239 NLRB No. 108 (N.L.R.B.), 239 NLRB 776, 100 L.R.R.M. (BNA) 1077,
100 L.R.R.M. (BNA) 1199, 1978-79 NLRB Dec. P 15360, 1978 WL 8310

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

East Belden Corporation
and
Bartenders and Culinary Workers Union, Local 126, Hotel and
Restaurant Employees and Bartenders International Union, AFL-CIO

Case 20-CA-13585
December 12, 1978

DECISION AND ORDER

**1 BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On August 31, 1978, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief.

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 [1] and has decided to affirm the rulings, findings, [2] and conclusions of the Administrative Law Judge and to adopt his recommended Order. [3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, East Belden Corporation, Tiburon, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached Appendixes A and B are substituted for those of the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL recognize and, upon request, bargain collectively with the Union, Bartenders and Culinary Workers Union, Local 126, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive representative of all our employees in the appropriate bargaining unit described below, with respect to rates of pay, wages, hours of employment,

and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

**2 All employees employed by us at the Windjammer bar and restaurant, Tiburon, California, excluding guards and supervisors as defined in the National Labor Relations Act.

WE WILL, upon request by the above-named Union, revoke the unilateral changes in the rates of pay, wages, and other terms and conditions of employment which we have instituted in the appropriate bargaining unit, until such time as we negotiate with the Union in good faith to agreement or an impasse in negotiations is reached.

WE WILL make whole the employees in the appropriate unit for any loss of pay or other benefits they may have suffered as a result of the aforesaid unilateral changes, with interest, and continue such payments until such time as we negotiate in good faith with the Union to agreement or to an impasse.

WE WILL pay Mark Mason for any earnings he lost as a result of his discharge on October 2, 1977, plus interest from the date of his discharge until February 20, 1978.

WE WILL offer to reinstate, if we have not already done so, the persons named below, who were discharged October 2, 1977, to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights previously enjoyed and WE WILL reimburse them for any loss of earnings suffered because of their discharge, together with interest.

Kalisa Fallon	Heather Healey
Dick Johnson	Herb Holzmann
Alan Leibowitz	Hermine Honeck
Gloria Mazzucco	Ricardo Imeri
David Reynolds	Orlando Jefferson
Gloria Samuel	Michael Labrie
Beverly Souza	Donald Jay Lesley
Armand Allegra, Jr	Ricardo Lopez
Jesus Aqular	Vic Lubet
Tom Atkin	Jeff Mason
Adolfo Camacho	Lilli McHugh
Harry Cohen	Mike Morand
Antonio Delgardo	Arturo Rico
Donna Diana	Jose Rodriquez

Lee Duran	Dennis Roe
Todd Duran	Hamilton Townsley
Michael Gravel	Steve Washington
Yam Hak-Ming	Armand “Ted” Allegra, Sr.
William Allen	Genaro Amezcua

***777** WE WILL NOT refuse to recognize and bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the appropriate unit.

WE WILL NOT unilaterally change the rates of pay, wages, hours and/or other terms and conditions of employment of the employees in the appropriate unit in derogation or our bargaining obligations to the above-named Union and to the rights of employees under the National Labor Relations Act.

****3** WE WILL NOT discourage membership in the above-named Union, or in any other union, by discharging employees or otherwise discriminating against them in any manner with regard to hire and tenure of employment or conditions of employment.

WE WILL NOT question employees about their union sympathies or their willingness to support a strike sponsored by a union.

WE WILL NOT solicit employees to withdraw from a union.

WE WILL NOT promise employees benefits of employment to dissuade them from joining or supporting a union.

WE WILL NOT threaten employees with discharge because they are represented by a union.

WE WILL NOT tell employees that we do not intend to sign a contract with the above-named Union.

WE WILL NOT condition employees' employment upon their agreeing not to support a strike sponsored by a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.

EAST BELDEN CORPORATION

APPENDIX B

Kalisa Fallon	Heather Healey
Dick Johnson	Herb Holzmann
Alan Leibowitz	Hermine Honeck
Gloria Mazzucco	Ricardo Imeri
David Reynolds	Orlando Jefferson

Gloria Samuel	Michael Labrie
Beverly Souza	Donald Jay Lesley
Armand Allegra, Jr.	Ricardo Lopez
Jesus Aqular	Vic Lubet
Tom Atkin	Jeff Mason
Adolfo Camacho	Mark Mason
Harry Cohen	Lilli McHugh
Antonio Delgardo	Mike Morand
Donna Diana	Arturo Rico
Lee Duran	Jose Rodriques
Todd Duran	Dennis Roe
Michael Gravel	Hamilton Townsley
Yam Hak-Ming	Steve Washington

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO. Administrative Law Judge:

The hearing in this case held June 6, 7, and 8, 1978, is based upon unfair labor practice charges filed by the above-named labor organization on January 3, 1978, as subsequently amended, and a complaint issued February 17, 1978, amended at the hearing, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Board, Region 20, alleging that East Belden Corporation, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

**4 Upon the entire record, [1] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS AND LABOR ORGANIZATION INVOLVED

The business enterprise involved in this case is a restaurant and bar known as the Windjammer located in Tiburon, California. Respondent East Belden Corporation, *778 which is incorporated in the State of California, concedes that the Windjammer's volume of business meets the Board's applicable jurisdictional standard and that in operating the Windjammer Respondent is

an employer engaged in commerce within the meaning of Section 2(5) and (6) of the Act. The labor organization involved in this case, Bartenders and Culinary Workers Union, Local 126, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. THE ULTIMATE QUESTIONS PRESENTED The essential questions presented for decision in this proceeding are as follows.

(1) Whether Respondent's refusal to recognize and bargain with the Union as the collective-bargaining representative of the Windjammer's employees and its changes in the employees' terms and conditions of employment without consulting or bargaining with the Union is a violation of Section 8(a)(5) and (1) of the Act?

(2) Whether in discharging all of the Windjammer's employees Respondent was motivated by a desire to avoid recognizing the Union as the employees' collective-bargaining representative, thus violating Section 8(a)(3) and (1) of the Act?

(3) Whether several statements and questions attributed to Respondent's owners were voiced, and, if so, whether they constitute the type of conduct which reasonably tended to interfere with, restrain, or coerce the Windjammer's employees from supporting the Union, thus violating Section 8(a)(1) of the Act?

Ill. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts: A Chronology*

1. The events which took place before and during escrow

The Windjammer, a restaurant and bar, was purchased in 1974 by Number Five Main Street, a California corporation, whose principal owner is Fred Zelinsky, and who, for the sake of convenience, is hereafter called Zelinsky. Respondent is equally owned by Gabriel and Halina Ferroni and Jason and Ray Kuhn, all of whom are officers of the corporation; Gabriel Ferroni, president; Jason Kuhn, vice president; Ray Kuhn, treasurer; and Halina Ferroni, secretary.

Mr. and Mrs. Ferroni and Mr. and Mrs. Kuhn first discussed buying the Windjammer with Zelinsky on July 23, 1977,[2] at which time Zelinsky indicated that he would be amenable to selling the Windjammer. On August 8, Mr. and Mrs. Ferroni and Mr. and Mrs. Kuhn, on behalf of Respondent, and Zelinsky entered into an "Agreement For Sale of Restaurant Assets," herein called the sales agreement. The pertinent provisions of the sales agreement are as follows. Zelinsky agreed to sell the Windjammer's stock-in-trade up to $25,000[3] (anything over $25,000 was at the option of Respondent), furniture and fixtures, trade name and good will, leasehold interest, and alcoholic beverage license. The sales price was $361,000, of which $100,000 was to be paid in cash and the balance in the form of a promissory note. The sales agreement obligated the parties to enter into an "Escrow" to carry out the terms of the sales agreement and the "Escrow Instructions" were incorporated into the sales agreement. The sales agreement further provided that the closing of escrow and the transfer of permanent possession of the Windjammer was conditioned upon several events taking place, including the approval by the State of California Department of Alcoholic Beverage Control of the transfer of the Windjammer's liquor license from Zelinsky to Respondent. Other conditions precedent to the closing of escrow included delivery of the property without encumbrances, execution of a leasehold between buyer and landlord,[4] and no occurrence of any event causing damage or destruction to the property during escrow. Zelinsky also agreed to immediately surrender his liquor license to the Department of Alcoholic Beverage Control and Respondent agreed to immediately obtain a temporary liquor license and all other required business licenses and "do all things necessary" to allow Respondent to "legally operate its business at the premises [emphasis supplied]" as soon as the temporary retail liquor permit was obtained. Continuing, the sales agreement states:

7. Temporary Permit

**5 (c). On the day the temporary retail permit become effective and [Respondent] has obtained all licenses necessary to legally operate the business at the premises, [Zelinsky] and [Respondent], ... shall conduct a physical inventory of the stock-in-trade as of that day. [Respondent], on that day, shall assume full management and control of the business and, as of 8 a.m., on the following day shall commence operation of the business without any interruption and continue uninterrupted businesslike operation until (i) the sales escrow has closed, (ii) the temporary permit and any extensions have expired; or (iii) the application for permanent license has been denied and [Respondent] has exhausted any diligently prosecuted administrative remedies, whichever occurs first. [Emphasis supplied.]

(d). For the period of possession of the business under the temporary permit [Respondent] shall rent from [Zelinsky], the premises, including real property, all fixtures, equipment and other assets agreed to be transfered on the close of the sale escrow. The total rent shall be $100 per day, or 7% of the daily gross income of the business ....

*779 (e). If the Escrow fails to close for any reason: (1) [Respondent] shall immediately relinquish possession of the premises to [Zelinsky] in the same condition as when [Respondent] took possession, reasonable wear and tear excepted.

Simultaneously with the signing of the sales agreement on August 8, the parties executed "Escrow Instruction" whereby they designated an "Escrow Holder" who was given detailed instructions concerning the implementation of the terms of the sales agreement. The pertinent instructions, for the most part, were already set forth in the sales agreement. Not mentioned in the sales agreement, however, is the instruction that all personal property taxes, rents, and insurance premiums are to be prorated and charged to Zelinsky "through [the] date of consummation of escrow." [5] Also, consistent with the terms of the sales agreement, the escrow holder was instructed to receive and hold Respondent's consideration until approval of the alcoholic beverage license transfer and the occurrence of all of the other conditions, at which time she was instructed to close the escrow and disburse the proceeds to Zelinsky. If the Respondent was not able to obtain the license transfer and had exhausted all administrative remedies, excrow would be canceled with all monies returned to Respondent and all documents returned to the appropriate parties. On August 7, the day before the parties signed the sales agreement, Zelinsky held a party at the Windjammer for the purpose of introducing the owners of Respondent to the public. During the party Zelinsky, in the presence of the Mayor of Tirubon and Mr. and Mrs. Ferroni, thanked cocktail waitress Kalisa Fallon for her past services and stated that it was his last night and that the next day Mr. and Mrs. Ferroni would be "taking over" and that "he [Zelinsky] no longer would have an interest in the restaurant." Zelinsky also gave Fallon mimeographed copies of a letter signed by himself and his wife for distribution to the employees. The letter, which Fallon distributed to the employees, in pertinent part stated:

> **6 This is to announce to you, that the operation of the lovely Windjammer Restaurant has been sold to the East Belden Corporation owned by Mr. and Mrs. Gabriel Ferroni and Mr. and Mrs. Jay Kuhn. By the time you receive this letter, they will be the new operators of the restaurant for the next 27 years....

On August 8, Respondent received a temporary license to serve alcoholic beverages under its name at the Windjammer and, as of that date, had also obtained all of the other business licenses essential to operating the Windjammer in its name. So on August 8, pursuant to the terms of the sales agreement, a physical inventory of the stock-in-trade was conducted and the next morning, August 9, Respondent took control of the Windjammer and commenced to operate the business. Also on August 9, Respondent's owners introduced themselves to the Windjammer's employees at a meeting held in the restaurant. They introduced

themselves as "the new owners" who would personally be operating the business. [6] The employees were informed that Gabriel Ferroni would manage the bar and restaurant, Halina Ferroni would maintain the books, Ray Kuhn would work with the chef in managing the kitchen, and Jason Kuhn would take care of public relations. The employees were also told that during escrow there would be no changes in personnel, nor any changes in the employees' wages or work schedules, that everything would remain the same as previously, but that Respondent was contemplating a lot of changes which would not be implemented until the close of escrow. On the subject of the Union, the employees were advised that Respondent had not reached any decision, but that when escrow closed it would allow the employees to decide whether the Windjammer would stay union or be nonunion. Finally, Jason Kuhn referred to the employees' medical insurance coverage [7] and asked how they would feel about a plan different from the Union's, explaining to them that he was in the insurance business and that at a later date Kuhn would possibly be able to offer them a better plan.

During escrow, August 8 to October 3, Zelinsky exercised absolutely no control over the Windjammer's business operations. Respondent's President Ferroni, in effect admitted that after Respondent, on August 9 commenced to operate the Windjammer that Zelinsky's only connection with the business was the suggestions he offered. Zelinsky credibly testified that from August 9, the date Respondent took possession of the Windjammer, he felt that he was no longer the owner of the Windjammer and that while he thereafter made suggestions to Respondent's owners, which he continued to do even after escrow closed, that they were merely suggestions, not commands. Also, Zelinsky credibly testified that during escrow he stayed out of the affairs of management and "personally made it well known to everyone that [he] would not interfere between [Respondent's owners] and the operation of the restaurant." In this regard it is undisputed that during escrow the business of the Windjammer was managed by Respondent's owners. Gabriel Ferroni managed the restaurant and bar. [8] Ray Kuhn, with the chef, managed the kitchen. Halina Ferroni took charge of the books and records. Jason Kuhn took care of the public relations and served as a host on occasions. It is also clear that during escrow Respondent's ***780** owners were managing the Windjammer on behalf of Respondent, not Zelinsky. Thus, during escrow, all of the business licenses, insurance policies, and books of account and other business records essential to the operation of the Windjammer were in Respondent's name. [9] Respondent paid all of the Windjammer's operating expenses, including fuel, water, utility charges, sales taxes, use taxes, food and beverage expenses, employees' wages, [10] and payroll taxes. Respondent's owners were paid a salary by Respondent, not Zelinsky, for managing the Windjammer during escrow and like any independent business entity Respondent, during escrow, could expect to make a new profit if its income from the Windjammer's business exceeded expenses.

