SULRAIN, INC. AND BARBARA J. HUDSON, GAIL B. BAKER, JAN STENSON AND MARY CAREY, UP-2263 (2/11/76).

(60 Prohibited Practices by Employer)
63.7 union activity and membership or non-memberhips

Commissioners participating: James S. Cooper, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

Joellen D'E. Bogdasarian, Esq. - Counsel to the Commission
David Burres, Esq. - Counsel to the Charging Parties
Paul T. Ford, Esq. - Counsel to the Employer

DECISION

Statement of the Case

On March 13, 1974 the Chicipee-Holyoke-Westfield Bartenders, Hotle, Motel, Cafeteria and Restaurant Employees International Union, Local 116, AFL-CIO (herein "the Union") filed a Charge of Unfair Labor Practice against Sulrain, Inc. d/b/a/ Joe's Cafe (herein "the Employer" or "Sulrain" or "Joe's Cafe") pursuant to Section 6(b) of Chapter 150A of the General Laws alleging that unfair labor practices within the meaning of Section 4, subsection (1) of Chapter 150A (herein "c.150A" or "the Law") had been committed by the Employer. Subsequently, on April 15, 1974 Barbara J. Hudson, Gail B. Baker, Jan Stenson and Mary Carey collectively filed a Charge of Unfair Labor Practice against Sulrain alleging that unfair labor practices within the meaning of Section 4, subsection (1), (3) and (5) of c.150A had been committed. On the same day, Caroline E. Holme filed a Charge of Unfair Labor Practice against Sulrain alleging that unfair labor practices within the meaning of Section 4, subsection (1), (3) and (5) of c.150A had been committed. Finally, on April 26, 1974 Amy Leos filed a Charge of Unfair Labor Practice against Sulrain alleging that unfair labor practices within the meaning of Section 4, subsection (1), (3) and (5) of c.150A had been committed.

Thereafter, the Commission investigated the charges pursuant to its authority under Chapter 150A of the General Laws and determined that there was good cause to believe that Sulrain had committed unfair labor practices. On June 27, 1974 the Commission issued its own Complaint in Case No. UP-2263 alleging that Sulrain had terminated certain employees because of their union activities in violation of Section 4, subsection (1) and (3) of c.150A.

Pursuant to notice, formal hearings were held at the Commission's offices on July 24, 1974 and July 30, 1974. At this time all charges pending which involved substantially the same facts were consolidated for trail and litigated without objection by either counsel. All parties were given full and fair opportunity to be heard, to examine and cross-examine witnesses and to introduce testimony. Briefs were timely filed by Sulrain and the Union, and have been carefully considered. Accordingly, upon the entire record herein, including the demeanor of the witnesses while testifying, the Commission finds:

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Sulrain, Inc. and Barbara J. Hudson, UP-2263

Findings of Fact

1. That Sulrain, Inc. d/b/a/ Joe's Cafe is an employer within the meaning of c.150A.

2. That Barbara J. Hudson, Gail B. Baker, Jan Stenson, Mary Carey, Caroline E. Holme and Amy Leos are employees within the meaning of c.150A.

3. That Chicopee-Holyoke-Westfield Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees International Union, Local 116, AFL-CIO is a labor organization within the meaning of c.150A.

Background

During the fall of 1973 the waitresses employed at Joe's Cafe, Barbara J. Hudson, Gail B. Baker, Jan Stenson, Mary Carey, Rena Johnson and Amy Leos, joined the Chicopee-Holyoke-Westfield Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees International Union, Local 116, AFL-CIO. TI,7.[1] Shortly thereafter, the Union sought recognition as the exclusive representative of the waitresses for purposes of collective bargaining from Market Street Corporation the owner of Joe's Cafe. On September 18, 1973 recognition was granted to the Union by Joseph Caruso, Manager of Joe's Cafe and principal stockholder in Market Street Corporation. TII, 18-19; Petitioner's Ex.#2. On September 21, 1973 contract negotiations between the Union and Market Street Corporation commenced. Approximately five negotiating sessions took place between September 21, 1973 and February 25, 1974. The Union's negotiating team consisted of four of the waitresses Barbara J. Hudson, Gail B. Baker, Jan Stenson and Mary Carey, who attended and actively participated in the bargaining sessions. The remaining two waitresses, Amy Leos and Rena Johnson, did not attend the negotiating sessions and did not take an active role in the negotiation process. TI, 7-8.

