting to harass them by taking the picture, and they could only have concluded that he had been doing so because of their picketing, since there has been no showing that Sebben would have photographed a customer had the latter been smoking marijuana in Respondent Kallmann's parking lot. Therefore, I find that by photographing Logan and Wadsworth, Respondent Kallmann violated Section 8(a)(1) of the Act.

F. *Whether Respondent Kallmann's Operations Satisfy the Board's Standards for Asserting Jurisdiction*

Although Respondents argue that the Board should adjust its discretionary standards upward to account for the effects of inflation, it would appear that any authority to do so, wholly aside from the merits of doing so, has been removed from the Board by virtue of Section 14(c)(1) of the Act.

A tabulation of the gross sales at the Hayward restaurant during the final year of operation discloses that it received gross revenues in excess of $500,000. Although Respondent Kallmann claims that it would not have encountered similar success during its first year of operation, which had not expired by the time of the hearing, it continued the business of Respondent Love's at the Hayward restaurant "in essentially the same manner as before the change of [operator]." *Martin J. Baker, an individual proprietor, d/b/a Galaxy Theater, Hayloft Theatre, and Mini-Art Cinema*, 210 NLRB 695 (1974). Though, as found above, not a successor employer for purposes of assuming the bargaining obligation of Respondent Love's, the change in the employee complement would not affect the fact that Respondent Kallmann is continuing essentially the same operation as had Respondent Love's at Hayward. Moreover, as late as November, Kallmann gave an affidavit, under oath, stating that he anticipated that Respondent Kallmann would derive in excess of $500,000 during its first year of operations. Although there was testimony concerning competing enterprises having opened in the vicinity of the Hesperian Boulevard restaurant, the only real difference in the situation appears to have arisen as a result of the Union's picketing of the restaurant. It is settled that "a drop in volume of business, as a result of picketing, cannot be taken into consideration as a factor in defeasance of the Board's jurisdiction." *Kachco Corporation d/b/a Hickory Farms of Ohio*, 180 NLRB 755 (1970).

Therefore, inasmuch as Respondent Kallmann is conducting the same type of operation as was conducted by Respondent Love's at Hayward, when the Board's standard for asserting jurisdiction over retail operations was satisfied during the year ending in closure, and in light of the fact that Kallmann's projection that over $500,000 gross revenue would be derived during the first year of operation appears to have been affected only by the Union's picketing, I find that the volume of Respondent Kallmann's operations do satisfy the Board's standard for asserting jurisdiction over retail enterprises.

II. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62, set forth above, occurring in connection

with its operations described above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62 and Love's Enterprises, Inc. are separate employers within the meaning of Section 2(2) of the Act, each of whom is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Hotel, Motel & Restaurant Employees & Bartenders Union Local 50, Hotel, Motel & Restaurant Employees & Bartenders International Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By telling employees that it did not intend to operate a unionized restaurant and by taking pictures of employees who had been engaging in picketing or other protected activities, without a valid reason, Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62 has violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62 has not violated the Act in any other manner.
6. Love's Enterprises, Inc. has not violated the Act in any manner.

THE REMEDY

Having found that Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62 has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

APPENDIX B

STANDARD OPERATING PROCEDURES

All employees are required to be in uniform and ready to work their "stations" prior to their scheduled starting time.

All employees are required to enter and leave by the front door.

All employees are to check their stations thoroughly before every rush hour and before going off their shift.

All employees must notify the Manager immediately upon a change of telephone number or address.

All employees are required to read the bulletin board DAILY.

All employees must "punch in" AFTER they are dressed in uniform and "punch out" BEFORE removing uniform.

All employees are required to check with person in charge BEFORE punching out.

No employee is allowed to park on the restaurant's parking lot, without specific permission.

No employee, while in uniform, will sit at a table with a customer.

No employee is allowed to bring packages into or out of the restaurant.

No employee is to "86" any item in the restaurant unless authorized by the Manager.

No employee is authorized to take a bank check that exceeds the sum of the purchase and all bank checks must be okayed by Manager, Owner, or his Designee. Proof of customer's identity is required.

No one should accept a check that has been, or is going to be, endorsed more than once.

No employee off duty is allowed in the restaurant unless as a customer.

No employee should ever be idle to the point where he or she is without something to do during any shift. If it happens to be a dull period, cleaning, replenishing and lining things up for the next period should be done.

No employee will write on time cards in area reserved for time punches.

No employee should ever OFFER a guest any form of medication.

No personal phone calls may be received or made while on duty.

Any employees reporting for duty with liquor on their breath are subject to immediate dismissal.

In the event an employee realizes that he or she is going to be late or absent, he or she MUST notify the Manager IMMEDIATELY. Failure to do so may lead to dismissal.

Items written on the guest check should never be changed. They should be crossed out and initialed by the Manager, Owner or person in charge.

The "wheel man" will be the only verbal contact between Kitchen and Dining Room.

No one, other than the wheel man, shall handle, remove or touch the guest check once it has been placed on the wheel.

The wheel man will always be addressed by all other restaurant employees as "Sir" or "Mr. Wheel Man".

Waitresses will be addressed by all other restaurant employees as "Ma'am" or their number, i.e., "Number 8 please."

Hostesses and Cashiers will be addressed as "Hostess" or "Cashier."

Busboys will always be addressed as "Busboy."