****7** When Respondent commenced to operate the Windjammer on August 9, and for the remainder of the escrow period, it retained the entire complement of employees that previously were employed by Zelinsky. These employees worked under virtually the same terms and conditions of employment that existed when Zelinsky operated the Windjammer. The only changes in the employees' terms and conditions of employment instituted during escrow by Respondent were as follows: (1) In the latter part of August the bartenders' 20-minute break period was eliminated and the bartenders since then have been required to work their shifts continuously without any break. [11] (2) In the middle of August, the practice of paying overtime pay to employees for working over 8 hours in any one day was discontinued [12] (3) During the week of either August 22 or August 29, the pay of one employee, Kalisa Fallon, was reduced. [13] (4) Immediately upon taking over the operation of the Windjammer, Respondent discontinued the employees' pension, health and welfare benefits by discontinuing making payments on their behalf into the pension, health and welfare funds established by the Union's collective-bargaining agreement with Zelinsky. Otherwise, the employees during escrow continued working at their same jobs, with the same work schedules and received the same benefits as previously. They continued to work in a restaurant and bar which did business under the name of the Windjammer and which served the same kind of beverages and foods to the general public as it had done in the past under Zelinsky. The only significant change in the Windjammer's business operation which came about because of Respondent's takeover during escrow was that the Windjammer's manager, Hans Behringer, was terminated by Respondent and Respondent's owners personally took over the day-to-day management of the business.

2. The Union requests Respondent to sign a collective-bargaining agreement

In January 1976, Zelinsky entered into a collective-bargaining agreement with the Union recognizing it as the bargaining representative of the Windjammer's employees. Zelinsky agreed to accept, adopt, and observe all of the terms contained in the Union's collective-bargaining agreement with The Marin Restaurant and Tavern Owners Association, Inc., and independent operators agreement and any changes or amendments made during the life of said agreement, provided Zelinsky was given 30 days to accept or reject said amendments. [14] The association agreement, which Zelinsky had agreed to abide by, was effective from July 1, 1974, until June 30, 1978. In entering into his contract with the Union, Zelinsky agreed that the agreement would be binding upon any successor and that the agreement would not be affected by any sale or transfer of the Windjammer. The record establishes that on August 8, when it signed the sales agreement, Respondent had no knowledge of Zelinsky's collective-bargaining agreement with the Union but, as indicated by its comments to the employees at the meeting of August 9, knew that the Windjammer's employees were represented by the Union.

**8 Respondent's president, Gabriel Ferroni, testified that soon after Respondent commenced to operate the Windjammer, he learned there was a collective-bargaining agreement between Zelinsky and the Union covering the Windjammer inasmuch as Respondent received through the mail the forms sent by the Union to the Windjammer asking Zelinsky for his monthly pension, health and welfare contribution on behalf of the employees. In addition, during the first part of August, it is undisputed that union business agent Nick Georgedes spoke to Mr. and Mrs. Ferroni about the Union and its contract covering the Windjammer. Georgedes credibly testified that he introduced himself to Mr. and Mrs. Ferroni and advised them that the Union was taking the position that the Windjammer was still under contract with the Union, but that the Union would like to sign another contract with Respondent so that it would have its own agreement with the Union. Mr. and Mrs. Ferroni, according to Georgedes, replied that they wanted to think the matter over and could not do anything without consulting the other owners. [15] Thereafter, during August and September, Georgedes visited the Windjammer on several occasions to collect dues from the employees and was observed doing this by Gabriel Ferroni. The final contact between a representative of the Union and an owner of Respondent took place early in December, after the Union had commenced picketing the Windjammer, at which time Georgedes informed Gabriel Ferroni that the only way the Union would remove its pickets *781 was for Respondent to sign a contract with the Union and offered to delay the contract's effective date for 3 months as an incentive for Ferroni to sign. Ferroni declined the offer.

3. Respondent's reaction to the Union's demand that it sign a collective-bargaining agreement

Upon learning that the Windjammer's employees had been covered by the terms of a collective-bargaining agreement when Zelinsky had operated the Windjammer and that the Union wanted Respondent to sign such an agreement, Respondent's owners spoke to several of the employees about the Union and union representation.

During the last week in August, Respondent's president, Gabriel Ferroni, asked bartender Frank Michell how he felt about the Union. Michell, who had been employed at the Windjammer for about 9 years and had performed virtually every job there, indicated he felt the Union was fine. Ferroni told him that Respondent was thinking about dropping the Union, asked whether Michell would remain if Respondent dropped the Union, and promised that if Michell stayed without the Union, Respondent would grant him a small monthly bonus and better benefits. Ferroni also asked Michell why, as of late, he seemed so unhappy. Michell answered that it was apparent to him that Respondent intended to get rid of a lot of the employees. Ferroni acknowledged that this was correct. Ferroni stated Respondent wanted to “drop the Union” and to do this “they have to [get] rid of almost everyone,” but had to wait until escrow closed to do this and would like Michell to stay in its employ. Michell told [16] Ferroni that he would have to consider Respondent's offer.

**9 In the latter part of September, in answering a question of waiter Lee Duran, the president of Respondent, Gabriel Ferroni, told Duran that the reason Respondent was instituting its own health insurance program was "because he was getting rid of the Union." Ferroni also stated to Duran that Respondent intended to get rid of 50 percent of the Windjammer's employees explaining, "it's a law that you have to get rid of 50% of the employees when you drop the Union." [17]

In the middle of September, President Ferroni spoke to waitress Heather Healey about the Union. After asking Healey to keep their conversation a secret, Ferroni asked whether she would work at the Windjammer if it were nonunion and assured her that Respondent was a good employer that would take care of its employees. Ferroni also explained that there was a law in the State of California that when a new operator took over a restaurant it had to discharge 50 percent of the employees, that Respondent did not like to do this, but it had no choice, and assured Healey that she would be one of the employees retained. Healey stated it was not a fair law, that she was willing to cooperate and give her best work effort to Respondent, but that she was not willing to state whether she would work union or nonunion as she felt it was up to all of the employees to vote upon this question. Later in September Healey asked whether Ferroni was sure about the law which stated he had to discharge 50 percent of the employees, explaining to Ferroni that she thought he was being misled as she had checked and there was no such law. Ferroni ignored her question and stated, in substance, that Respondent was a good employer to work for and that other than the fact that Respondent might not be Union, that the employees' working conditions would remain the same and be good conditions and that Healey would have nothing to worry about working for Respondent. [18]

In the middle of September, Halina Ferroni, a part owner and corporate secretary of Respondent, asked Healey how she felt about the Union and whether she would work for the Respondent if it was nonunion. Ferroni told Healey that the Union was composed of "trouble makers" who would cause nothing but trouble for Respondent and also described the Union as being connected with the "mob" and stated Respondent did not want any interference from the Union. Healey answered that Respondent should allow the employees to vote whether or not they wanted to work union or nonunion. [19]

In the latter part of September, President Ferroni spoke to bartender David Reynolds and solicited his opinion about certain changes he had in mind for the bar. Ferroni also asked Reynolds how he felt about the Union. Reynolds stated that he thought the Union was fine and liked its benefits. Ferroni asked if Reynolds would consider continuing to work at the Windjammer if it went nonunion. Reynolds stated he would have to consider the question and would make his decision when and if this occurred. [20]

**10 During the first part of September, waiter Mark Mason was asked by President Ferroni how he felt about the Union. Mason stated he thought the Union was a good idea for employees. Two weeks later Ferroni again asked the same question. Mason repeated that he felt it was a good idea for employees but that he wished it had better medical benefits. [21]

In September, while waiter Michael Labrie was serving dinner to Respondent's owners, Jason Kuhn, Respondent's *782 vice-president, asked how he liked working at the Windjammer. Labrie indicated he liked working there very much and stated he had never worked previously in a union restaurant and enjoyed the benefits and pay. Either Jason Kuhn or Ray Kuhn, the Respondent's treasurer, then asked whether Labrie would be willing to work in a nonunion restaurant. Labrie answered yes but then qualified his answer stating it would depend upon the benefits and pay. [22]

Early in August, while questioning waitress Healey about the restaurant and asking for suggestions to improve the restaurant, Respondent's owners Jason Kuhn and Gabriel Ferroni asked what Healey though about the Union. Healey stated her only criticism of the Union was that its health and welfare plan was not adequate. [23] Thereafter, all four of Respondent's owners at different times separately approached Healey while she was working and asked if she would work at the Windjammer if it were nonunion. Healey answered that she was not a representative of the Union and would do whatever a majority of the employees favored. [24]

4. The meeting of September 30

a. *The admissibility of General Counsel's evidence*

On Friday, September 30, Respondent's owners held a meeting in the restaurant's bar with the Windjammer's employees. Kalisa Fallon, one of the employees present at the meeting, sat with a tape recorder on her lap and recorded the entire meeting without the knowledge of Respondent's owners. Fallon, thereafter, prepared a transcript of the recording. General Counsel, relying upon the tape recording and transcript, both of which I admitted into evidence over Respondent's objection, did not call a single witness about what took place at the meeting.

There is no evidence that the tape recording has been altered. Nor did Respondent adduce sufficient evidence to demonstrate that the recording was not an accurate representation of what was said at the meeting or that the transcript attributes statements to the wrong persons. During the hearing, in the presence of myself and all parties, the recording was played twice. Two employees, Fallon and Healey, listened to the recording and as they listened, identified the voices of the persons talking so as to make sure that the transcript accurately identified the persons who spoke. [25]

Based upon my having listened to the recording, and Fallon's and Healey's testimony concerning the identity of the speakers, Respondent's failure to refute their testimony or to produce one witness to challenge the accuracy of the tape recording, I am persuaded that the recording is an accurate representation of what was said at the September 30 meeting and that the transcript accurately reflects what was recorded and correctly reflects the names of the persons who spoke at the meeting and what they stated. [26] It is for these reasons that I reject Respondent's contention that the tape recording and the transcript thereof are not admissible because "there are authenticity problems with tape and transcriptions."

****11** Respondent also urges I erred in receiving into evidence the recording of what was stated at the September 30 meeting because the recording was obtained in violation of the laws of the State of California. The California law in question, §632 of the California Penal Code, provides, in pertinent part, that to tape record "intentionally and without the consent of all parties to a confidential communication" constitutes a crime and the evidence is prohibited from being introduced in any judicial or administrative proceeding. "Confidential Communication" is defined as including "any communication carried on in such circumstances as may reasonably indicate that any party to such desires it to be confined to such parties, but excludes a communication made in public gathering ... or in any other circumstances in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Respondent argues that in view of this statute I cannot base any findings and conclusions upon the tape recording evidence. I disagree. Section 10(b) of the National Labor Relations Act, as amended, obligates the Board to look toward Federal law to determine the admissibility of evidence, although the Board is not bound by the strict rules of evidence applicable in Federal courts. Under the Federal Rules of Evidence, evidence obtained by means of a tape recording which is not obtained in violation of the Constitution or Federal law is admissible in Federal court, even though obtained in violation of state law. See cases cited in *Local 90, Operative Plasterers and Cement Masons International Association (Southern Illinois Builders Association)*, 236 NLRB 329 (1978). In the instant case, there is no contention nor does the evidence reveal that Fallon recorded the September 30 meeting in violation of the Constitution or Federal law. It is for these reasons that I reject Respondent's contention that the California Penal Code precludes the admission into evidence of the recording. [27] See *Local 90, Operative Plasterers, supra*, where the Board considered a state statute very similar to the California statute and refused to exclude a tape recording made in violation of that statute.

***783** b. *The meeting*

Ray Kuhn, the treasurer and a part owner of Respondent, acted as Respondent's spokesperson at the September 30 meeting.

Kuhn informed the employees that escrow was closing Monday, October 3, at which time "Zelinsky [would] no longer have any interest in the business" and advised the employees that Respondent's owners "can now officially go ahead and make our own decisions, changes whatever we want to do." Continuing, Kuhn stated that since Zelinsky's "interests" end Sunday, October 2, that on Monday, October 3, when Respondent's owners "take over" the employees would receive their final paychecks and any accrued vacation pay through Sunday and that all employees who desired to continue to work at the Windjammer should file employment applications with Respondent no later than 5 p.m., Saturday, October 1, and that in selecting its new staff Respondent would review the applications filed by the current employees as well as the applications submitted by other applicants. Also, Kuhn stated that the Windjammer would be closed Monday, October 3, during the day and would reopen for dinner, and that the employees should either phone or visit the restaurant on October 3 between 9 a.m. and 11 a.m. to determine whether or not their applications had been accepted.

****12** Employee Fallon asked whether the employees should consider themselves as having been laid off. Ray replied, "it's not laid off. I mean its just that we're officially starting on Monday and we have to Start from scratch as if we were a brand-new place. And that's the reason for the applications. So its all of Zelinsky's interests through Sunday and then ours officially start on Monday." Fallon asked if Respondent intended to hire all of the current employees back or if Respondent's owners could give the employees some idea as to who would or would not be reemployed. Ray answered that it was impossible for her to answer Fallon's question inasmuch as the decision to employ the employees who submitted applications would be a joint one arrived at only after all four owners had reviewed the applications and discussed the matter among themselves. Also, Fallon asked Kuhn where the employees stood with Respondent if the Union started "some kind of trouble" by taking the position that it had a contract with Respondent. In response, both Kuhn and President Ferroni stated, "well if you wanna work here you go through the picket line, if there is one." Finally, in connection with Respondent's intent to hire the current employees, Fallon pointed out that there had been talk that Respondent was planning on reemploying only 50 percent of the employees and asked if this was true, explaining that employee Lee Duran had been told this by President Ferroni. [28] Ferroni said that this was not true.