During the course of collective bargaining negotiations, Market Street Corporation decided to sell Joe's Cafe. The reason for this decision was, according to Joe Caruso, Caruso's inability "to put up with" the union activity of the waitresses. Indeed, Caruso expressed his sentiments not only to the waitresses, but to the customers as well. He believed that "the union was ruining a lot of his business..." and that "it would be the best thing that ever happened to him" if the waitresses "would all quit". TI, 19. Caruso would frequently "express himself very vividly" and was often "quite excited and quite upset" when talking about the waitresses and their organizational activities. TI, 19-22, 93-94. In any event, Market Street Corporation began to negotiate with Sulrain over the purchase of Joe's Cafe by Sulrain. TII,2,3. The negotiations took place in September, 1973 and were conducted by Caruso and John Sullivan and Gerald Rainville, partners and sole stockholders of Sulrain. TII, 1,2,3. During his discussions with Sullivan and Rainville, and as early as September, 1973, Caruso complained to the two partners about the union activities at Joe's Cafe. TII, 4,5. Specifically, the partners of Sulrain were

[1] References are to the transcript volume and page.

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informed that the waitresses had joined a union and that contract negotiations were in progress. TII, 48-49. Caruso further indicated that he had not signed a contract with the Union yet, and that Sulrain "might have difficulties with the union in writing up a contract" in the event that it determined to buy the business. TII, 82-83. This information did not deter Sulrain, and the respective corporations executed a purchase and sale agreement in November, 1973. TII, 17. This agreement provided for transfer of the assets of Joe's Cafe from Market Street Corporation to Sulrain on the date that approval of the transfer of the cafe's liquor license to Sulrain took place. The transfer to the liquor license became official on February 26, 1974. TII, 17.

On January 28, 1974, approximately one month before the transfer of assets became final, the Union sent a certified letter to Sullivan in his capacity as a partner in Sulrain advising him of the Union's status as exclusive representative of the waitresses and of the contract negotiations then in progress. Additionally, the Union requested a meeting with Sulrain as successor to Market Street Corporation to discuss certain matters pertaining to collective bargaining. TI, 8-9; TII, 15, 16; Petitioner's Ex.#2.

Upon receipt of the Union's letter, Sullivan contacted Donald Dunphy, his attorney, who advised him that Sulrain need not recognize or bargain with the Union as long as the prior owner had not entered into a collective bargaining agreement with the waitresses. He also advised Sullivan that Sulrain was under no obligation to retain or rehire any of the waitresses previously employed by Market Street Corporation, and in the event that more than half of the former waitresses who were union members were retained as employees, Sulrain would be required to recognize and negotiate with the Union. TII, 19, 20. Accordingly, Sulrain refused to meet with the Union or its representatives to discuss the takeover of Joe's Cafe or any matters pertaining to collective bargaining, and further refused to acknowledge written communications from the Union, most notably a letter dated February 13, 1974 indicating a breakdown in contract negotiations between Market Street Corporation and the Union, or to attend an informal meeting with the waitresses which it had previously agreed to participate in and which had been scheduled for February 24, 1974. TI, 92,94,95.

<u>Discharges</u>

At approximately one o'clock p.m. on February 25, 1974 Mary Carey called Joe's Cafe in response to a message left at her home and spoke to Gerald Rainville. During this conversation Rainville informed Carey that "we won't be needing you girls any more" for the reason that "we are bringing in our own help from Checkers", a restaurant that he formerly owned and managed. Carey had been employed as a waitress at Joe's Cafe for more than two years prior to her discharge, and was described as "the most personable waitress they had" by one of the restaurant's regular customers. TI, 7; TII, 93.

