Washington Fruit and Produce Company *and* International Brotherhood of Teamsters, AFL–CIO, d/b/a Teamsters United For Change. Cases 19–CA–25404, 19–CA–25424, 19–CA–25441, 19–CA–25533, 19–CA–25598, 19–CA–25659, 19–CA–25673, 19–CA–25685, 19–CA–25689, 19–CA–25702, 19–CA–25735, and 19–RC–13536

December 16, 2004

DECISION, ORDER AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 29, 2000, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent and the General Counsel filed exceptions[1] and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified[3] and set forth in full below.

[1] There were no exceptions to the judge's dismissals of the following allegations: (1) the written warning to employees Rosio Diaz and Rosa Quintanar for leaving work early on August 7, 1997, as well as the written warning to employee Ana Guzman for leaving work early on September 9, 1997; (2) the Respondent's excessive supervision and surveillance on August 8, 1997; (3) the Respondent's August 1997 initiation of improved health care plan costs; (4) Supervisor Betty de Weese's telling employees they could not contribute to funeral flower costs because of the Respondent's no-solicitation rule; (5) the December 1997 comment by Supervisor Christina Bautista regarding the Respondent's "No Union" T-shirts; and (6) the December 9, 1998 interview between employee Rigoberto Flores and Attorney Natalie Pierce.

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

[3] In light of the fact that the Respondent's employees are Spanish-speaking, we shall modify the recommended Order to provide that the Respondent post the attached notice to employees in both Spanish and English.

We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). In addition, we shall modify the recommended Order to provide standard remedial language and to conform the language to the violations found.

I. ADOPTION OF JUDGE'S ULP FINDINGS AND DISMISSALS

A. Summary

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by (1) telling employees that they could not engage in union activity on company property; (2) coercively interrogating employees about their union sympathies and threatening them with the loss of their jobs[4] for seeking union representation; (3) making comments that employees who choose to wear prounion apparel were "cutting their own throats" or "putting their heads in a noose"; (4) ordering employees to wear "No Union" T-shirts; and (5) intimidating employees by falsely accusing them of holding union meetings during work.[5] The judge also found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by (1) issuing an enhanced warning to employee Ana Guzman because she engaged in union activity;[6] and (2) issuing a warning to employee Indalecio Mata for parking his car near the Respondent's front entrance because it contained a union placard.[7]

[4] In his exceptions, the General Counsel contends that the judge erred in failing to find that Bautista also threatened employees with job loss in December 1997. We find it unnecessary to pass on this allegation because the finding of such an additional violation would be cumulative and would not affect the remedy. See also fn. 35, infra.

[5] Member Schaumber would reverse the judge's finding that Shift Manager Bautista unlawfully threatened employees Flores, Martin Alvarez, and Clemente Gomez when she told them that she did not want them having any union meetings in the cold room. At the time that Bautista made this statement, the three employees had halted work and were engaged in conversation. In Member Schaumber's view, Bautista's comment to them was merely a casual, offhand remark made simply to prompt them to resume working and was not threatening or coercive.

In response, Chairman Battista and Member Walsh emphasize that Bautista did not simply direct the three employees to return to work. Instead, she told them that she "did not want them having any union meetings there in the cold room," even though Bautista could not hear what the three employees were saying. Under the circumstances, Chairman Battista and Member Walsh agree with the judge that, in essence, Bautista was threatening employees with discipline in the event that they were perceived to be talking about the Union at work.

[6] Member Schaumber would dismiss this allegation. See fn. 23, infra.

[7] Chairman Battista and Member Walsh emphasize that Mata had parked in the same spot without incident for at least 3 weeks, and that the Respondent could hardly have avoided noticing his car since it was bright pink in color. Mata received a warning only after he placed two union placards in his car's windows. Thus, the Respondent treated him disparately based on his display of prounion sentiments. Further, the judge found that the Respondent's prior efforts to enforce its parking regulations were "desultory, uneven, and half-hearted." Accordingly, the Respondent has failed to show that it would have warned Mata even in the absence of his show of support for the Union.

The judge, however, referred to the Mata warning as a violation of Sec. 8(a)(1) and inadvertently neglected to mention that Sec. 8(a)(3) was violated as well. We correct the judge's oversight.

We agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) by refusing to reinstate Maria Abundiz upon her return from Mexico.[8] We also agree with the judge's dismissal of the 8(a)(1) allegations pertaining to Supervisor Christina Bautista's asking two employees who were dressing in heavy jackets before entering the cold room, if they were putting on their "bulletproof vests."[9]

B. Dismissal of Videotaping Allegation[10]

As more fully explained below, we agree with the judge that the Respondent did not violate Section 8(a)(1) by videotaping employees during a union rally. The Respondent is engaged in the business of nonretail packing and sale of fruit at its main office and two plants in Yakima and Union Gap, Washington. The Union began its campaign to organize the Respondent's employees in March 1996. The Union sought to represent a unit of production and maintenance employees, and warehouse, shipping, repair yard, and refrigeration employees at both plants.

The Union determined that it would request recognition from the Respondent in a very public fashion by holding a rally on August 12, 1997,[11] in front of the Respondent's main office, which is located in a relatively busy industrial area near downtown Yakima.[12] The Union contacted the local television and newspaper media to cover the event, but it gave no advance information about the rally or its plans to the Respondent.

On August 11, Mike Gempler, an official of the Washington Fruit Growers League, told the Respondent's president, Rick Plath, that a group of union organizers and union supporters, including high-ranking officials from AFL–CIO headquarters in Washington, D.C., would be marching from the Union's office at the local train station to the Respondent's main office the next day. Although Plath knew nothing of the specifics of the Union's planned rally—i.e., what its purpose was; at what time it would take place or how long it would last; how many people would be involved; or whether it would be peaceful—he believed that the Respondent should be prepared for the event.

On the morning of August 12, Plath met with Warehouse Manager Tommy Hanses and Human Resources Manager Lupe Martinez. Plath told them about the Union's planned rally and expressed to them his concerns about the safety of employees and their cars; the safety of the Respondent's packing equipment; and possible incidents of violence and trespassing.[13] Plath asked Martinez to have a video camera ready to videotape the rally so as to preserve on tape evidence of any damage done to vehicles and packing equipment on the Respondent's premises.

In mid-afternoon on August 12, Teamsters and AFL–CIO officials led a march of 50 to 60 people from the Union's train station office to the Respondent's main office, where they set up a large table, intended to serve as a symbolic bargaining table. A union official estimated that by the time the group arrived at the Respondent's office, there were over 100 demonstrators. The

Contrary to his colleagues, Member Schaumber would dismiss the complaint allegation that the Respondent enforced its parking regulations more stringently against employee Mata by issuing a *written* warning to him for parking in front of the Respondent's office before 5 p.m. Member Schaumber notes that the Respondent did not treat Mata disparately. Rather, both Mata and employee Oscar Moreno violated the same parking rule on the same day, and the Respondent issued them identical warnings. Contrary to the judge, Member Schaumber would not find, without additional evidence, that the Respondent's warning to Moreno was merely an effort to "sanitize" its warning to Mata. Further, while the Respondent had given oral warnings to parking rule violators on two occasions in the past, Mata and Moreno were longtime employees who, in the Respondent's view, should have known the rule. It is true that the Respondent gave longtime employee Cecilia Padilla an oral warning when she parked in front of the office before 5 p.m. in violation of the Respondent's rule, but this was because the Respondent knew that Padilla, whose shift began after 5 p.m. was accustomed to parking there at the commencement of her shift. Her parking a bit earlier was an aberration from her prior practice warranting an oral instead of a written warning.

[8] The judge found that Abundiz had effectively abandoned her job by overstaying the leave of absence she had been granted, and, thus, when she sought to return to work, she was no longer an employee of the Respondent. In addition, the judge considered, under *FES*, 331 NLRB 9 (2000), Supp. Decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), whether the Respondent unlawfully refused to *hire* Abundiz as a new employee. The judge found that the General Counsel had failed to establish a prima facie case and that, even if he had, the Respondent rebutted it. We affirm the judge's dismissal of the refusal to reinstate allegation, but we find it unnecessary to pass on the judge's *FES* analysis because the complaint did not allege a refusal to hire violation, and the matter was not fully litigated at the hearing.