On the subject of working conditions, Kuhn told the employees that Respondent did not intend to reduce their wages but intended to pay employees by the hour rather than by the shift and intended to introduce a new health insurance plan which would cost $5 a month for those who wanted it. [29]

There was also extensive discussion about the Union. Employee Rico asked if Respondent was dropping the Union. Kuhn replied that Respondent did not have a contract with the Union and "don't have any intention of signing a contract," explaining to the employees that "at this point ... what we really need is flexibility to operate the place without tieing ourselves in any contracts, that's what we really need." Fallon told Kuhn that the Union had stated it intended to sue the Windjammer under the successorship clause in the collective-bargaining agreement and that the employees were caught in the middle of a fight between Respondent and the Union. Kuhn answered, "all I can tell you is that we don't intend to sign a contract, o.k., so whatever happens after that is up to you all, up to the Union." Later, employee Healey asked, in substance, what it was about the Union that Respondent found objectionable. Kuhn answered, "basically we just don't want to be tied down to a contract and have some outside agency ... dictate to us how to operate our business, we need the flexibility, especially now starting out, to run the business as best we see it." Continuing, Kuhn explained that she understood that the Union's contract dictated all working conditions and "everything else" and Respondent "just don't [want to] be tied to it" and emphasized to the employees that it was "super-important" for Respondent to have flexibility and that any time you have "a contract of any kind" an employer loses this flexibility. When, later during the meeting, Fallon expressed the view that once the Union was dropped Respondent would be in a position to treat the employees arbitrarily Kuhn replied, "we don't intend to be unfair employers, on the other hand we don't want to sign a contract."

5. The events which took place after escrow closed

****13** The Windjammer was open for business as usual on Saturday, October 1, and Sunday, October 2. It employed 39 persons. [30] By the October 1 deadline imposed by Respondent for the filing of employment applications, 35 of the 39 had filed applications. On October 3, Respondent closed the Windjammer for the entire day because it had discharged all of the employees and was in the process of hiring a new staff. Likewise, October 3 was the day on which escrow closed resulting in the transfer of the Windjammer from Zelinsky to Respondent. ***784** Respondent reopened the Windjammer for business October 4 with 33 persons in its employ [31] and certain terms and conditions of the employees' employment changed. Previously, employees were paid by the shift, now they were paid by the hour. New vacation pay and sick leave pay policies were instituted as well as new health insurance and death benefit programs. No evidence was introduced, however, that from October 3 until the date of the hearing in this case, June 8, 1978, that Respondent made any significant changes in the nature of the Windjammer's business. Quite the opposite, the record reveals that since October 3 Respondent had made no physical changes in the Windjammer nor has it changed the Windjammer's business format. The Windjammer still serves the same kind of foods and beverages, maintains the same type of menu, and its employees exercise the same skills as under Zelinsky.

As indicated *supra*, 35 of the 39 persons discharged on October 2 submitted applications for reemployment. On October 4, when the Windjammer reopened, 18 of them were not reemployed, but for the most part had been replaced by new hires. General Counsel presented evidence concerning the circumstances surrounding the efforts of 11 dischargees [32] to secure reemployment and Respondent presented similar evidence concerning one. [33] This evidence has been set forth and evaluated herein.

a. *Kalisa Fallon*

Kalisa Fallon was employed at the Windjammer for approximately 3-1/2 years. She had worked as a hostess, cashier, cocktail waitress, and bartender; at the time she was discharged she was working as a cocktail waitress. On September 30, at the meeting between Respondent's owners and the employees, Fallon spoke more frequently than any of the other workers and by the nature of her questions it should have been plain to Respondent's owners that she was a union adherent. [34] Later that day, after work, Fallon filled out an employment application and in the upper right hand corner, to emphasize her strong desire to remain at the Windjammer, penciled in, “I wish to stay at the 'Jammer.' “

Fallon was not scheduled to report for work on Saturday, October 1, until 5 p.m., at which time she handed her application to President Ferroni. Fallon told Ferroni that she wanted to continue working at the Windjammer but was worried about her chances for employment because she feared that the remarks she had made about the Union at the September 30 meeting might have antagonized the owners of Respondent. She asked whether Ferroni could tell her whether he planned on reemploying her. Ferroni indicated it would not be his decision, but would be a joint one made by all of the owners.

****14** President Ferroni denies that on October 1, as set forth *supra*, Fallon handed him her employment application. Ferroni testified he was absent from the Windjammer all of that day, thus, Fallon could not have spoken to him or given him her application. He further testified that the first time he observed Fallon's application was the morning of Sunday, October 2 when, with Halina Ferroni, he discovered a pile of applications on the reservation desk in the restaurant. As they looked through the applications, according to President Ferroni, Halina Ferroni discovered Fallon's application and informed her husband that it looked as if Fallon had written “I wish to stay at the 'Jammer,' “ but that someone had erased it off.

President Ferroni did not impress me as a trustworthy witness, whereas Fallon did; accordingly, I have credited her testimony. In addition, Ferroni's testimony that he was absent from the Windjammer all day Saturday, October 2, does not ring true inasmuch as Saturday is the busiest day of the week and was the day the employees were supposed to give Respondent their applications for reemployment. Moreover, at another point in his testimony, President Ferroni testified that during escrow he normally worked

at the Windjammer 7 days a week from 9 a.m. to 11 p.m. In addition, Ferroni had absolutely no recollection where he spent his "day off" and then, inconsistent with his earlier testimony, testified that it was possible he did work Saturday, October 2, at the Windjammer, but only until the night manager arrived, which the record reveals was between 4 p.m. and 5 p.m. Finally, Halina Ferroni, the wife of President Ferroni, who was present in the hearing room, was not called upon to corroborate her husband's testimony concerning the discovery of Fallon's application; thus, I presume her testimony would not have been consistent with her husband's and would have been adverse to Respondent. It is for all of these reasons that I reject Ferroni's testimony and credit Fallon's that she gave her application to Ferroni on October 1 and spoke to him at the same time about employment; and, I further find, that the penciled in notation made by Fallon on the top of her application was there when the application was received by Respondent's owners and was presumably erased by one of the owners.

It is undisputed that Fallon worked for the duration of her normal shift on Saturday, October 1. There is a dispute, however, about whether she informed night manager William Allen, at the end of the shift, that she was voluntarily terminating her employment. Allen testified that Fallon, on October 1, expressed dissatisfaction to him about the manner in which Respondent was operating the restaurant and that later in the evening, at approximately 11:30 p.m. or 12 midnight, while at the bar with five or six employees, Fallon made the following statement to him: "She said she was leaving, going to have a few drinks, and good bye." Fallon, on the other hand, specifically denies indicating to Allen or any of the employees that she was quitting her job, but testified that when she finished work Allen purchased a drink for her at the bar, that she took a couple of sips and when Allen asked her to remain for awhile and drink with ***785** him that she declined the invitation and left. Fallon impressed me as a more credible witness than Allen; accordingly, I have rejected Allen's testimony. In addition, the record establishes that as Fallon left the bar that evening to go home, she called out to the bartender with whom she worked, "I'll see you tomorrow."

****15** On Sunday, October 2, Fallon was unable to report for work because she had twisted an ankle. She phoned the Windjammer and told waitress Beverly Souza, who answered the phone, that she had twisted her ankle and because of this would not be able to work that evening. Sou2a promptly gave this message to Jason Kuhn and Garbriel Ferroni. As a result, another waitress was assigned to fill in for Fallon.

On Monday, October 3, Fallon went to the Windjammer at 9 a.m. to find out about her employment status. She asked Gabriel Ferroni and Jason Kuhn, who were seated in the restaurant together, whether she was "in or out." Ferroni stated that she had terminated her employment with Respondent by quitting Fallon denied this explaining that she had not come to work the previous day because she had hurt her ankle and remainded Ferroni that on Saturday she had expressly told him of her strong desire to continue working at the Windjammer. Ferroni replied that the night manager would say that she had quit. Fallon reiterated she had not quit and intended to report for work. Ferroni stated she had already been replaced. [35]

Based upon the foregoing, I find that the reason given to Fallon by Respondent for its rejection of her employment application, that she had quit her employment, was a patently false reason and was not made in good faith.

In concluding that Ferroni did not have a good-faith belief that Fallon had voluntarily terminated her employment, I have considered Allen's and Ferroni's testimony that on the morning of October 2 Allen advised Ferroni, as Allen testified, that Fallon had stated "she was going to quit." Since Fallon made no such statement to Allen, I do not believe he communicated this message to Ferroni. In any event, assuming Allen's and Ferroni's testimony is not contrived and Allen, on October 2, did mistakenly inform Ferroni that Fallon had indicated she was terminating her employment, the record establishes that Ferroni could not have reasonably accepted this message at fact value. On October 1 Fallon had personally handed Ferroni her employment application and personally informed him of her strong desire to continue working at the Windjammer where she had worked for 3-1/2 years. The next day, rather than indicate to Respondent that she had quit her employment, she informed Respondent's owners that the reason she was not working that day as scheduled was due to an injured ankle. These circumstances, plus Respondent's union animus and its knowledge of Fallon's union sympathies, establish that President Ferroni, in accepting Allen's message as proof

that Fallon had quit her employment, without even first speaking to Fallon about the matter, was not acting in good faith but was looking for a reason to use to justify not reemploying Fallon on account of her union sympathies.

b. Heather Healey

Heather Healey was employed as a waitress at the Windjammer for about 2 years. In September, as described *supra*, when questioned by Respondent's owners, she refused to commit herself to working without union representation. On October 3, she went to the Windjammer to determine whether her employment application had been accepted. Gabriel Ferroni and Jason Kuhn told her it had been rejected. They explained that Respondent's owners had nothing against Healey's work performance, but that the reason she was not being reemployed was because Respondent intended to operate with new employees. Ferroni stated that he had some reservations about doing this and that Respondent might be making a mistake by not using the former employees. Kuhn, on the other hand, stated he was positive that Respondent had not made a mistake and, in answer to Healey's question, specifically stated that all of the former employees were not being rehired. When Healey specifically asked about waiters Labrie and Rico she was informed that Labrie would not be reemployed but that no decision had been reached about Rico's employment status. The meeting ended with Ferroni and Kuhn agreeing to write a recommendation for Healey to help her find work with another employer. [36]

****16** President Ferroni testified that Healey's application was rejected "because she did not do her duties as a food waitress," namely, she failed to perform the following duties: fill salt and papper shakers, clean mustard and catsup containers, set up and clean up her station, and help the bus boys. Ferroni admitted that in the 8 weeks he supervised Healey's work that he never criticized her for this unsatisfactory state of affairs and did not explain his failure to do so. Ferroni also admitted that in all other respects Healey was a "very good" waitress for whom Respondent offered to write a letter of recommendation.

The foregoing circumstances--the palpably false reason given Healey for Respondent's rejection of her application, the inconsistency between the reason given Healey and the one given at the hearing to justify the rejection of her application, and Respondent's unexplained failure to ever mention to Healey her alleged work deficiencies which Respondent now claims resulted in the rejection of her ***786** application--persuade me that the reasons Respondent has advanced to justify its rejection of Healey's employment application are not the real ones.

c. *Arturo Rico*

Arturo Rico was employed as a waiter at the Windjammer for 7 years. On October 3 he went to the Windjammer to determine whether his application had been accepted. He spoke to Gabriel Ferroni, Ray Kuhn, and Jason Kuhn. Rico asked whether he had a job. Either Jason Kuhn or Gabriel Ferroni answered that he had a job but, in the same breath, asked whether he was willing to "get out of" the Union and asked whether he would cross a picket line if one were established by the Union. Rico indicated he would resign from the Union and that by resigning would be able to cross the Union's picket line. Rico was hired as head waiter.

The aforesaid description of the October 3 meeting is based upon Rico's testimony. Ferroni's version is that Rico asked whether Respondent was going to have any union problems. Ferroni testified that in response he told Rico Respondent had not signed a contract with the Union and that there was a possibility of a picket line. When Rico asked if he would have to cross it, Ferroni testified that he told him that it was Rico's decision and, in reply to Rico's inquiry, suggested that maybe the Union would give him a withdrawal card. Rico, who at the time of the hearing was employed by Respondent as an assistant manager, impressed me as the more credible witness; accordingly, I have rejected Ferroni's testimony. Moreover, neither Mr. nor Mrs. Kuhn was called by Respondent to corroborate Ferroni's testimony; thus, I presume their testimony would have contradicted Ferroni's and been adverse to Respondent.

Based upon the foregoing I find that on October 3, Respondent, by implication, indicated to Rico that the acceptance of his application for employment was conditioned upon his withdrawal from the Union and, if the Union established a picket line, crossing the picket line. [37]

d. *Harry Cohen*

****17** One of the employees discharged on October 2 was waiter Harry Cohen. Cohen filed an employment application but did not go to the Windjammer on October 3; rather, he reported for work later that week on the day he was scheduled to normally work. At this time President Ferroni informed him that, "[Respondent] took over the restaurant this week and [he] anticipate[d] some difficulty with the Union because ... [The Windjammer] is no longer a union house," and asked Cohen, "what [he] would do about a picket line. Would [he] cross one?" Cohen stated he would not cross a picket line. At this point Cohen and Ferroni engaged in this colloquy:
Ferroni: "Well, then you know where I am at."

Cohen: "Yeah, I think I know where you are at."

Ferroni: "You know I want you. I suggest when this blows over I want you to come back and work for me."

Cohen: "Gabe, as soon as your problems with the union are resolved, I'll be glad to work for you...."

Ferroni: "Good, let's keep in touch."

During the week of October 9, headwaiter Rico phoned Cohen and told him that he did not think there was going to be any picket line as none had materialized and asked Cohen to return to work. Cohen advised Rico to speak to President Ferroni. The same day President Ferroni phoned Cohen and told him to report back to work, explaining he did not think there would be any problems for awhile. Cohen worked at the Windjammer until November 28, on which date the Union began to picket the Windjammer and picketed for approximately 3 weeks. Cohen, who has been a member of the Union for over 30 years, honored the picket line for its duration and returned to work after the picketing ceased.

In its post-hearing brief Respondent, described Ferroni's conversation with Cohen, when Cohen initially reported for work after having submitted his employment application, in these terms: "Cohen testified that Ferroni and he spoke about the possibility of a picket line and Cohen's conviction not to cross same. Nevertheless, Ferroni offered him a position. The terms of the offer were such that Cohen could abstain from working in the event of a picket line without affecting his status as a Windjammer employ ee." I disagree. The description of Cohen's conversation with Ferroni on the date Cohen reported for work has been set out above in haec verba. It unambiguously establishes that in answer to Cohen's request to continue working for Respondent, as embodied in his employment application and his actual appearance at the Windjammer to start work, Ferroni responded by asking him whether he would be willing to cross a union picket line. When Cohen answered in the negative, Ferroni indicated that because of Cohen's unwillingness to commit himself to crossing a union picket line, Ferroni could not offer him reemployment at that time.