Later that same day, between six and seven o'clock p.m., Gail Baker received a telephone call from Rainville during which he told her that "he was sorry he had some bad news for her", and that "he wouldn't be needing [her] anymore." Rainville further indicated that he planned to "bring in his own help from Checkers." TI, 75. Thereupon, in response to some of Baker's questions, Rainville said that the people from Checkers "would work longer hours or the

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hours he wanted them to work". TI, 77. Neither Rainville nor Sullivan had ever asked any of the charging parties if they would be willing to work different or longer hours. TII, 123. Prior to her discharge, Baker had been employed as a waitress at Joe's Cafe for two and one half years. TI, 72.

On the same evening of February 25, 1974, Jan Stenson received a message at her home requesting that she call Rainville. Upon returning the call, Rainville informed Stenson that "he couldn't keep [her] anymore, that he was bringing in other help from Checkers probably and from his family, girlfriend" and that they "may be switching over to waiters instead of waitresses..."[2] TI, 81. In response to Rainville's comments, Stenson then asked "how he had fired the only four people who had been on the negotiating team for the union". Rainville retorted that he didn't "know anything about the union" and that "it was merely coincidence" that the four of them had been fired. TI, 82. Stenson had been employed as a waitress at Joe's Cafe for one year prior to her discharge. TI, 79.

Mary Carey informed Barbara Hudson of the termination during the evening of February 25th. TI, 95. After speaking with Carey Hudson phoned Rainville at his home, reaching Sullivan instead. At this time Sullivan said "we won't be needing you. We are bringing in our own help who worked before with us at Checkers." TI, 96. Hudson then asked why she in particular was being fired, and Sullivan replied "we think you won't fit in...we watched you work." TI, 96. Hudson had been briefly observed at work by Sullivan on the preceding afternoon of February 24, 1974, and had never been observed at her work by Rainville. TI, 97. Hudson had been employed as a waitress at Joe's Cafe for six months prior to her discharge. TI, 89.

Amy Leos was the only waitress that Rainville and Sullivan did not discharge on February 25th. However on the following day, February 26, 1974, Leos, together with Barbara Hudson, Gail Baker, Jan Stenson, Mary Carey and an organizer from the Union went to Joe's Cafe to discuss the discharges with Sullivan and Rainville. Rainville, upon observing that Leos was part of the Union group, exclaimed "Amy this changes things". TI, 29,76,98. Leos then asked Rainville "how does this change things? I've been a member of the Union all along...do you still want me to work?" Rainville replied "I will let you know". TI, 76. Leos heard nothing further from either Sullivan or Rainville and accordingly reported for work as scheduled on February 27, 1974. At that time she met and spoke to Sullivan. He asked her "do you want to work", and she indicated that she did. Leos then inquired whether Sullivan was "going to negotiate with the Union", and Sullivan answered her in the negative. At this, Leos informed him that "I can't work until you do", and left the Cafe. TI, 30. The waitresses

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[2]We express no opinion as to whether discrimination on the basis of sex is also an unfair labor practice within the meaning of c.150A since the issue was never raised during the course of the hearings. See United Packinghouse Workers v. NLRB, 416 F.2d 1126 (C.A.D.C., 1969) aff'g and remanding 169 NLRB 290 (1968), cert. denied 396 U.S. 903 (1969), NLRB Case No. 16-CA-2802, 72 LRRM 1251; Bekins Moving & Storage Co., 211 NLRB 7 (1974); Cf. Jubilee Mfg. Co., 202 NLRB 272 (1973).

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who had been discharged established a picket line in front of Joe's Cafe to protest their terminations, and Leos participated in picketing with the other waitresses. TI, 38.