[9] Although we dismiss this allegation, we specifically disavow the judge's reasoning that Bautista's statement was not a threat because Bautista was joking and "mak[ing] fun of the Union." A supervisor's statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended. See *Trover Clinic*, 280 NLRB 6 fn. 1 (1986). Board precedent makes clear that the proper test in these circumstances is whether the supervisor's comments reasonably tended to interfere with the employees' free exercise of their Sec. 7 rights. *Hanes Hosiery, Inc.,* 219 NLRB 338 (1975). Applying Board precedent, we find, in agreement with the judge, that Bautista's comments about "bulletproof vests" did not reasonably tend to interfere with the free exercise of employees' Sec. 7 rights.

[10] Member Walsh does not agree with the dismissal of the videotaping allegation. See his dissent in part.

[11] All subsequent dates are in 1997 unless indicated otherwise.

[12] The Respondent's Yakima plant is located across the street from its main office.

[13] Plath testified that, prior to the August 12 rally, the Respondent had called the police several times because of problems with trespassers.

rally leaders sat at the table with the crowd around them chanting for Plath to come out of the building, which he did for a short time.

Martinez recorded about 19 minutes of videotape. The tape shows that demonstrators in the street significantly affected traffic. Traffic slowed to a crawl as some drivers attempted to negotiate through the crowd, while other drivers made U-turns to avoid the crowd. The "bargaining table" and some benches in the street blocked traffic and there were demonstrators sitting on cars. The tape also shows that, at one point, a large number of demonstrators entered the Respondent's office as a group. Martinez testified that he recognized only 12 of the demonstrators as being employees of the Respondent, while a union official testified that she recognized about 40 employees. Either way, a majority of the approximately 100 demonstrators appeared not to be employees of the Respondent. Three employees eventually made their way into the office with a written demand for recognition, which the Respondent rejected.

The principles the Board applies to videotaping cases were fully set out in *National Steel & Shipbuilding Co*., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), where the Board stated:

> [T]he fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. . . . Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. ''[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing. . . . The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case." [Citations omitted.]

The judge correctly followed this precedent and examined whether the Respondent had demonstrated sufficient justification for its videotaping of the rally. The judge found that at the time Path made his decision, he knew that the Union was planning a high-profile event with a group of people, including high-ranking union officials from out of town, who would be marching from the train station to hold a public demonstration at the Respondent's office. Plath did not know the purpose of the march, or when it would start, or whether the Union could control the crowd. What Plath did know, as found by the judge, was that he had to be concerned about the safety of both the Respondent's employees and the Respondent's equipment. Faced with these circumstances, and concerned about a recurrence of trespassing on the property, Plath asked Martinez to videotape the upcoming rally to gather and preserve evidence. Finding the Respondent's concerns with trespassing and safety issues to be reasonable, the judge properly found no violation of the Act based on the Respondent's videotaping.[14]

Our dissenting colleague would find a violation because, in his view, the Respondent failed to establish proper justification for its decision to videotape the Union's rally. According to the dissent, the Respondent had only a "mere belief" or '"sheer suspicion" that unprotected activity might occur at the rally because Plath had minimal information about the rally; the rally occurred on public property; and the videotaping began without any union or employee misconduct occurring that day or on prior occasions. We disagree with the dissent on all three points.

First, given the available information, Plath's reason for deciding to videotape was based on more than what the Board refers to as a "mere" belief that something might happen. At the time he made the decision, Plath knew that there was going to be a demonstration possibly involving a large number of people in front of the Respondent's office. Plath knew that officials from the AFL–CIO had come into town from Washington, D.C., to take part in the demonstration. Plath could easily visualize the consequences of such a high-profile gathering, and he could predict that he would have safety, property, and security issues to face.

[14] See, e.g., *Corporate Interiors, Inc.,* 340 NLRB 732, 746 (2003), citing *Ordman's Park & Shop*, 292 NLRB 953 (1989) (concern about trespass issues constitutes a valid justification); *Saia Motor Freight Line,* 333 NLRB 784 (2001) (concern about traffic safety provided a legitimate justification).

The judge also relied on the Union's failure to inform the Respondent about the demonstration as grounds for finding that the videotaping was not coercive. The judge speculated that the Union's planning of the demonstration suggested that the Union was "setting the company up for a fall . . . [and] seeking to provoke some sort of illegal response." We do not adopt this portion of the judge's rationale for dismissing the videotaping allegation.