Based upon the foregoing, I find that during the week of October 3 Respondent refused to employ Cohen because he refused to assure President Ferroni that if the Union established a picket line that Cohen would not support the Union by honoring the picket line.

e. *Mark Mason*

**18 Mark Mason was employed as a waiter at the Windjammer since February 1977. In September, as described *supra*, he informed Gabriel Ferroni that he favored union representation.

Since Mason's regularly scheduled days off were Monday and Tuesday, he did not go to the Windjammer until Wednesday, October 5, to determine whether his employment application had been accepted. He spoke to Ray Kuhn. Kuhn told him that during the past 2 days Respondent had hired a lot of people and asked Mason how he *787 would feel if there were a picket line in front of the Windjammer and if he would give up his union affiliation. Mason answered that he did not know whether he would be able to cross a picket line and would not be able to answer Kuhn's question until he was faced with a picket line. Kuhn stated she felt Mason was not really behind what Respondent was doing and would not be able to cross a picket line. Kuhn acknowledged that Mason's application was impressive and that he was a good waiter but stated he was not totally committed to what Respondent was doing, explaining to Mason she was not sure if he would be able to cross a picket line. Mason replied, “what can I do? I won't know what I'll do until the thing comes up,” and asked whether he could assume he was fired. Kuhn said yes. [38]

Based upon the foregoing, I find that on October 5 Respondent refused to employ Mason because he refused to assure Kuhn that if the Union established a picket line at the Windjammer that Mason would not support the Union by honoring the picket line.

Mason testified that on February 20, 1978, he spoke to Garbriel Ferroni at the Windjammer and asked to be reinstated. Ferroni supposedly asked whether Mason had signed anything with the Board. Mason stated he had talked to “them” but had not signed anything. Ferroni asked who was responsible for going to the Board and asked if it was Kalisa Fallon. Mason stated that he did not know. Ferroni's testimony is in sharp conflict with Mason's. Ferroni testified that late in February 1978, Mason came to the Windjammer and asked Ferroni if he had a job for him. Ferroni stated that they were not hiring because business was slow. In response Mason declared that he was Muhammed Ali and threatened to kill Ferroni because he had not given him a job and called Ferroni all kins of names. Thereafter, on about 14 different occasions--over the telephone and personally--Mason threatened to kill Ferroni who filed a complaint with the local police department. Mason generally denied ever threatening Ferroni's life. I credit Ferroni. In contrast with the other testimony that he presented in this proceeding, Ferroni's testimony that Mason threatened to kill him was given with conviction and sincereity. He impressed me as a more credible witness than Mason; accordingly, I have credited his version of what was stated in his conversations in February 1978 with Mason.

f. *Tom Atkin*

Tom Atkin was emloyed at the Windjammer as a cook for over 2 years. He went to the Windjammer on October 3 to find out whether his application had been accepted. He spoke to Ray Kuhn, Jason Kuhn, and Gabriel Ferroni. Ray Kuhn, the owner who was managing the kitchen, advised Atkin that Respondent intended to operate nonunion and asked whether Atkin would be willing to remain with the Windjammer under those conditions. Atkin answered in the negative, explaining to Respondent's owners that he had been a union member for 8 years and would lose all of his benefits if he worked in a nonunion restaurant. Atkin also stated he desired to pursue his music. [39]

**19 The description of the October 3 meeting is based upon Atkin's testimony. Gabriel Ferroni's version is that after Respondent had indicated Atkin's application had been accepted that Atkin asked if Respondent intended to go nonunion and when he was told that Respondent had not signed a union contract and there would be a picket line that Atkin said he would rather not accept the job because he had his music and had been in the Union for a long time and would probably be the first employee to picket. Atkin impressed me as the more credible wttness. Moreover, neither Ray Kuhn nor Jason Kuhn was called by Respondent to corroborate Ferroni's testimony; thus, I presume their testimony would have contradicted Ferroni's and would have been adverse to Respondent.

g. Beverly Souza

Beverly Souza was employed as a hostess and cocktail waitress at the Windjammer for 16 months. On October 2, she was working part time at the Windjammer and worked at another restaurant, The Velvet Turtle, on Friday or Saturday night.

On October 3, Souza went to the Windjammer to find out whether she was being reemployed. She met with Gabriel Ferroni and Jason Kuhn. Ferroni stated that they would like to use Souza, but she only wanted to work part time. Souza asked, "what other options are there? What can you offer me." Ferroni did not answer this question, but reiterated "we'd like to use you but you only want to work part time." Souza answered that this was not true. Ferroni pointed out that she also worked at The Velvet Turtle. Souza told him she only worked there on Friday or Saturday nights and was available the rest of the time and asked if they could offer her anything. Ferroni answered in the negative, explaining that the business was not doing so well. Souza asked if there was anything wrong with her work and was informed that she did a good job and they liked her. The meeting ended with the participants discussing the nature of Souza's termination, i.e., whether she had been fired, and she stated she did not appreciate the way she was being treated especially since she had worked that past Sunday, which was her day off, to help Respondent out of a jam. [40] ***788** In summation, the record establishes that on October 3 Ferroni and Kuhn ignored Souza's statement that she was not limited to part-time work and also ignored her request that they make her an offer of full-time work. In addition, Respondent failed to offer any convincing evidence which explains why an admittedly satisfactory part-time worker like Souza was not offered a part-time position. Ferroni's conclusionary testimony "we needed somebody full time" was never made more specific nor was his testimony corroborated by any of Respondent's other owners who supposedly participated in the decision not to employ any of the part-time workers. Also, without corroboration from the other owners, is Ferroni's further testimony that Respondent's owners "were trying to find employees who would more or less try to work full time." Ferroni did not explain why Respondent's owners had supposedly decided that the Windjammer should no longer employ part-time employees, as it had done in the past, but only employ full-time employees. The lack of specificity in Ferroni's testimony, as well as the lack of corroboration, makes his testimony suspect especially where, as here, the record reveals that almost immediately after October 3 Respondent's owners commenced to employ part-time workers. [41]

****20** Based upon the foregoing, I find that on October 3 Respondent refused either to offer Souza full-time or part-time work and that its refusal was not based upon any legitimate business consideration.

h. *Lee Michael Duran*

Lee Duran, a high school student, worked at the Windjammer as a busboy and waiter for over 2 years. He worked full time during the summer and part time while school was in session. His discharge occurred on October 2 while school was in session; hence, he was working part time.

On October 3, Duran phoned the Windjammer to find out whether his application as a waiter had been accepted and was informed by Gabriel Ferroni that his application had been rejected because "they wanted full-time employees only." Duran asked if he could work as a busboy, part time. Ferroni stated he would have to discuss this request with the other owners and, an hour later, Jason Kuhn informed Duran that Respondent could not employ him as it was only employing full-time busboys.

Duran's application, like Souza's, was ostensibly rejected because, as Ferroni told Duran, "Respondent wanted full-time employees only." I say ostensibly, because no reason was given to Duran or any of the other applicants for Respondent's new policy of employing only full-time workers. Nor did any one of Respondent's owners explain the basis for this new police at the hearing. Ferroni's testimony that in determining which applicants to employ Respondent's owners "were trying to find employees who would more or less try to work fulltime" is simply a restatement of what Respondent supposedly did, not an explanation of why it did it. Nor was Ferroni's testimony corroborated by any of Respondent's other owners who supposedly

participated in the decision not to employ any part-time workers. Respondent's failure to present evidence explaining the basis for its policy not to hire any part-time workers, when viewed in the light of the undisputed fact that almost immediately following October 3 Respondent commenced to hire part timers, makes the failure of Respondent to call at least one of the owners to corroborate Ferroni extremely suspect. Under the circumstances, I presume that the testimony of the other owners would have impeached Ferroni and have been harmful to Respondent.

Based upon the foregoing, I find that the reason given Duran for Respondent's rejection of his application was not based upon a legitimate business consideration and was not the real reason for its rejection.

i. *Michael John Labrie*

Michael Labrie was employed for over 2 years as a waiter at the Windjammer. He worked 4 days a week. As described *supra*, in September he had informed Respondent's owners that he enjoyed working at the Windjammer because of the benefits that went with union representation.

On October 3, he went to the Windjammer and spoke to Gabriel Ferroni, Ray Kuhn, and Jason Kuhn to determine whether his employment application had been accepted. Jason Kuhn stated that Respondent was very happy with Labrie and wanted him to continue working at the Windjammer, but Respondent intended to drop the Union because it could not afford the expense. Jason Kuhn asked what the Union had done for Labrie. Labrie indicated that he felt very secure with his job and enjoyed the benefits and pay provided by union representation. Kuhn pointed out that Respondent had offered the employees a very good medical plan and insurance benefits and asked if Labrie would be willing to work with these benefits. Labrie asked what kind of a shift he would be working. Ray Kuhn stated that at first he would have to work 6 to 7 days a week. Labrie asked if he would be able to work 4 days a week as he had been customarily working. Kuhn stated Respondent could not guarantee that he would ever be able to work his present schedule of 4 days a week, but at the very least would have to work 5 days a week. Labrie stated he was not sure he was willing to work under the stated conditions, but would have to think about Respondent's offer. [42] Later that evening Labrie phoned Jason Kuhn and rejected Respondent's job offer. *Labrie testified that the reasons he rejected Respondent's job offer were: (1) he wanted to continue working* ***789** *part time; (2) Respondent intended to operate nonunion which meant the loss of the benefits secured through union representation; (3) he disliked the manner in which Respondent's owners were operating the Windjammer.*

****21** In short, the record establishes that Labrie, an excellent waiter who was employed part time at the Windjammer, was offered employment by Respondent only if he accepted a full-time position and that this offer was supposedly made pursuant to Respondent's policy of hiring only full-time workers. For the reasons set forth in connection with Duran's and Souza's applications, *supra*, I am persuaded that Respondent's rejection of Labrie's application for part-time work and its conditioning of his reemployment upon his accepting full-time work was not based upon legitimate business considerations.

j. *David Reynolds*

David Reynolds was employed at the Windjammer for over 2 years as a bartender. As described *supra*, in late September Reynolds informed Gabriel Ferroni that he was in favor of representation by the Union.

Reynolds worked October 2. During the evening at about midnight, a group of customers drinking at the bar became drunk and disorderly which resulted in their being evicted by Reynolds or leaving because Reynolds refused to continue to serve drinks to one of the group who was intoxicated.

On October 3, Reynolds went to the Windjammer to find out whether he was being reemployed. He met with Gabriel Ferroni and Jason Kuhn. Ferroni stated that they had decided to let him go because Respondent had decided to hire a new crew. Feeling that the incident of the previous night might have been responsible for the decision not to employ him, Reynolds asked whether Ferroni had heard about what had taken place and informed Ferroni that he was obliged as a bartender not to serve drunk and disorderly customers. Ferroni indicated that he had not heard of the incident. Jason Kuhn assured Reynolds that Respondent's refusal to reemploy him had nothing to do with his job performance and told him that Respondent's owners thought he was an excellent bartender and would not hesitate to recommend him to another employer, offered to write him a recommendation, and suggested that Respondent, in the future, might rehire him. [43]

Ferroni testified that Respondent's reasons for refusing to employ Reynolds were as follows: (1) A private detective agency notified Respondent that Reynolds was "giving drinks away" and was "giving bottles of liquor to other employees to take out". (2) Reynolds "was not a good bartender with people at the bar."

Regarding Reynolds' conduct of "giving drinks away," Ferroni testifited that this allegation was based upon an Agust 15 investigation report submitted to him by a private detective agency which indicated that on one occasion Reynolds was observed charging a customer the price of a beer for vodka. Ferroni admittedly never spoke to Reynolds about this accusation and gave the incredible testimony that, although it was expensive for Respondent, for the next 6 weeks Respondent continued to allow Reynolds to give drinks away. Neither Ferroni nor Kuhn, when he spoke to Reynolds on October 3, indicated to Reynolds that this was a reason for Respondent's refusal to reemploy him. Reynolds credibly testified that he never gave unauthorized free drinks to customers. Based upon the foregoing, I find that Ferroni, on October 3, did not believe Reynolds had given drinks away.

****22** Regarding Reynolds' conduct of "giving bottles of liquor to other employees to take out," Ferroni testified that this allegation was based upon the August 15 detective report which stated that Reynolds had been observed on one occasion selling three bottles of liquor to the chef at wholesale prices which cost Respondent money and was a violation of state law. Ferroni admittedly never spoke to Reynolds about this misconduct and it was not mentioned to him as a reason for Respondent's refusal to reemploy him. Ferroni admits that he did not discipline the chef, who was equally as responsible as Reynolds, inasmuch as he learned that it was customary at the Windjammer for the employees to purchase liquor by the bottle at the bar, paying wholesale prices. Based upon the foregoing, I find that Reynolds' conduct of selling liquor by the bottle at wholesale to the chef had absolutely nothing to do with his discharge.

Regarding Ferroni's contention that Reynolds was not a good bartender with customers, there is not a single piece of evidence in the record, other than Ferroni's self-serving conclusionary testimony, which supports this contention. Not one of Respondent's other owners was called to corroborate Ferroni's testimony, nor did Ferroni or Kuhn on October 3 indicate to Reynolds that this was a reason which influenced Respondent not to reemploy him. Moreover, it is undisputed that during his 8 weeks of employment under Ferroni's supervision that Ferroni did not speak to Reynolds about this alleged failing or otherwise criticize his work. The foregoing circumstances establish that Ferroni's contention that Reynolds was not a good bartender with the customers is a fabrication.

Based upon the foregoing, I find that the reasons advanced at the hearing to justify Respondent's refusal to employ Reynolds, which were inconsistent with the reasons given to Reynolds, are a fabrication and not the true reasons for the refusal to employ him.

k. *Alan Leibowitz*

Leibowitz was employed since June 1977 as a bartender at the Windjammer. He had no prior experience tending bar.