Sometime during the afternoon of February 25th, Rainville hired Caroline Holme as a new waitress at Joe's Cafe. Holme was not a friend or relative of either Sullivan or Rainville. She had never previously worked for either man, nor had they observed her performance as a waitress. Holme's references and qualifications were not checked prior to the time she was hired. TI, 84; TII, 54, 112. Holme reported for work at Joe's Cafe on Wednesday, February 27th, and had a conversation with Rainville. She informed him at this time that "I would like to work at Joe's," but "I didn't feel I could work out at Joe's until the legitimate waitresses were reinstated or unless he was willing to talk to them because he fired them so quickly." TI, 84. Rainville indicated that "it is up to you", and Holme did not take the job.

Opinion

It is well settled that an employer may not discharge an employee or refuse to hire a person because that individual has engaged in union or protected concerted activities. St. Elizabeth's Hospital, UP-2222 (8/17/73) aff'd _____ Mass. App._____, 321 N.E. 2d 837 (1975). For further citations see Massachusetts Teachers Association v. Mt. Wachusett Community College, 1 MLC 1496. Such discriminatory action is a clear violation of c.150A, Section 4(3). While it is true that the employer is under no duty to hire any particular applicant for employment, the employer may not refuse to hire a person because of his union activity. NLRB v. New England Tank Industries, Inc., 302 F.2d 273 (C.A. 1, 1962) cert. denied 371 U.S. 875 (1962); Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575 (C.A. 3, 1960) cert. denied 364 U.S. 933 (1961).

In this case the Commission is not confronted with a successorship question, but rather with the refusal of an employer to hire individuals who were known to be actively engaged in organizing a union and negotiating a collective bargaining agreement with the former owner of the business. The United States Supreme Court addressed the question of a new employer's obligation to hire the employees of its predecessor in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972). In that case the Court held that while the act of purchasing a business of itself creates no obligation on the part of the new owner to hire any or all of its predecessor's employees, "...an employer who declines to hire employees solely because they are members of a union commits an unfair labor practice." Burns, supra at 280, n.5. The same principle was elaborated upon by the Court in Howard Johnson Co. v. Hotel Employees, 417 US 249 (1973). There the Court stated:

> Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. Sec 158 (a)(3). Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. 417 U.S. at 262, n.8.

See also: K.B. & J. Young's Super Markets v. NLRB., 377 F.2d 463, (C.A. 8, 1967),

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cert. denied, 389 U.S. 841 (1967); Tri State Maintenance Corp. v. NLRB, 408 F.2d 171 (C.A.D.C., 1968).

Applying these principles of law to the facts of this case we conclude that Sulrain refused employment to the charging parties herein solely because they were actively engaged in protected concerted activities within the meaning of c.150A, Section 3. The record reflects that Sullivan and Rainville had knowledge of the existence of the Union and the union activities of each of the charging parties prior to purchasing the restaurant. TII, 4,26,34,35,46,47; TI, 7-8,26,10,30,94. Further, there is unrebutted testimony in the record that Rainville was informed by the former owner, Joseph Caruso, that the corporation might have difficulties with the Union prior to Sulrain's take over of the business. TII, 83. Indeed, in anticipation of future problems with the Union, Sulrain was advised by its legal counsel that it would not be obligated to recognize and bargain with the Union provided that it employed fewer than one half of the waitresses employed by the former owner. TII, 20. Moreover, we note that after the termination of Mary Carey, the shop steward, and Gail Baker, a member of the negotiating team, the new owners refused to meet with individual waitresses because they did not want such a meeting to be deemed a "recognition" of the Union which would thereby obligate them to bargain.