Second, Plath certainly had every reason to expect that there would be, at the very least, trespassing by union supporters and organizers on the Respondent's property, given the close proximity of the public areas. Unlike *Robert Orr-Sysco Food Services,* 334 NLRB 977, 978 (2001), where the Board found no proper justification for employer videotaping of employees' handbilling, the public property in the present case literally began at the respondent's doorstep, rather than "two turns away from the [respondent's] driveway" as in *Robert Orr-Sysco Food Services*. 334 NLRB at 978. Furthermore, given prior incidents of trespassing on the Respondent's property, which had led Plath to contact the police, it was prudent of Plath to plan on documenting the Union's rally.

Finally, the Respondent, like the employer in *Saia*, supra, had legitimate safety and trespassing concerns which justified its videotaping of the demonstration. and its videotaping was consistent with the Board's Rule that the taking of photographs or videotaping to document trespassory activities for the purpose of making a claim of trespass is lawful.[15] In *Saia Motor Freight Line*, supra, the Board found that the employer was justified in videotaping handbilling activities, which occurred on the employer's property in its driveway. The Board accepted the employer's concern about safety and potential negligence liability as a legitimate justification for photographing employees engaged in handbilling. The Board in *Saia* also pointed out that the employer began its videotaping after the handbilling began and after becoming dissatisfied with police efforts to stop handbillers' interference with traffic entering its facility. It does not follow, however, that the Board requires that "solid justification" can be established only *after* specific instances of anticipated problems have occurred. The Board's rules regarding picture-taking of protected activity do not mean that an employer is precluded from asserting a legitimate concern simply because no disruption has yet occurred. If that were the case, there would be no reason for the Board to require "solid justification for its resort to anticipatory photographing." *National Steel & Shipbuilding*, supra. As the Board has held, in a different context, "The pedestrian need not wait to be struck before leaping for the curb." *Betts Cadillac Olds, Inc*., 96 NLRB 268, 286 (1951).

Thus, we conclude, in agreement with the judge, that the Respondent had a reasonable basis to expect misconduct based upon the circumstances discussed above. Accordingly, we conclude that the Respondent's videotaping of the union rally did not violate the Act.[16] We shall dismiss this allegation.

II. REVERSALS OF JUDGE'S ULP FINDINGS[17]

Contrary to the judge and our dissenting colleague, we find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by: (1) warning employees and demoting employee Pamela Smith for violating the Respondent's no-solicitation rule; and (2) by discharging employee Ana Guzman for work-related misconduct.

A. Discipline for Allegedly Violating No-solicitation Rule

The Respondent maintains a no-solicitation rule for employees which states:

> Approaching fellow employees in the work place regarding activities, organizations or causes, regardless of how worthwhile, important or benevolent, can create unnecessary apprehension and pressures for fellow employees. Such conduct is inappropriate and unnecessary. . . . No employee shall solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed.[18]

The General Counsel concedes that this rule, which was in effect prior to the union organizing campaign, is valid on its face. He argues, instead, that the Respondent discriminatorily enforced the rule in violation of Section 8(a)(3) and (1) by applying it to discipline employees Pam Smith, Maria Andrade, Rosa Salas, and Sonia Abundiz for discussing the Union while working in 1997.

On September 4, Smith's duties included delivering an electric motor to coworker Clayton Johnson at the Union Gap plant. While delivering the motor to the plant, Smith, an active union organizer, initiated a conversa-

[15] In fact, Plath's concerns were justified. When the demonstrators arrived, the Union immediately placed its symbolic bargaining table in the public street in front of the office. Also, as the judge remarked, traffic on the public street was disrupted and could have resulted in personal injury. At one point a large number of demonstrators entered the Respondent's office. We do not, of course, rely on the incidents, which occurred after the videotaping began, to justify the videotaping. Rather, these ensuing events simply show that the safety and trespassing issues about which Plath was already concerned were legitimate.

[16] As the judge found, the possibility that the Respondent's videotaping could have coerced the employees is remote. Several TV stations were also covering the event, at the Union's request, along with the Yakima Herald newspaper. Thus, it was the Union, not the Respondent, who first introduced cameras to the demonstration.

[17] Member Walsh does not agree with the reversals of the judge's unfair labor practice findings. See his dissent in part.