***790** On October 3, Leibowitz went to the Windjammer to determine if his application had been accepted. He spoke to Gabriel Ferroni and Jason Kuhn. Ferroni told Leibowitz that his application was rejected because Respondent intended to operate with its own crew, but that Ferroni liked Leibowitz very much and if things did not work out there was a possibility of Respondent calling him back to work at the Windjammer. Ferroni suggested that Leibowitz go to the Bus Stop, a bar Ferroni owned, and talk to the manager about a job and offered Leibowitz a letter of recommendation. [44]

Ferroni testified that he rejected Leibowitz' application because he was inexperienced and sloppylooking in his dress. As described *supra*, this was not the reason Ferroni gave to Leibowitz. As in the case of Respondent's other bartender, Reynolds, Ferroni indicated that he was satisfied with Leibowitz' work, and offered to help him find other employment by giving him a letter of recommendation, explaining that Respondent had decided to hire a whole new crew. Leibowitz credibly testified that the only time during his 2 months of employment under Ferroni's supervision that Ferroni criticized his work performance or appearance was once when Ferroni told him to wear a tie whenever Zelinsky was present and to be more sociable with the customers. [45]

****23** The foregoing circumstances-the inconsistency between the reason given Leibowitz and the one advanced at the hearing to justify Respondent's rejection of his application and Respondent's unexplained failure to speak to Leibowitz about the alleged failings which Respondent now claims resulted in the rejection of his application-persuade me that the reason advanced by Respondent at the hearing to justify the rejection of Leibowitz' application was not the real one.

1. *Hamilton Edward Townsley*

On the day of his discharge, Townsley had been employed at the Windjammer for over 2 years as a cook. He worked 40 hours a week and was paid by the shift. Townsley worked his entire shift even though business may not have warranted it. On September 30, at the meeting of the employees with Respondent's owners, Townsley asked Ray Kuhn whether Respondent's announced intent to pay the employees by the hour instead of by the shift, as had been the practice, meant that if prior to the end of a shift there was insufficient work to keep him busy that Respondent intended to send him home early. Kuhn answered that this was a possibility because it did not make sense to pay employees for work they did not perform.

On October 3, Townsley went to the Windjammer to determine if Respondent had accepted his application. He spoke with Gabriel Ferroni, Jason Kuhn, and Ray Kuhn. Ray Kuhn testified that before this meeting Respondent's owners knew Townsley supported two children and because of this was concerned about working 40 hours a week and knew Townsley felt he needed a guarantee of 40 hours' work a week. At the October 3 interview, Townsley was offered employment as a cook but was specifically informed that Respondent could not guarantee him 40 hours of work a week. Townsley rejected the job explaining to Respondent's owners, what they already knew, that as the sole support of two children he could not accept a job that did not guarantee him at least 40 hours a week.

B. *Conclusionary Findings and Analysis*

1. Respondent refuses to recognize and bargain with the Union

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the Windjammer's employees' collective-bargaining representative and by making unilateral changes in their terms and conditions of employment without bargaining with the Union. In order to decide these allegations, it is first necessary to determine whether Respondent is a successor employer within the meaning of the Act and, if so, on what date did Respondent's bargaining obligation mature.

"It is a settled principle that when employees have bargained collectively with an employer and there occurs a change of ownership not affecting the essential nature of the enterprise, the successor employer must recognize the incumbent union and deal with it as the bargaining representative." *Tom-A-Hawk Transit Inc.* v. *N.L.R.B.*, # 419 F.2d 1025, 1026-27 (7th Cir. 1969) cited with approval in *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 281 (1972). This principle derives, in part, from the statutory policy of promoting industrial stability and, in part, from the presumption that the Union's majority will survive transfer of managerial authority that does not affect the substantial continuity of the employing enterprise. Thus, in *N.L.R.B.* v. *Burns International Security Services, supra*, the Supreme Court upheld the Board's finding of successorship where, despite the transfer of the business, there were no significant changes in the unit and a majority of the successor's employees had been represented by an incumbent union. In short, where it is shown that, despite the change in employers, there is substantial continuity in the employee complement and in the unit for bargaining, the predecessor's duty to bargain devolves upon the new "successor" employer. *Burns, supra* at 278-281.

****24** In the instant case, the Windjammer's complement of employees remained identical after Respondent's takeover of the business. When Respondent took over control of the Windjammer on August 9 it employed all of the employees who worked for the predecessor employer except for one, the manager. [46] In short, there was a continuity of bargaining unit employees.

***791** Similarly the record shows that there was a continuity of business operations and organization of job functions, after the takeover, so that the bargaining unit remained a viable one. See The *William J. Burns International Detective Agency, Inc., [International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162]* v. *N.L.R.B.*, 441 F.2d 911, 914-915 (3d Cir. 1971), enfd. in pertinent part 406 U.S. 272, 280, fn. 4. Thus, when Respondent took over the Windjammer on August 9 it used the identical facilities as its predecessor, continued to operate a restaurant and bar which was open to the public, employed the same size work force as had worked for the predecessor, who continued to work in their same job classifications and exercise the same skills as previously. Plainly, there was a continuity of the employing enterprise.

Based upon the foregoing, I find that Respondent is a successor employer for purposes of the Act. Specifically, I find Respondent took over and continued the employing enterprise on August 9, when it hired all of the employees who previously worked for the predecessor employer, and as of that date was legally obligated to recognize and bargain with the Union as the employees' collective-bargaining representative. [47]

I further find that in August, shortly after taking over the operation of the Windjammer, Respondent refused to recognize the Union as the employees' collective-bargaining representative. Thus, within 1 week after Respondent assumed control over the Windjammer, two of its owners, Mr. and Mrs. Ferroni, were approached by union representative Georgedes who, in effect, told them that the Union was taking the position that the Windjammer was still under contract with the Union and asked that Respondent sign a contract with the Union. [48] Mr. and Mrs. Ferroni refused, explaining to Georgedes that they wanted to discuss the request with Respondent's other owners. There is no evidence that they in fact discussed the matter with the other owners or ever contacted the Union and informed it of their decision. This is understandable inasmuch as Respondent's owners' statements made to the employees during August and September establish Respondent had no intention of ever recognizing or entering into a contract with the Union. In any event, I am satisfied that the encounter between union representative Georgedes and Respondent's owners was reasonably calculated to inform Respondent that the Union was taking the position that it still represented the Windjammer's employees and that Respondent, as a successor employer, was obligated to acknowledge the Union's representative status. Respondent's failure and refusal to recognize the Union as the employees' exclusive bargaining representative constitutes a violation of Section 8(a)(5) and (1) of the Act.

****25** In concluding that Respondent became a successor employer for the purposes of the Act as of August 9, and as of that date was obligated to bargain with the Union, I have considered Respondent's contention that the successorship criteria should not be applied until October 3 when Respondent first took legal title to the Windjammer. In support of this argument Respondent urges:

(1) "there cannot be successorhip without ownership" and Respondent did not own the Windjammer until escrow closed on October 3 (2) during escrow Respondent only managed the Windjammer on Zelinsky's behalf and Zelinsky was the employees' employer (3) it would be inequitable to conclude that Respondent was a successor during escrow inasmuch as Respondent's agreement with Zelinsky precluded Respondent from making any significant changes in the employing enterprise prior to the close of escrow.

Respondent's assertion that "there cannot be successorship without ownership" is contrary to the law. It is settled that the controlling factor in successorship cases is not the form of the transfer, but whether the employing enterprise remains essentially the same. E.g., *Band-Age, Inc.*, 217 NLRB 449 (1975), and *Maintenance, Incorporated*, 148 NLRB 1299, 1301 (1964). In cases where a successor employer operated a business under a lease agreement, similar to the rental agreement under which respondent operated during escrow, it has been long held that the successor employer may be subject to successorship obligations despite the fact that there has been no transfer of title to the assets. See *N.L.R.B.* v. *Pine Valley Division of Ethan Alien, Inc.,* 544 F.2d 742 (4th Cir. 1976) enfg. 218 NLRB 208 (1975) (an oral lease agreement); *N.L.R.B.* v. *Valleydale Packers, Inc.*, of Bristol, 402 F.2d 768 (5th Cir. 1968) enfg. 162 NLRB 1486, 1490 (1967); *N.L.R.B.* v. *Lunder Shoe Corp., d/b/a Bruce Shoe Co.* 211 F.2d 284 (1st Cir 1954); *N.L.R.B.* v. *Albert Armato and Wire & Sheet Metal Specialty Co., 199* F.2d 800, 802 (7th Cir. 1952).

Likewise, I reject Respondent's contention that during escrow it was not the employer, but only managed the business on behalf of Zelinsky. Consistent with the parties' sales agreement which, in substance, provided that during escrow Respondent would "legally operate its business at the [Windjammer]" and undertake "full management and control of the business," the Respondent, effective August 9, replaced Zelinsky as the employees' employer. On August 9 Respondent's owners introduced themselves to the employees as the new owners. Effective August 9, all business licenses, insurance policies, books of account and business records necessary to operate the Windjammer were placed in Respondent's name. Also, effective August 9, Respondent, not Zelinsky, maintained the Windjammer's books of accounts and other business records. Respondent, with the commencement of escrow, not Zelinsky, paid the Windjammer's operating expenses including utility charges, taxes, food and beverage expenses, employees' wages and payroll taxes. And, for managing the Windjammer during escrow, Respondent's owners were ***792** paid by Respondent, not Zelinsky. Finally, it was Respondent, not Zelinsky, that could expect to make a net profit or suffer a loss from the operation of the business during escrow. In short, during escrow, Respondent operated the Windjammer for its own account, not for Zelinsky's, and Zelinsky had virtually nothing to do with the operation of the Windjammer after August 8. It is for all of these reasons that I am persuaded that the record overwhelmingly establishes that it was Respondent, not Zelinsky, that was the employer in this case during escow.

****26** In concluding that Respondent was the employer during escrow, I recognize that there was a possibility during that period that Respondent would only operate the Windjammer temporarily due to the danger, however remote, that Respondent's deal with Zelinsky to purchase the Windjammer might fall through. However, even though an employer may only be operating a business temporarily it does not privilege the employer to ignore the provisions of Section 8(a)(5) of the Act. See, *N.L.R.B.* v.*Pine Valley Division of Ethan Allen, Inc., supra*; *Marion Simcox, Trustee of Wagner Shipyard and Marina Inc., et al. d/b/a Stateside Shipyard and Marina, Inc.*, 178 NLRB 516 (1969); *Paul Stevens, Receiver of Carolina Service Stages, a corporation et al.*, 109 NLRB 86, 107-108 (1954). I note that the instant case is not one wherein a purchaser of a business operates temporarily with the predecessor's employees in order to finish the work in progress and thereafter carries out its original intent of changing the essential nature of the operation to be performed, thereby necessitating replacing the predecessor's employees with those who exercise different skills. See *Galis Equipment Company, Inc.*, 194 NLRB 799 (1972). There is no contention here that Respondent intended to change the essential nature of the business to be performed at the Windjammer. Quite the contrary, the record shows that even after the title to the business was transferred to Respondent that the business remained essentially the same and that the work performed by the employees required the same skills as before.

In evaluating Respondent's contention that it would be unfair to impose upon it the burden of a successor employer during escrow because its agreement to purchase the business precluded it from making any significant changes during that period

in the employing enterprise, I believe it is significant that Respondent did not have to agree to step into Zelinsky's shoes and operate the business prior to the close of escrow. There is nothing in the law of the State of California which requires that a prospective buyer of a business take control over the business prior to the close of escrow. Nor is there any contention or evidence that Respondent was compelled to agree to take over the operation of the business immediately as a part of the "price" for purchasing the Windjammer. Respondent of its own free will chose to enter into this type of an arrangement with Zelinsky. In any event, assuming for the sake of argument, that Respondent was compelled to operate the business during escrow, the terms of Respondent's agreement with Zelinsky did not require it to continue the employing enterprise unchanged. Thus, although the agreement with Zelinsky prevented Respondent from making physical alterations during escrow, it otherwise granted Respondent full authority to manage and control the business, as long as it was done in a businesslike manner. When Respondent's owners took control over the Windjammer on August 9, they had the complete authority under the terms of the sales agreement to replace all or some or none of Zelinsky's employees and to change all or some or none of the employees' terms and conditions of employment. Respondent, for reasons of its own, decided to retain all of Zelinsky's employees, except for the manager, and to employ them under substantially the same terms and conditions of employment as had existed previously. It is because of all of the foregoing reasons that I reject Respondent's contention that it would be inequitable to impose the obligations of a successor employer upon it during escrow.

****27** Based upon the foregoing, I conclude that the appropriate period for considering whether Respondent occupied the status of a successor Employer commenced on August 9, when Respondent took over control of the Windjammer, and not, as Respondent contends, on October 3, when it became the legal owner.

2. Respondent unilaterally changes the employees' terms and conditions of employment

The Supreme Court held in Burns, *supra*, that a successor employer is not required to observe the substantive terms of the predecessor's collective-bargaining agreement with a union. It held that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor ..." 406 U.S. at 294. The Court made it clear in Burns, however, that once the obligation to bargain has matured, the successor stands in no different position than his predecessor and cannot lawfully take unilateral action affecting employees' working conditions. Accordingly, a successor employer is required to bargain over changes in the predecessor's terms of employment if the duty to bargain arises before it initiates such changes. The question, then, is whether the Union's majority status was evident when the successor set the changed terms. *Spitzer Akron, Inc.* v. *N.L.R.B.*, 540 F.2d 841, 844-845 (6th Cir. 1976) citing *N.L.R.B.* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 969 (7th Cir. 1972). Once the duty to bargain attaches, the successor employer is subject to the corollary duty not to make changes in wages, hours or working conditions without giving the Union notice and an opportunity to bargain. *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962).