Dish Machine Operators are to be addressed as "DMO."

Do not offer to handle any customer's belongings (coats, hats, umbrellas, etc.) unless specifically asked.

The following DO NOTS are Standard Operating Procedure.

DO NOT Chew gum or put toothpick in your hair, ear, nose, mouth, or on the food.

DO NOT Eat, drink or smoke in front of guests.

DO NOT Put a towel around your neck, on your shoulders, or under your arm.

DO NOT Clean fingernails in front of guests.

DO NOT Smoke in kitchen.

DO NOT Speak louder than necessary.

DO NOT Use profane language.

DO NOT Gossip or criticize a guest or fellow employee.

DO NOT Count tips or "jingle" tips in your pocket.

DO NOT Discuss your tips.

OBSERVE THE FOLLOWING SAFETY RULES

Look in the direction you are walking. Don't turn sharply or stop abruptly. Broken glass or china should be placed in a trash can (check with Manager if you are not sure where the trash can is). NEVER place broken glass in bus trays.

DO NOT Operate or attempt to operate any piece of equipment with which you are not familiar.

DO NOT Stand in front of swinging doors. If you must do so, hold it ajar with your foot. IF FOOD OR BEVERAGES are spilled they must be wiped up immediately. If anything is spilled on a customer's clothing or person, you should apologize and assist them with cleaning cloth or in any way possible. You should then report the incident immediately to the Manager, Dining Room Supervisor, or other designated individual in charge. The Manager of his designee should then fill out all necessary insurance forms, regardless of the customer's attitude and even if they assure the Manager that there is no problem.

CARE AND MAINTENANCE OF EQUIPMENT

All equipment arrives with a manual of operation and a warranty. If the Owner/Manager does not have these, he must get them. They should be filed in safe, but readily accessible location.

NO ONE IS TO ATTEMPT TO REPAIR ANY EQUIPMENT WITHOUT THE EXPRESS CONSENT OF THE OWNER/MANAGER

SPECIAL NOTICE

Absolutely no alcoholic beverages are to be consumed by any employee while on the premises of a Love's restaurant, unless off duty and in the unit as a paying customer. It would be a sound business decision to discourage consumption of alcoholic beverages by your employees on the premises of a Love's restaurant under any circumstances.

APPENDIX C

CRAFT DUTIES & RESPONSIBILITIES

HOSTESS

The Hostess will great each guest with a pleasant smile and say "Good Morning, Good Afternoon, or Good Evening," depending on the time of day and "Welcome to LOVE's." These three greetings are the only ones to be used. "Hi there", "Hello folks", etc., are not LOVE'S Standard Operating Procedure. Rather than guessing the number of people in a party, she should ask "How many in your party, please?". She is to give each guest a menu when she seats them. She should ALWAYS have in her mind a picture of every table in the dining room that is CLEAN, vacant and ready for service. This awareness will give the guests the feeling that, in this restaurant, they are in competent hands. Whenever possible, she is to seat each successive party in a different "station". This procedure will not put a strain on one Waitress while the other Waitresses remain idle.

During peak periods, when the dining room is filled to capacity, she is to maintain a written list showing the name and the number of people in each waiting party. During these peak periods a second Hostess should be on duty. The Hostess taking names is referred to as the Door Hostess and the other is the Floor Hostess. The Hostess working the door will say "Good Morning, Good Afternoon, or Good Evening, Welcome to Love's, may I have your name, please?". She should not forget to say "Thank you Mr. or Mrs.——." A good Door Hostess will recognize regular guests and remember their names, so that if time permits, she may ask, "Was everything all right, Mr. or Mrs.——?," while they are paying the check or about to leave the restaurant. People like to be remembered.

The Door and Floor Hostesses must work as a team. The Door Hostess must be constantly on the alert.

She must observe as much of the dining room as possible whenever she is not taking or calling the name of a guest. The Floor Hostess becomes the extra pair of eyes for the Hostess on the door. As soon as a table is vacated, a Busboy must be on the scene. In the event a Busboy doesn't see the table that should be cleared off (pulled), it becomes the duty of either Hostess to see that a Busboy pulls the vacated table. The Floor Hostess is to notify the Door Hostess as soon as the table is cleared and set up so that the next patrons may be seated. When the Door Hostess notifies the next group of quests that their table is available she should say "Your Hostess will seat you, thank you for waiting, Mr.——." The Floor Hostess will seat guests as quickly as possible and present each guest with a LOVE'S menu, ladies first. She should smile, thank them for waiting once more and wish them a pleasant meal. Remember, menus must be handed to each guest, not just placed on the table.

A HOSTESS SHOULD NEVER SEAT A PARTY AT A TABLE THAT HAS NOT BEEN CLEARED, CLEANED AND SET UP!

The Door Hostess must call (whenever possible) the names on the waiting list as they were received. The Hostess should explain, "There will be only a . . . minutes waiting time." In instance when the turnover is quite rapid, the preceding is not necessary.

The Hostess must know the number of each waitress, each table, and each station.

She must know how to make coffee.

Craft Duties and Responsibilities

HOSTESS

She should know the duties of the Cashier and be able to fill in if needed.

She should see that the floor is kept clean.

She should assist the Waitresses whenever the need arises and time allows.

All arrangements for private parties and large groups should be approved by the Owner/Manager.