[18] The rule states that "working time" includes "all time for which an employee is paid and/or is scheduled to be performing services for the Company; it does not include break periods, meal periods, or periods in which an employee is not, and is not scheduled to be, performing services or work for the Company."

tion, which included references to the Union, with employee Gabriel Villarreal while she waited for Johnson. After he arrived, Johnson removed the motor from Smith's car and, accompanied by Smith, brought it inside the plant. Johnson testified that as they walked to the plant, Smith asked him how he felt about the Union and told him that a union would mean better wages and benefits. Although Johnson indicated he did not support the Union, Smith continued to press him about it. Smith later continued her conversation about the Union with Villarreal during an approximately 15-minute trip to the local hardware store to do an errand for Johnson. Smith does not deny that her conversations with Johnson and Villarreal occurred during working time and were intended to solicit and promote support for the Union. Johnson reported Smith's conversations to the Respondent.

The Respondent also received complaints from five other employees that prounion employees Andrade, Salas, and S. Abundiz were "harassing" them with talk about the Union and were constantly pressuring them to attend meetings and to support the Union. One employee testified that she asked her supervisor to move her workstation away from Abundiz to escape the harassment. Andrade and Salas did not deny that they solicited support for the Union during worktime. Abundiz did not testify.

On September 10, the Respondent issued Smith a warning for "soliciting the union during work hours at the Union Gap plant. It is a violation of company policy to solicit during work hours." The warning also stated that Smith would be dismissed for a further incident of soliciting for the Union during working hours. The Respondent also removed Smith from her parts runner position, a demotion resulting in loss of premium pay. On October 23, the Respondent issued written warnings to Andrade, Salas, and S. Abundiz about "[c]omplaints from several employees for soliciting the Union during work time."

The judge found that these warnings and the demotion were unlawful because the employees involved did no more than talk about the Union while they were working and that this conduct did not amount to "solicit[ing] or promot[ing] support for any cause or organization" in breach of the Respondent's no-solicitation rule. The judge also stressed that there was no showing that these conversations interfered with the work of Smith, Andrade, Salas, S. Abundiz or any employee. Relying on *Jennie-O Foods*, 301 NLRB 305 (1991), the judge further concluded that, in effect, the Respondent "was imposing a no union talk rule" against these employees, which is a violation of Section 8(a)(1).

We disagree with the judge's analysis. The General Counsel concedes that the Respondent's rule is valid on its face. The rule, on its face, prohibits solicitation and the promotion of support. These terms are to be understood in terms of the overall purpose of the rule. That purpose is readily apparent from the opening sentence of the rule. That is, the Respondent is concerned about employees "approaching fellow employees in the work place regarding activities, organizations, or causes." Such "can create unnecessary apprehension and pressure for fellow employees." Accordingly, such conduct is "inappropriate." The conduct involved here was of that kind and, thus, clearly fell within the ambit of the rule. Accordingly, without resolving the semantic question of whether the words "solicit" or "promote," standing alone, would cover the conduct here, the conduct here clearly fell within the ambit of the rule.

Similarly, the fact that the Respondent tolerates "talk" in the workplace does not warrant a contrary result. It is one thing, for example, to "talk" to fellow employees about Sunday's football game. It is quite another to try to "persuade" fellow employees to support a cause. The former is allowed. The latter is not, irrespective of whether the cause is the union or something else.[19]

Finally, the fact that there was no actual interference with work does not render unlawful the rule or its application. The Board has found that rules restricting solicitation activity during worktime are permitted because of the employer's right to prevent interference with work. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). There is, however, no requirement that actual interference be shown to justify the rule.

The conduct for which Smith, Andrade, Salas, and S. Abundiz were disciplined was encompassed by the Respondent's valid rule. Thus, the Respondent clearly permits employees to talk among themselves while working, without restriction as to subject matter, so long as their personal discussions do not rise to the level of solicitation or promotion within the meaning of the rule. Here, the conduct of these four employees exceeded discussion and was proscribed under the Respondent's rule. Pam Smith did not merely talk to Johnson and Villareal about the Union—she persistently urged them to support the Union. Andrade, Salas, and S. Abundiz also did not simply talk to their coworkers about the Union—they constantly pressured them to attend meetings and to support the Union. This conduct is precisely that which the Respondent intended by proscribing promotion and solicitation. Thus, based on a concededly valid rule, the

[19] There is no allegation that approaching employees about other causes (e.g., religion) was permitted under the rule.