I have concluded, *supra*, that Respondent succeeded to the predecessor's collective-bargaining obligation on August 9 when it took control of the Windjammer and selected as its work force all of the predecessor's bargaining unit employees to perform the same tasks at the same place they had worked in the past. In view of these circumstances and guided by the aforesaid principles of law, I find that Respondent, in violation of Section 8(a)(5) and (1) of the Act, made unilateral changes in the employees' wages, hours, and other terms and conditions of employment without bargaining with the Union, as follows: [49] (1) In late ***793** August it eliminated the bartenders' break period. (2) In the middle of August it discontinued paying overtime for hours worked over 8 in a day. (3) In late August it reduced the wages of Kalisa Fallon. (4) On August 9 it discontinued making payments on behalf of the employees into the pension, health and welfare trust funds established by the terminated collective-bargaining agreement, thus, discontinuing the employees' medical and pension benefits. See *Charles Starbuck and Diane Starbuck, d/b/a Starco Farmers Market*, 237 NLRB No. 52 (1978). (5) On October 4 it discontinued paying employees by the shift, but commenced to pay them by the hour. (6) On October 4 it instituted new paid vacation, sick leave, and death benefit programs. (7) On October 4 it instituted a new medical insurance program. [50]

**28 In concluding that the aforesaid unilateral changes are illegal, I have considered the decision of the Supreme Court in *Burns* wherein the Court stated that successor employers are free to unilaterally establish the terms on which they will hire employees of a predecessor, unless "it is perfectly clear that the new employer plans to retain all of the employees in the unit...." In such cases, the Court stated, the successor must consult with the employees' bargaining representative before establishing initial terms of employment. *Burns* at 294-295. This case falls within this category. Having as of August 9 retained all of tile predecessor's unit employees in its own employ, Respondent, under the teaching of *Burns* was thereafter no longer free, as a successor Employer, either to fix its own initial terms and conditions of employment or to change previously established terms and conditions of employment for such employees without consulting the Union. I recognize that when it took over the business of August 9 that Respondent indicated to the employees that at some time in the future, after escrow, certain unspecified changes in their terms and conditions of employment would be instituted. This did not, however, privilege Respondent's subsequent unilateral changes in the employees' terms and conditions of employment. For, as to those changes made prior to the close of escrow, Respondent misled the employees by indicating to them that no changes would be made during that period. See *Spruce Up Corporation*, 2C9 NLRB 194, 195 (1974). And, as to those changes made when escrow closed, 2 months after Respondent succeeded to the predecessor's bargaining obligation, I do not read Burns as allowing a successor employer to make unilateral changes in employees' terms and conditions of employment 2 months after succeeding to the predecessor's bargaining obligation, particularly, where as in the instant case, the predecessor's employees, when offered continued employment by the Respondent, were not clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent's announcement was couched in generalized and speculative terms.

3. The interference, restraint, and coercion a

As described more fully *supra*, in the latter part of August President Ferroni asked bartender Frank Michell, who had worked at the Windjammer for 9 years, how he felt about the Union. When Michell indicated he felt the Union was fine, Ferroni stated that he was thinking of dropping the Union, asked if Michell would stay if Respondent dropped the Union, and promised him a bonus and better benefits if he would remain without union representation. In addition, Ferroni told Michell that in order to drop the Union, Respondent would have to get rid of almost all of the employees when escrow closed, but wanted Michell to stay.

**29 Ferroni's interrogation of Michell about his feelings toward the Union violated Section 8(a)(1) of the Act. In questioning Michell about his attitude toward the Union and, as described *infra*, in questioning other employees about their attitudes toward the Union, Ferroni and Respondent's other owners did not have, and did not suggest to the employees that they had, any legitimate reason for questioning them, and gave no assurance against reprisal. Contrariwise, the interrogation of the employees which occurred in this case took place at the same time Respondent was voicing its hostility toward union representation and committing unfair labor practices. It is for this reason that I have concluded that Respondent's interrogation of Michell about his feelings toward the Union and Respondent's similar interrogation of other employees, *infra*, violated Section 8(a)(1) of the Act.

President Ferroni's promise of benefits to Michell to persuade him to remain with Respondent without union representation also violated Section 8(a)(1) of the Act. Likewise, Ferroni's statement that Respondent would have to get rid of almost all of the employees in order to drop the Union violated Section 8(a)(1) inasmuch as it constitutes a declaration that in order to avoid its lawful bargaining obligation Respondent intended to discharge almost all of the employees. This statement may reasonably be said to have a tendency to interfere with Michell's right to support the Union.

b

As described more fully *supra*, in the latter part of September President Ferroni told waiter Lee Duran that Respondent was "getting rid of the Union" and intended to get rid of 50 percent of the employees, explaining to Duran, "it's a law that you have io get rid of 50 percent of the employees when you drop the Union."

F erroni's declaration to Duran that Respondent intended to get rid of the Union by discharging 50 percent of the Windjammer's employees, as was the case with Ferroni's similar statement to Michell, constitutes a violation of Section 8(a)(1) inasmuch as it may reasonably be said to have a tendency to interfere with Duran's statutory right to support the Union.

***794** c

As described more fully *supra*, in the middle of September, President Ferroni asked waitress Heather Healey if she would continue to work for Respondent if the Windjammer became nonunion, assuring her that Respondent was a good employer and would take care of its employees. Also, Ferroni stated that by law Respondent would be compelled to discharge 50 percent of the employees when it took over the Windjammer, but that Healey would be one of the employees Respondent retained.

As described more fully *supra*, in the middle of September, Halina Ferroni, a part owner of Respondent and its corporate secretary, asked Healey how she felt about the Union and if she would work for Respondent if the Windjammer were nonunion. Also, Ferroni told Healey that the Union was connected with the "mob," that the Union would cause nothing but trouble and Respondent did not want any interference from the Union.

****30** As described more full *supra*, in August, after Respondent began to operate the Windjammer Jason Kuhn, as well as President Ferroni, asked Healey what she thought of the Union and thereafter during August and September all four of Respondent's owners asked Healey whether she would work for Respondent if it were nonunion. The aforesaid repeated questioning of Healey by Respondent's owners about her feelings toward the Union and whether she would work for Respondent if the Windjammer became nonunion violated Section 8(a)(1) of the Act. [51]

d

As described more fully *supra*, in September on two separate occasions President Ferroni asked waiter Mark Mason how he felt about the Union and in the latter part of September asked bartender David Reynolds how he felt about the Union and if Reynolds would consider continuing to work at the Windjammer if it were nonunion.

By interrogating Mason and Reynolds about their feelings toward the Union, Ferroni engaged in conduct which violated Section 8(a)(1) of the Act.

e

As described more fully *supra*, in September, either Jason Kuhn or Ray Kuhn, owners of Respondent, asked waiter Michael Labrie if he would be willing to work in a nonunion restaurant. This placed Labrie in the position of having to reveal his union sympathies. By engaging in this conduct, Respondent violated Section 8(a)(1) of the Act.

f

As described more fully *supra*, on September 30, Ray Kuhn and President Ferroni told all of the employees that if the Union should strike and picket Respondent and the employees desired to continue in Respondent's employ, they would have to go through the Union's picket line. Implicit in this statement was a warning that employees could expect to be terminated if they exercised their statutory right to honor the Union's picket line. By making this statement Respondent violated Section 8(a)(1) of the Act. [52]

g

As described more fully *supra*, on September 30, Ray Kuhn, one of Respondent's owners, in the presence of the rest of Respondent's owners, repeatedly told the employees that Respondent had no intention of signing a contract with the Union, explaining to the employees "we just don't want to be tied down to a contract and have some outside agency ... dictate to us how to operate our business, we need the flexibility ... to run the business as we see it." This statement violates Section 8(a)(1) of the Act because a statement that an employer does not intend to enter into a collective-bargaining agreement amounts to an anticipatory refusal to bargain and inculcates in employees a sense of futility about the exercise of free choice in selecting a representative for collective-bargaining. See *El Rancho Market*, 235 NLRB 468 (1978).

h

As described more fully *supra*, during the week of October 2, waiter Harry Cohen was informed by President Ferroni that the Windjammer was no longer a union restaurant and because of this Respondent anticipated difficulty with the Union and asked whether Cohen would cross a union picket line. Cohen stated that he would not cross such a picket line whereupon Ferroni refused to allow him to continue to work.

****31** As described more fully *supra*, on October 5, waiter Mark Mason was asked by Ray Kuhn how he would feel if there were a union picket line in front of the Windjammer and whether he would give up his union affiliation. Mason stated that he was unable to answer this question and would not be able to answer it until he was actually faced with such a situation. Kuhn refused to allow Mason to continue in Respondent's employ, explaining to him that she did not think he was totally committed to Respondent and was not sure he would cross the Union's picket line.

As described more fully *supra*, on October 3, waiter Arturo Rico was asked by either Jason Kuhn or President Ferroni whether he was willing to get out of the Union and whether he would cross a union picket line. Rico indicated he would resign from the Union and cross its picket line. ***795** He was alowed to continue in Respondent's employ and promoted from waiter to headwaiter.

By asking Mason whether he would give up his union affiliation and asking Rico whether he was willing to get out of the Union, Respondent engaged in the type of interrogation which forces employees to reveal their union sentiments; accordingly, by engaging in this conduct, Respondent has violated Section 8(a)(1) of the Act. I am also persuaded that in view of the Respondent's other unfair labor practices, which were taking place at the same time, that this conduct constitutes improper solicitation of employees to withdraw from the Union and for this additional reason violated Section 8(a)(1) of the Act.

By questioning Cohen, Mason, and Rico about their willingness to cross a picket line if the Union should call a strike and picket, Respondent violated Section 8(a)(1) of the Act. This kind of questioning requires the employee being questioned to reveal whether or not he or she intends to support the Union. I recognize, "that questions about employee strike intentions are not *per se* unlawful but must be judged in light of all the relevant circumstances." *Mosher Steel Company*, 220 NLRB 336 (1975). Here the questioning occurred contemporaneously with Respondent's other unfair labor practices including its statement to the employees that it would be futile for them to support the Union because it did not intend to enter into a contract with the Union and its threats to discharge the majority of the employees in order to get rid of the Union and the actual discharge of the employees for this purpose. Also, when Cchen and Mason failed to indicate a willingness to refrain from striking and crossing a union picket line, Respondent refused to employ them even though there was no strike or a threat of an imminent strike.[53] In addition, the interrogation did not take place in the context of a prospective economic strike, but occurred in the context of a prospective unfair labor practice strike caused by Respondent's unlawful refusal to recognize and bargain with the Union. Accordingly, for this reason alone, Respondent had no legitimate justification for questioning the employees about their

intentions in the event of a strike for as unfair labor practice strikers Respondent was not privileged to replace them. Under the circumstances, I find that the Respondent's interrogation of Cohen, Mason, and Rico about their willingness to cross a union picket line was unlawful.

4. Respondent discharges all of the employees

****32** On October 2, Respondent discharged all of the Windjammer's employees, closed the restaurant for 1 day and, when it reopened, rehired only 17 of the 39 employees that had been discharged. The General Counsel takes the position that the wholesale discharge of the employees violated Section 8(a)(1) and (3) of the Act because it was motivated by Respondent's desire to avoid its legal obligation to recognize and bargain with the Union as the employees' collective-bargaining representative. I am satisfied, for the reasons set forth herein, that the record supports this contention.

As I have concluded *supra*, on August 9, when Respondent commenced to operate the Windjammer with all of the predecessor's employees it was obligated to recognize and bargain with the Union as the employees' collective-bargaining representative. Respondent, however, incorrectly believed that its bargaining obligation as a successor employer did not mature until escrow closed. On August 9, at their initial meeting with the employees, Respondent's owners told them that Respondent, when escrow closed, would allow the employees to decide whether the Windjammer would remain union or become nonunion. Shortly after, however, Respondent learned about the Union's contract with the predecessor employer. Also, a union representative notified Respondent's president that the Union expected Respondent to recognize it as the employees' collective-bargaining representative and sign a contract. Respondent's owners promptly set out on a course of conduct reflecting Respondent's hostility toward union representation and its desire to evade its obligation as a successor employer to recognize and bargain with the Union for a contract. Thus, Respondent's owners interrogated employees about their feelings toward the Union, asked whether the employees would continue working for Respondent if it dropped the Union and became nonunion, and promised one employee increased benefits as a substitute for union representation. Also, virtually contemporaneously with the employees' discharge, Respondent's owners told the employees that Respondent did not intend to sign a contract with the Union; thus, indicating to the employees it would be futile for them to even think of union representation while working at the Windjammer. At the same time Respondent's owners also told the employees that if the Union attempted to secure recognition and a contract by striking the Windjammer that the employees, in order to continue working for Respondent, would have to agree to remain at work and not join the strike.

Respondent's hostility toward the Union and its scheme to avoid its obligation to bargain with the Union is further demonstrated by the fact that in interviewing employees who had been discharged for the purpose of determining whether they qualified for reinstatement, Respondent's owners questioned at least three of them--Mason, Cohen, and Rico--about their willingness to cross a union picket line and refrain from striking if the Union called a strike over Respondent's refusal to bargain. When Cohen and Mason refused to commit themselves to crossing such a union picket line, they were denied reinstatement. Rico, after indicating that he would resign from the Union and continue to work despite a union picket line, was reinstated and promoted. In addition, while interviewing discharged employees Rico, Mason, Labire, Cohen, and Atkin to determine whether they qualified for reinstatement, Respondent's owners solicited Rico and Mason to withdraw from the Union and informed Labrie, Cohen, and Atkin that Respondent intended to operate nonunion.

****33** Respondent's hostility toward union representation and its plan to avoid recognizing the Union as the employees' bargaining representative is plainly revealed by the statement of President Ferroni to bartender Michell that Respondent ***796** intended to drop the Union and that in order to drop the Union Respondent would have to get rid of almost all of the employees when escrow closed and his similar statement to waiter Duran that Respondent intended to get rid of the Union by discharging 50 percent of the employees. In a similar manner Ferroni, while asking waitress Healey if she would work for Respondent if the Windjammer became nonunion, told Healey that by law Respondent was required to discharge 50 percent of the employees

when escrow closed. Such statements cogently reveal a predesign to discharge a majority of the Windjammer's employees when escrow closed in order to avoid having to recognize and bargain with the Union.