During the hearing Sullivan and Rainville testified that they were not hostile to the Union, but rather that they wanted to bring in as waiters and waitresses individuals known to them either because they were former employees at Checkers or were relatives. We find no reason to credit this testimony in view of their offer to Caroline Holme notwithstanding her previous limited waitressing experience and their failure to check her references. Further, with respect to the offer of employment to Amy Leos, a union member, the record reflects that Rainville, upon seeing her in the company of other union members, said, "Amy, this changes things" at the same time indicating that he would "let her know" if he still wanted her to work for him. TI, 29,76,98. At this juncture we note that the situation of Leos and Holme was analogous to that of an unfair labor practice striker who is offered conditional reinstatement by an employer. It is well settled that strikers who have been engaged in an unfair labor practice strike are entitled to reinstatement to their former jobs even if the employer has hired permanent replacements. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); NLRB v. Fotochrome, Inc., 343 F.2d 631, 633 (C.A. 2, 1965) cert, denied, 382 U.S. 833 (1965). Moreover, "the duty to reinstate is not fulfilled by a conditional offer of reinstatement [and] the imposition of the condition which required the union to abandon rights to which it is entitled under the National Labor Relations Act was an unfair labor practice." NLRB v. St. Mary's Sewer Pipe Co., 146 F.2d 995 (C.A. 3, 1945); NLRB v. Pecheur Lozenge Co., 209 F.2d 393 (C.A. 2, 1953) cert. denied, 347 U.S. 953, (1954); Revere Metal Art Co., Inc., 127 NLRB 1028 (1960) enforced 287 F.2d 632 (C.A. 2, 1961); Ralph's Wonder, Inc., 127 NLRB 1280 (1960). In this case we find that through their concerted refusal to work and their picketing, Leos and Holme participated in an unfair labor practice strike. Big Town Super Mart, Inc., 148 NLRB 595 (1964). Further, we find that Sulrain's offer to employ Leos and Holme was, at best, a conditional offer which the two employees were entitled to reject without altering the protected character of their strike activity. Big Town Super Mart, Inc., supra at 601.

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There can be no doubt that Sulrain's refusal to reinstate or offer employment to the other discriminatees materially affected the obligation of Leos and Holme to accept the offers made to them, In the absence of the Employer's complete cessation and full remedying of the specific unfair labor practices we are confronted with herein, it is our judgment that its offer to Leos and Holme was indeed qualified, and we may therefore properly order the reinstatement with back pay of these two individuals. Big Town Super Mart, Inc., supra, at 607-608. See D'Armigene, Inc., 148 NLRB 2 (1964).

We are constrained to observe that although Sullivan and Rainville stated that they wanted to hire employees who would work longer hours, neither asked the charging parties if they would be willing to work such a schedule. Accordingly, for the above reasons we reject as wholly pretextual and without merit the contention of Sulrain that it terminated the employment of the charging parties herein because they were incompetent and because the corporation wanted to hire experienced workers who would be willing to work longer hours, and further find that the charging parties were denied employment as the result of their union activities. TI, 23-24; TII, 93,95; TI, 77; TII, 54, 123. Massachusetts Teachers Association v. Mt. Wachusett Community College, 1 MLC 1496 and cases cited therein.

Finally, where an employer has committed independent and substantial unfair labor practices which undermine majority strength and impede the election process, the Commission may issue a bargaining order as a remedy for the various violations. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In Gissel, the Supreme Couet sustained the Board's remedial authority to issue a bargaining order in cases where, as here, serious unfair labor practices have been committed "that interfere with the election processes and tend to preclude the holding of a fair election" 395 U.S. at 594. The Court defined two situations in which a bargaining order would be appropriate: first, where the employer's unlawful conduct is so "outrageous" and "pervasive" that a bargaining order is the only effective means of remedying those unfair labor practices, even in the absence of a Section 8(a)(5) violation or a bargaining demand; and second, where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order..." 395 U.S. at 613-615. Accordingly, upon application of the Gissel test to the facts of this case, it is our judgment that a bargaining order is warranted to remedy Sulrain's c.150A, Section 4(3) violations. Bausch & Lomb, Inc. v. International Union of Operating Engineers, Local 71-71A, AFL-CIO, 214 NLRB 53, 88 LRRM 1197 (1974).