Respondent lawfully prohibited employees from soliciting or promoting support for a cause during working time.

Accordingly, we shall dismiss the 8(a)(3) and (1) allegations based on these four warnings and Smith's demotion.

B. Discharge of Ana Guzman

On November 12, the Respondent discharged Guzman for a November 11 incident in which she "purposely let a tray of apples fall to the ground." The facts leading to her discharge are not in dispute. Guzman, the leading union adherent,[20] was working at the end of line 35 picking trays of apples from the conveyor belt and packing the trays into a shipping carton. Cristina Herrera also was working with her arranging the trays on the conveyor belt. Other employees were working on lines 34 and 36. Three supervisors, including Kirk McGarity, were positioned on the catwalk above the conveyor belts, which put them in a position to observe the employees' work.[21]

A tray of apples moved down line 36, but the person responsible for line 36 did not see it. As the judge found, line employees have a responsibility to assist fellow line employees when needed. McGarity called out to warn Guzman, who was the closest to the end of line 36, that the tray was about to fall off the belt. Guzman did not respond. As a result, some apples fell into the shipping carton and some onto the floor. McGarity believed that Guzman deliberately allowed the apples to fall. Guzman testified that she heard McGarity yell at her about the time she heard the tray of apples fall off the conveyor belt and that she was attending a tray of apples on her own line at the time. When McGarity questioned Guzman as to why she had not stopped the tray from falling, Guzman responded that she did not see the apples fall and that line 36 was not her line.

McGarity reported the incident to Night-Shift Manager Eric Hanses, who investigated the incident. He asked McGarity for a written statement, interviewed Guzman about her view of the incident, and asked for statements from employees who worked nearby line 36. McGarity provided a written statement of what he observed. Hanses asked Guzman what had happened, and she replied that it was not her line. Hanses also spoke to nearby employees. Several of Guzman's coworkers told Hanses that Guzman had asserted on more than one occasion that employees on the line should not work so hard and that they should indeed let apples fall off the conveyor belts if there were not enough employees available to perform the job. In fact, Hanses had heard this assertion previously from Noemi Mendes regarding the August 6 incident: Mendes told him that Guzman had told her, "Don't work so hard. Just let the bags fall."

Eric Hanses next reported the incident to Warehouse Manager Tommy Hanses with the recommendation that Guzman should be discharged. Tommy Hanses conducted his own investigation by speaking with the supervisors who were on the catwalk above the conveyor belts, including Miriam Delgado who stated that Guzman had allowed the tray to fall. Tommy Hanses also spoke with a number of employees who worked in the area of line 36. Tommy Hanses did not speak with Guzman because she had already made a statement to McGarity in which she declined to accept responsibility for the incident. After reviewing these supervisors' and employees' statements and Guzman's disciplinary record, which included prior verbal warnings for past work-related misconduct, Tommy Hanses concluded that Guzman should be discharged.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Guzman. He described the warehouse manager's investigation as "shoddy," faulting T. Hanses for not interviewing Guzman and disagreeing with his reliance on statements of coworkers who were not, in the judge's view, in the best position to see what had happened. The judge also found that T. Hanses could not properly rely on the verbal warning Guzman received in August for a similar incident because that warning was unlawful in that it was substantially motivated by the Respondent's animus towards the Union.

We assume, without deciding, that applying the principles of *Wright Line*[22] the General Counsel has proved by a preponderance of the evidence that Guzman's union activities were a substantial and motivating factor in the Respondent's decision to discharge her. We find, however, contrary to the judge and our dissenting colleague, that the Respondent has shown that it would have discharged Guzman even in the absence of her union activities.

First, Guzman had a history of repeatedly ignoring and violating the Respondent's lawful work rules. For example, on July 29, Guzman deliberately violated the Respondent's valid no-distribution rule by attempting to distribute a newspaper to employees while they were working. The judge concluded that the day-shift man-

[20] The judge described Guzman as "relentless in her pursuit of seeking advantage" of opportunities to advance the Union's cause.

[21] There is no allegation that the supervisors' observation of employees from that catwalk was unlawful.