In defense of its discharge of the employees on October 2, Respondent contends that its conduct was motivated by legitimate business considerations. In support of this contention, Respondent relies upon President Ferroni's testimony that the reason for discharging all of the employees was that Respondent's owners wanted to take a fresh look at the entire staff employed by the Windjammer, compare them with other applicants who had applied for jobs, and from the entire group of applicants select the best crew. Ferroni also testified that the reason Respondent's owners did not discharge one unit employee during their first 2 months of operating the Windjammer, but had waited for October 2, was because title did not pass to Respondent until October 3 when escrow closed and that until then the employees were employed by Zelinsky, not Respondent. Ferroni in this regard testified that the October 2 discharges were carried out by Respondent "on behalf of Zelinsky." I am persuaded, for the reasons set forth herein, that Respondent's defense does not withstand scrutiny.

The record does not support President Ferroni's assertion that the October 2 discharge of Respondent's employees was affected so as to enable Respondent to select the best possible crew of employees to work at the Windjammer. First, aside from Ferroni's bare assertion, Respondent came forward with no evidence to support this assertion. Respondent did not present evidence which demonstrated that discharged employees were replaced by more qualified employees. Nor did Ferroni describe in any detail Respondent's procedure or criteria utilized to determine whether or not to replace current employees by outside applicants. In fact, when Ray Kuhn, one of the owners who supposedly participated in deciding which applicants to employ, was questioned about the procedure used by Respondent's owners to make these decisions, her testimony was vague, evasive, and contradictory. The failure of Respondent to corroborate President Ferroni's conclusionary self-serving testimony with other evidence is particularly damaging to Respondent's defense because the record reveals that Respondent gave patently false reasons for rejecting the employment applications of several of the discharged employees, and that in place of the experienced workers whom it had discharged Respondent hired inexperienced applicants. Thus, as described *supra*, the evidence presented concerning the efforts of 12 of the dischargees to be reinstated establishes that the reasons which Respondent gave to seven [54] for rejecting their applications for reinstatement were patently false; two applications [55] were rejected because the applicants refused to indicate that they would refrain from supporting the Union in the event of a strike over Respondent's illegal refusal to bargain with the Union, one application--Rico's--was accepted when the applicant indicated he would refrain from supporting the Union in the event of such a strike. Another applicant--Townsley--was offered a position under conditions which Respondent knew he was bound to reject and the twelfth applicant--Atkin--was offered a position conditioned upon his accepting Respondent's unlawful refusal to recognize the Union as the employees' bargaining representative and working under nonunion working conditions. At the same time, as Respondent's owners were unjustifiably rejecting applicants who had previously worked at the Windjammer and were conditioning employment of other such applicants upon their agreement to work under nonunion conditions and not to support the Union in its dispute with Respondent, Respondent was also hiring inexperienced applicants to work in their place. Thus, it is undisputed that on October 3 and continuing thereafter, the Respondent's headwaiter trained new employees who were "very new" to the type of work for which they had been hired to perform. While they may have worked in a coffee shop prior to being hired to work at the Windjammer, the new hires lacked the experience to perform the type of work required at the Windjammer and, apparently due to their lack of experience, a substantial number of them remained only for a short period of time. The foregoing circumstances in their totality persude me that President Ferroni's testimony that Respondent discharged all of the employees in order to select the best crew to operate the Windjammer is false.

****34** Likewise, I reject Ferroni's testimony that Respondent, during its first 2 months of operation, failed to discharge employees and replace them with more satisfactory workers because it thought, until escrow closed on October 3 and title to the Windjammer was transferred, that Zelinsky was still the employees' employer and that Respondent made the October 2 discharges "on behalf of Zelinsky." The record does not support this contention. As I have found *supra*, the record overwhelmingly establishes that Respondent, not Zelinsky, was the employer during escrow. There is not an iota of evidence,

other than Ferroni's self-serving testimony, to support his contention that during the escrow period Respondent had a good faith belief that Zelinsky, rather than Respondent, was the employees' employer. Quite the contrary, the evidence as detailed, *supra*, overwhelmingly demonstrates that no reasonable person could have held such a belief. In fact, the record reveals that Respondent hired employees during escrow and fired the Windjammer's manager prior to the date his contract with Zelinsky was due to terminate, changed the job duties of employees, eliminated the bartenders' break periods, engaged a detective agency to investigate the work habits of the bartenders, decreased the pay of one employee, eliminated overtime pay for hours worked over 8 in a day, and discontinued the employees' medical and pension benefits by ceasing to make the monthly payments on behalf of the employees for those benefits. The foregoing circumstances ***797** persuade me that Respondent's contention that it believed it did not occupy the status of employer until escrow closed and title had passed was a fabrication manufactured to enable Respondent to justify discharging all of the employees when escrow closed. This, when viewed in the light of Respondent's extreme hostility toward union representation and President Ferroni's admission that Respondent intended to get rid of the Union by discharging employees at the close of escrow and the pretextual nature of the reason advanced by Respondent for discharging the employees, has led me to conclude that on October 2 Respondent discharged all of its employees in furtherance of an unlawful scheme to avoid having to recognize and bargain with the Union. By engaging in this conduct Respondent violated Section 8(a)(3) and (1) of the Act. [56]

I recognize that Armand "Ted" Allegra, Sr., William Allen, and Genaro Amezcua, who were included among the employees discharged by Respondent, were statutory supervisors. Nonetheless, their discharges violated Section 8(a)(1) of the Act where, as here, Respondent discharged its supervisors in order to carry out its unlawful scheme to avoid having to recognize and bargain with the Union. The supervisors were discharged so Respondent could interfere with the employees' statutory right to have union representation. In other words, the discharge of the supervisors was an important element in Respondent's total strategy designed to rid itself of the Union. Accordingly, I find that the discharge of Armand "Ted" Allegra, Sr., William Allen, and Genaro Amezcua was "an integral part of a pattern of conduct aimed at penalizing the employees for their union activities." and therefore violated Section 8(a)(1) of the Act. See, *Pioneer Drilling Co., Inc.*, 162 NLRB 918, 923 (1967); *Krebs and King Toyota, Inc.*, 197 NLRB 462, fn. 4 (1972); *Donelson Packing Co., Inc. and Reigel Provision Company*, 220 NLRB 1043 (1975).

Conclusions of Law

****35** 1. Respondent, East Belden Corporation, is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Bartenders and Culinary Workers Union, Local 126, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of Respondent employed at the Windjammer bar and restaurant located in Tiburon, California, excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union at all times material herein has been, and is now, the exclusive bargaining representative of all employees in the aforesaid bargaining unit within the meaning of Section 9(a) of the Act.

5. By failing and refusing to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally changing previously established terms and conditions of employment for bargaining unit employees that were in existence at the time Respondent incurred its obligation to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, and by failing as a consequence to grant bargaining unit employees the benefits to which they were entitled under such terms and conditions, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By interrogating employees about their union sympathies, by soliciting employees to withdraw from the Union, by promising an employee better terms and conditions of employment to dissuade him from supporting the Union, by threatening employees with discharge because they are represented by the Union, by interrogating employees about their willingness to support a strike by the Union, by conditioning continued employment upon employees agreeing not to support a union-sponsored strike, and by telling employees that Respondent does not intend to sign a contract with the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By discharging the employees who are named in Appendix A of this Decision on October 2, 1977, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

9. By discharging Armand "Ted" Allegra, Sr., William Allen, and Genaro Amezcua on October 2, 1977, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after August 8, 1977, and by unilaterally changing employees' wages, hours, and other terms and conditions of employment after August 8, 1977, I shall recommend it to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act. The remedy should be fashioned with a view toward restoring the situation, as nearly as possible, to that which would have prevailed absent the unfair labor practices. I shall therefore recommend that, among other things, Respondent, upon the request of the Union, revoke until such time as Respondent negotiates with the Union in good faith to agreement or impasse thereon, all the unilateral changes which heretofore in this Decision have been found to have violated the Act and to make the unit employees whole for any financial loss they may have suffered by reason of the aforesaid unilateral changes, [57] with interest ***798** as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

****36** Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affiramtive action designed to effectuate the policies of the Act. Specifically, having found that the discriminatees named in Appendix A herein, as well as Armand "Ted" Allegra, Sr., William Allen, and Genaro Amezcua, were illegally discharged by Respondent I shall recommend that Respondent, if it has not already one so, offer each of them immeidate and full reinstatement to their former jobs [58] or, if those jobs are no longer in existence, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and to make them whole for any oss of pay [59] or other employment benefits they may have suffered as the result of their discharges. Backpay shall be computed on a quarterly basis in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The record reveals that on October 4, 1977, a number of the discriminatees were reinstated and thereafter two more were reinstated. However, whether or not Respondent's obligation to reinstate these discriminatees has been satisfied was not litigated and is better left for the compliance stage of this proceeding. The parties, however, fully litigated whether Respondent's offers of reinstatement to discriminatees Tom Atkin, Hamilton Townsley, Michael Labire, Beverly Souza, and Lee Duran satisfied Respondent's obligation. I find that the offers of reinstatement to these employees were insufficient to terminate Respondent's reinstatement or backpay liability obligation. Thus, as described in detail *supra*, Respondent did not offer Souza

or Duran their former positions as part-time workers but required them to accept full-time work. And, with respect to Townsley, Respondent offered him his old position but under significantly different terms of employment. Townsely, who previously had been guaranteed 40 hours of work a week, was informed he no longer would be guaranteed 40 hours and if the work load did not warrant his presence would be sent home before his shift ended. This offer was consistent with Respondent's new policy of paying employees such as Townsley by the hour rather than by the shift which had been the past practice. This was a change in a significant term and condition of Townsley's employment which, as I have found *supra*, was instituted unilaterally in violation of Section 8(a)(5) of the Act. Finally, regarding Atkin, Respondent's offer of reinstatement was specifically conditioned upon his agreeing to work "non-union," that is, to accept Respondent's unlawful refusal to recognize and bargain with the Union and to work under unlawfully imposed working conditions. See *Superior Sprinkler, Inc.,* 227 NLRB 204, 208-210 (1977), and *Marquis Elevator Company*, 217 NLRB 461 (1975). It is for these reasons that I find that Respondent's offers of reinstatement to Labire, Atkin, Townsley, Souza, and Duran were insufficient.

****37** As the unfair labor practices committed were of a character which go to the very heart of the Act, I shall recommend an Order requiring Respondent to cease and desist therefrom and to cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.

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

ORDER [60]

The Respondent, East Belden Corporation, Tiburon, California, its officers, agents, successors, and assigns, shall:

I. Cease and desist from:

(a) Refusing to recognize and bargain collectively with the Union, Bartenders and Culinary Workers Union, Local 126, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Respondent at the Windjammer bar and restaurant, Tiburon, California, excluding guards and supervisors as defined in the Act.

(b) Unilaterally changing wages, hours, or other terms and conditions of employment of the employees in the aforesaid bargaining unit in derogation of its bargaining obligations to the aforesaid Union and to the rights of employees under the Act.

(c) Discouraging membership in the aforesaid Union, or any other labor organization, by discharging employees or otherwise discriminating against them in any manner with regard to their hire and tenure of employment or any term or condition of employment.

(d) Interrogating employees about their union sympathies and their willingness to support a union-sponsored strike, soliciting employees to withdraw from a union, promising employees better terms and conditions of employment to dissuade them from supporting a union, ***799** threatening employees with discharge because they are represented by a union, telling employees

Respondent does not intend to sign a contract with a union, and conditioning employees' employment upon their agreeing not to support a union-sponsored strike.

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

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

(a) Recognize, and upon request bargain collectively with, the above-named Union as the exclusive representative of all its employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon the request of the above-named Union revoke the unilateral changes in the rates of pay, wages, and other terms and conditions of employment described in this Decision which were placed into effect by Respondent in the appropriate unit, until such time as Respondent negotiates with the Union in good faith to agreement or impasse thereon.

**38 (c) Make whole the employees in the appropriate unit for any loss of pay or other benefits they may have suffered as a result of Respondent's unilateral implementation of rates of pay, wages, and other terms and conditions of employment, which were described in this Decision, with interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and continue such payments until such time as Respondent negotiates in good faith with the Union to agreement or to impasse.

(d) Offer to Armand "Ted" Allegra, Sr., William Allen, Genaro Amezcua and to each of the persons named in Appendix B herein, if they have not already been so offered, immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to seniority or other rights and privileges previously enjoyed, 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 above in the section of this Decision entitled "The Remedy." [61]

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

(f) Post at its place of business copies of the attached notice marked "Appendix A." [62] Copies of said notice, on forms provided by the Regioanl Director fro Region 20, after being duly signed by Respondent's representatives, shall be posted by Respondent 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 to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent violated the Act otherwise then as found herein.

Footnotes

1 The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.
The General Counsel has moved to strike certain portions of Respondent's brief and Respondent opposed this motion. In view of our resolution of this case, the General Counsel's request is hereby denied.

2 Respondent has 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.

3 In adopting the Administrative Law Judge's recommended Order, we note that in Appendixes A and B one of the employees is mistakenly listed as "Hermine Boneck," when, in fact, the record indicates that the correct spelling is "Hermine Honeck." We shall therefore correct the Administrative Law Judge's Appendixes A and B accordingly.

1 Respondent's post-hearing motion that the record be reopened for the limited purpose of admitting into evidence the escrow instructions and General Counsel's opposition have been considered. Respondent's motion is granted and the excrow instructions are received into evidence. Likewise, General Counsel's opposition insofar as it requests that the excrow closing statement be received into evidence is granted.

2 All dates herein, unless otherwise specified, refer to 1977.

3 Respondent agreed that while in possession of the premises during escrow it would purchase no more stock-in-trade than was reasonably necessary to maintain the inventory at the same level that existed at the time Respondent took possession.

4 Zelinsky leased the Windjammer, so contemporaneously with the execution of the sales agreement, Zelinsky entered into a lease agreement with Respondent whereby Zelinsky, with the pcrmission of the landlord, assigned all of his right, title and interest in the lease to Respondent, which agreed to assume and perform all of the terms of the lease.

5 The record indicates that contrary to this portion of the escrow instructions, certain personal property taxes and the premium for liquor liability insurance were not charged to Zelinsky "through the date of consummation of escrow." rather they were charged to Zelinsky only until August 8.