We will not restate at this juncture each fact in the record which supports our position. Nevertheless, we do wish to note those facts which establish beyond peradventure that the Union clearly enjoyed a majority status prior to the time that Sulrain assumed control of the business and unlawfully refused to hire the charging parties. NLRB v. Gissel Packing Co., supra. Testimony that recognition was granted to the Union by Joseph Caruso on September 18, 1973, and that contract negotiations were on going at the time that Sulrain

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purchased Joe's Cafe from Caruso was undisputed. Further, the record indicates that Sulrain knew that the Union requested a meeting to discuss the status of collective bargaining negotiations in January, 1974 prior to its take over of the business. Simultaneously Sulrain unlawfully refused to employ the majority of the waitresses at Joe's Cafe each of whom was affiliated with the Union. In short, the majority status of the Union was never questioned by Sulrain prior to its purchase of the business. We therefore conclude that Sulrain's entire course of conduct, but most notably, its refusal to hire the union activists, was an aggressive and pervasive effort to dissipate the Union's acknowledged majority status and thereby evade its duty to bargain in good faith. NLRB v. Gissel Packing Co., supra.

O R D E R

Wherefore, on the basis of the foregoing, IT IS HEREBY ORDERED, pursuant to Chapter 150A, Section 6 of the General Laws, that Sulrain, Inc. shall:

1. Cease and desist from:

   (a) Unlawfully refusing to hire, or otherwise discriminate against, any person because that person has engaged in concerted activity as set forth in General Laws Chapter 150A, Section 3.

   (b) In any like or related manner interfering with, restraining or coercing any person in the exercise of rights protected under General Laws Chapter 150A, Section 3.

   (c) Unlawfully refusing to bargain in good faith upon request of Chicopee-Holyoke-Westfield Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees International Union, Local 116, AFL-CIO.

2. Take the following affirmative action which will effectuate the policies of General Laws, Chapter 150A:

   (a) Offer Barbara J. Hudson, Gail B. Baker, Jan Stenson, Mary Carey, Caroline E. Holme and Amy Leos immediate employment as a waitress or a substantially equivalent position in Joe's Cafe, without prejudice to seniority or other rights and privileges, and make each of them whole for any loss of earnings suffered as a result of the discrimination against them, by payment to them of a sum equal to that which each would normally have earned, absent the discrimination, from the date of the refusal to hire to the date of Sulrain's offer of employment, less net earnings during such period attributable to regular employment.

   (b) Pay interest on such amount of back-pay computed on a quarterly basis at the rate of 6 per cent interest per annum.

   (c) Upon request, bargain collectively in good faith with Chicopee-Holyoke-Westfield Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees Union, Local 116, AFL-CIO.

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

(e) Post in conspicuous placed at Joe's Cafe and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.

(f) Notify the Commission in writing within ten (10) days of the service of this Decision and Order of the steps taken to comply therewith.

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

Sulrain, Inc. d/b/a/ Joe's Cafe will not refuse to hire or otherwise discriminate against persons because they support an employee organization, or because they engage in activities protected by Law.

Sulrain, Inc. will offer Barbara J. Hudson, Gail B. Baker, Jan Stenson, Mary Carey, Caroline E. Holme and Amy Leos immediate employment as a waitress or, if that job no longer exists, to a substantially equivalent position at Joe's cafe without prejudice to seniority or other rights and privileges.

Sulrain, Inc. will make Barbara J. Hudson, Gail B. Baker, Jan Stenson, Mary Carey, Caroline E. Holme and Amy Leos whole with interest for any loss of pay suffered as a result of the discrimination against them.

SULRAIN, INC.

By______________________________
JOHN SULLIVAN

By______________________________
GERALD RAINVILLE

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 100 Cambridge Street, Room 1604, Boston, Massachusetts, Telephone 727-3505.

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