6 The description of the August 9 meeting is based upon a composite of the testimony given by employees Fallon, Reynolds, Leibowitz. Labrie. Healey. and Respondent's President Gabriel Ferroni. Their testimony, other than Fallon's testimony that Jason Kuhn asked the employees "how [they] felt about the Union," is not inconsistent. Ferroni denied that Kuhn asked such a question and none of the other witnesses corroborated Fallon in this respect. Accordingly. I have rejected this part of her testimony.

7 The employees were receiving health and welfare benefits including medical insurance benefits under the terms of the Union's contract with Zelinsky.

8 On August 8. Respondent discharged Hans Behringer, the person who had managed the Windjammer for Zelinsky. Gabriel Ferroni testified that Zelinsky, in the presence of Respondent's owners, instructed Ferroni to discharge Behringer and, in discharging Behringer, Ferroni was only carrying out Zelinsky's order. None of Respondent's other owners corroborated Ferroni. Zelinsky. a disinterested witness, convincingly testified he did not tell Ferroni to discharge Behringer: rather, he testified that he had advised Respondent's owners that they could do whatever they wanted about Behringer's employment. In fact. Zelinsky's written correspondence to Behringer indicates that Zelinsky was heopefu! that during escrow Respondent would retain Behringer in its employ, but Zelinsky realized this was Respondent's decision, not his.

9 Respondent also kept all of the books of account and other business records of the Windjammer.

10 In addition to paying the employees' wages Respondent also reimbursed the employees for vacation pay which had accrued during escrow.

11 The bartenders are allowed to compensate for their loss of a break period by starting work 20 minutes later or leaving 20 minutes earlier without suffering any loss of pay.

12 This overtime payment is required by law, so when Respondent was notified that it was violating the law it reverted to the past practice.

13 On August 8, President Ferroni informed Fallon that Respondent did not intend to change anything and that her job duties would not change. Later that week, however, Ferroni indicated to Fallon that Respondent could not continue paying her the amount of money she was receiving and intended to take away some of her duties and reduce her pay. Thereafter, during the latter part of August, Fallon's pay was reduced.

14 During the term of the association agreement, several changes or amendments were made pursuant to the agreement's reopening clause and were apparently accepted by Zelinsky.

15 I reject Gabriel Ferroni's testimony that Georgedes “asked me if we were going to sign a contract, and at that time I said I really did not know. I did not know a contract existed.” Georgedes impressed me as the more credible witness.

16 The description of Ferroni's conversation with Michell is based upon Michell's testimony. I reject Ferroni's denial that this conversation took place. Michell impressed me as the more credible witness. In crediting Michell I carefully considered that Michell, although not alleged as a discriminatee, was not a completely disinterested witness since he is an intimate friend of Kalisa Fallon, an alleged discriminatee.

17 The description of Duran's conversation with Ferroni is based upon Duran's testimony. I reject Ferroni's testimony that he never said anything to Duran about a “50% requirement” in connection with the Union. Duran impressed me as the more credible witness.

22 Based upon Labrie's undenied and credible testimony.

23 Based upon Healey's testimony. Jason Kuhn did not testify. Ferroni denied ever talking with Healey about the Union. Healey impressed me as the more credible witness.

24 Based upon Healey's testimony. Neither Jason Kuhn nor Ray Kuhn denied this testimony. Halina Ferroni and Gabriel Ferroni testified they never spoke with Healey about the Union. Healey impressed me as the more credible witness.

25 Fallon and Healey were called as witnesses by the General Counsel. Respondent failed to call one witness to challenge the accuracy of the transcript.

26 In those few instances where there was a conflict between Fallon and Healey in identifying those who spoke, I have disregarded that section of the transcript. Also, in listening to the recording, whenever I found it difficult to hear what was being stated, due to the overlap of several voices speaking at once. I have not, as I indicated on the record, relied upon those sections of the transcript.

27 In view of my conclusion that Federal and not state law furnishes the standard governing the admissibility of the tape recording into evidence, I have not considered whether, in fact. Fallon's conduct in recording the September 30 meeting held in Respondent's bar ran afoul of §632 of the California Penal Code.

28 As I have found *supra*, President Ferroni had told Duran late in September “it's a law that you have to get rid of 50% of the employees when you drop the Union.”

29 A chart which compared the health insurance plan which Respondent intended to institute with the plan which the employees had previously enjoyed under the Union's contract was distributed to the employees. Also. a representative for the insurance company which was underwriting the new plan spoke to the employees and answered questions about the plan.

30 The figure 39 excludes Respondet's owners who were on the payroll but includes other statutory supervisors. In this regard, in agreement with Respondent. I find that the record establishes that at the time of their discharges, manager Armand “Ted” Allegra. Sr., night floor manager William Allen. and chef Genaro Amezcua, were supervisors within the meaning of Sec. 2(11) of the Act. I realize that since Respondent's owners, particularly Gabriel Ferroni and Ray Kuhn, were personally participating in the day-to-day management of the Windjammer and the supervision of the employees

that there was a high proportion of supervisors to employees. Nevertheless, I am persuaded that the record establishes that on October 2, Allegra, Sr., Allen and Amezcua were statutory supervisors.

31 The figure 33 which includes statutory supervisors but excludes Respondent's owners is based upon Respondent's payroll records for the period October 9 to October 16, inasmuch as the records for October 4 were apparently misplaced and unavailable at the time of the hearing.

32 Fallon, Healey, Rico, Atkin, Labrie. Duran, Mason, Sousa, Leibowitz. Reynolds, and Townsley.

33 Harry Cohen.

34 Also in August 1977, when Respondent stopped paying overtime to employees who worked over 8 hours a day, Fallon complained to Halina Ferroni about the matter, stating it was a "union violation" as well as a violation of state law.

35 The description of Fallon's meeting with Ferroni and Kuhn is based upon Fallon's testimony. Respondent called President Ferroni to testify about this meeting. His testimony was essentially the same as Fallon's and he admits that the sole reason given Fallon for Respondent's refusal to reemploy her was that she had quit her employment, which Fallon denied. In other respects, however, there are certain conflicts between Fallon's and Ferroni's testimony which I have resolved in favor of Fallon, inasmuch as; she impressed me as the more credible witness. Also, Respondent's failure to have Kuhn testify indicates his testimony would not have supported Ferroni's version.

36 The description of the October 3 meeting is based upon Healey's testimony. Ferroni's version is that he told Healey her application had been rejected because "she would not set up her station, would not fill salt and peppers, would not bus a table if it was necessary, would not clean mustard and mayonnaise jars and would not clean up her station when she went home," and that Healey simply answered, "thank you very much" and left the premises. Healey impressed me as the more credible witness, accordingly, I have rejected Ferroni's testimony. Moreover, Kuhn was not called by Respondent to corroborate Ferroni's version; thus, I presume his testimony would have contradicted Ferroni's and would have been adverse to Respondent.

37 In my opinion, Respondent's interrogation of Rico which took place simultaneously with Respondent's acceptance of Rico's employment application, under these circumstances, was reasonably calculated to lead him to believe that Respondent's acceptance of him as an employee was conditioned upon his withdrawal from the Union and his not honoring a union picket line.

38 The description of Mason's October 5 interview with Kuhn is based upon Mason's testimony. Kuhn specifically denies asking Mason if he would give up his union affiliation. She testified she told him that Respondent had done quite a bit of hiring and "there might be a posslbllity of a picket line." Upon hearing this, Mason. according to Kuhn, replied that he would not be interested in working at the Windjammer because a lot of his friends were with the Union. Mason, when he testified about this conversation, impressed me as a more credible witness than Kuhn: accordingly. I have credited his testimony.

39 Although Atkin made mention of a desire to pursue his music, it is plain that a significant factor in Atkin's indication that he no longer desired to work at the Windjammer was Kuhn's statement that Respondent intended to operate nonunion.

40 The description of this meeting is based upon Souza's testimony. Ferroni testified that the meeting lasted only 30 seconds because when Souza was offered a full-time job she told Ferroni and Kuhn "you're trying to use me. Go fuck yourself" and walked out of the room. Souza impressed me as the more credible witness; accordingly, I have rejected Ferroni's testimony. Moreover. Kuhn was not called by Respondent to corroborate Ferronl: thus. I presume his testimony would have contradicted Ferroni's and would have been adverse to Respondent.

41 Ferroni was unable to convincingly explain why, despite Respondent's owners' decision to employ only workers who could work full time, almost immediately thereafter it commenced to employ part-time workers.

42 The description of the October 3 meeting is based upon Labrie's testimony. Gabriel Ferroni and Ray Kuho testified, in substance, that Labrie, an excellent waiter who worked only part time, was offered a job as a full-time waiter and that he indicated that he did not want to work full time but would consider the offer. Ferroni also testified that in response to Labrie's inquiry, Ferroni told him that he would be working in a nonunion restaurant. Labrie impressed me as the more credible witness; accordingly, I--have rejected the testimony of Ray Kuhn and Gabriel Ferroni. Moreover, the

person whom Labrie attributed the remarks about the Union, Jason Kuhn, was not called upon to corroborate Ferroni's testimony; thus, I presume his testimony would have contradicted Ferroni's and would have been adverse to Respondent.

43 The description of this meeting is based upon Reynold's testimony. Ferroni testified that Kuhn and Ferroni told Reynolds that he was a good bartender and offered to give him a letter of recommendation, but also told Reynolds that they thought his services were more suited for a service bar where he would not have to wait on customers rather than a bar, like the Windjammer's where there were customers. Reynolds supposedly stated that their assessment of his ability was correct and admitted that the previous night, when there were a lot of customers at the bar, he had not known how to handle the "action." Reynolds impressed me as a more credible witness than Ferroni; accordingly, I have rejected Ferroni's testimony. Moreover, Kuhn was not called by Respondent to corroborate Ferroni's version, thus. I presume his testimony would have impeached Ferroni and would have been adverse to Respondent.

44 The description of the October 3 meeting is based upon Leibowitz' testimony. Ferroni's version is that he told Leibowitz he liked him very much but was not going to hire him because Leibowitz was "a little inexperienced" and suggested he should go to work at the Bus Stop where he could get a "little more experience." Leibowitz impressed me as the more credible witness; accordingly, I have rejected Ferroni's testimony. Moreover, Kuhn was not called upon to corroborate Ferroni's testimony; thus, I presume his testimony would have impeached Ferroni's and would have been adverse to Respondent.

45 I reject Ferroni's testimony that during Leibowitz' employment Ferroni criticized him for being inexperienced and for dressing sloppy.

46 Of course, a substitute in management is not of itself sufficient to feat a finding of successorship where, as in the instant case, there is otherwise a substantial continuity in the employing enterprise.

47 A successor employer is obligated to bargain with a union which is the exclusive bargaining representative of the employees acquired from the predecessor, absent a reasonably based doubt that such union represents a majority of the employees. This is so whether such representative status is evidenced by a Board certification or, as in the instant case, by recognition and the existence of a collective-bargaining contract. See *Roman Catholic Diocese of Brooklyn, etc.*, 22 NLRB 1052, 1053 (1976). and cases cited therein. Respondent does not contend, nor does the record establish, that it doubted the Union's majority status when it hired all of the predecessor's employees.

48 On August 9 Respondent knew that the employees were represented by the Union and shortly thereafter learned that they had been covered by the terms of a contract between Zelinsky and the Union.

49 The record reveals that when each one of these unilateral changes was instituted, Respondent knew that the Union was the collective-bargaining representative of the employees who were affected by the changes.

50 Also on October 4, Respondent ostensibly discontinued the past practice of allowing employees to work part time. In such a change in the employees' terms and conditions of employment had in fact been made it would also constitute an unlawful unilateral change. However. as I have indicated, *supra*, the record establishes that this alleged change was a fiction fabricated by Respondent to enable it to refuse to continue to employ several of its employees so as to avoid having to recognize and bargain with the Union.

51 Asking Healy whether she would work for Respondent if the WindJammer become nonunion was calculated to force Healy into revealing her union sympathies.

52 Although Respondent was privileged to notify the employees that they would be replaced if they ceased work in support of a strike by the Union, it could not lawfully threaten them with termination or otherwise give them the impression that if they ceased work to strike and picket they would lose their jobs and be without any right to reinstatement. See *George Webel, d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815, 818 (1975).

53 There is no evidence that the Union had indicated to Respondent that it intended to call the employees out on strike or picket Respondent.

54 Fallon, Reynolds, Souza, Duran, Leibowitz, Healey, and Labrie

55 Cohen's and Mason's applications.

56 I note that it is settled that a group termination which is undertaken to avoid union representation violates the Act as to all victims of the termination regardless of the employer's knowledge of their union sympathies and regardless of

whether they are prounion at all. See, *Rock Tenn Company. Corrugated Division*, 234 NLRB 823, 825 (1978). Also see *American Bottling Co.*, 99 NLRB 345, 352 (1952).

57 So there is no misunderstanding, I note that the make whole portion of "The Remedy" herein requires that Respondent make whole the unit employees by, among other things, paying all pension, health and welfare contributions set forth in the terminated collective-bargaining agreement which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments found herein. See *Charles Starbuck and Diane Starbuck, d/b/a Starco Farmers Market*, 237 NLRB No. 52 (1978).

58 As found *supra*, discriminatee Mark Mason several months after his discharge repeatedly threatened to kill Respondent's president. By engaging in this conduct, I find that Mason forfeited his right to reinstatement and I shall recommend that Respondent pay him backpay from the time Respondent unlawfully discharged him, October 2, 1977, until February 20, 1978, the time of Mason's own misconduct. See *O. R. Cooper and Son*, 220 NLRB 287 (1975).

59 The record establishes that but for Respondent's decision to unlawfully discharge all of its employees on October 2, that the Windjammer on October 3 would have been open for business. Accordingly, those discriminatees who were scheduled to work October 3 should be reimbursed for their loss of earnings suffered due to the October 3 closing of the Windjammer.

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

61 As noted in The Remedy section of this Decision. Respondent does not have to offer reinstatement to discriminatee Mark Mason whose backpy period is from October 2, 1977, to February 20, 1978.

62 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."

239 NLRB No. 108 (N.L.R.B.), 239 NLRB 776, 100 L.R.R.M. (BNA) 1077,
100 L.R.R.M. (BNA) 1199, 1978-79 NLRB Dec. P 15360, 1978 WL 8310