[22] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ager lawfully told her she could not distribute materials in a work area at any time. Additionally, on September 9, Guzman deliberately walked off the job before all her work was finished. The judge found that the Respondent's written warning to Guzman for this incident did not violate the Act. Finally, the Respondent issued warnings to Guzman and her coworker, Mendes, on August 6 for an incident in which 15 bags of fruit fell from the overflow table to the floor. The judge found that the Respondent violated the Act by giving a warning to Guzman which contained a threat of discharge, which the warning to Mendes did not contain. We agree with the judge that the August 6 warning is unlawful only because of the "enhancement" it contained, i.e., threat of discharge, which shows that the Respondent unlawfully treated Guzman differently than it treated Mendes for the same incident (because of Guzman's union activity).[23] However, we point out, as the judge did, that the "concept" of the warning—letting bags of fruit fall to the floor—is valid, but the "enhancement" of it to threaten discharge to Guzman but not to Mendes is not valid.[24]

Second, as set forth above, during the course of Eric Hanses' investigation, several of Guzman's coworkers told Hanses that Guzman had informed employees on previous occasions, including August 6, that they should not work so hard and that they should just let the apples fall off the conveyor belt. These employee statements, together with the fact that similar incidents were used by Guzman to provoke confrontations with the Respondent, convinced Hanses that Guzman's actions in failing to prevent the tray of apples from falling to the floor on November 11 were deliberate.

Finally, we find that the Respondent's investigation into the November 11 incident was not, in fact, "shoddy," as the judge described, but was, instead, thorough and complete. Almost contemporaneously with the incident, McGarity asked Guzman why she had not prevented the tray of apples from falling. Guzman responded that not only had she not seen the tray, but also that, in essence, it was not her responsibility because it was not her line. However, the Respondent's work rules clearly establish that although an employee may be primarily responsible for a particular line, that employee is also responsible for assisting other employees on other lines nearby. McGarity's oral report of the incident to Eric Hanses prompted Hanses to conduct his own investigation, which included talking to Guzman and her coworkers who were eyewitnesses to the incident. Eric Hanses' report prompted Tommy Hanses to also conduct his own investigation, which included getting statements from three supervisors and six employees.[25] He did not speak with Guzman because she had already given her statement. Tommy Hanses concluded, on the basis of these statements, that Guzman saw the tray of apples on line 36 in time to help the employee assigned to line 36 and to prevent them from falling to the floor. There was no evidence that Guzman did not see the tray about to fall, and she was the employee in the best position to prevent the fall because she was physically closest to line 36. Hanses reasonably concluded that Guzman deliberately ignored what was happening and purposely let the tray of apples fall to the floor.[26]

Accordingly, we find, for the reasons discussed above, that the Respondent did not violate the Act by discharging Ana Guzman. We shall dismiss this allegation.

[23] Contrary to his colleagues, Member Schaumber would reverse the judge's finding that the August 6 warning to employee Guzman was unlawful. The judge found the warning unlawful solely on the basis that the Respondent treated Guzman disparately, in that its warning to her was more severe. Unlike Mendes, however, Guzman had a prior work rule violations.

In response, Chairman Battista and Member Walsh point out that the August 6 Guzman warning, on its face, contains no reference whatsoever to a prior work-rule violation. Indeed, the warning form contained a section entitled "Previous Warnings," but no entries were made in it. As the warning itself shows that the Respondent did not, in fact, rely on any prior misconduct, the more severe discipline Guzman received cannot be justified on that ground.

[24] In fact, the judge states: "Had the warnings been equal, it would be hard to say that [the supervisor] had done anything wrong. What happened here is that [the supervisor] wrongfully enhanced the warning to Guzman."

[25] We do not find it problematic that T. Hanses disregarded the statement of Antonia Fernandez which tended to corroborate Guzman's version, as it was the only statement which did so.

[26] The dissent claims that the Respondent's *Wright Line* burden was to show that the discharge would have occurred even in the absence of the unlawful enhanced warning on August 6. Assuming arguendo that this is so, we find that the Respondent satisfied its burden here. The Respondent has established that Guzman had a history of violating its work rules, as evidenced by the lawful July and September warnings. The Respondent also has established that Guzman had a history of letting apples fall onto the floor, regardless of whether the Respondent unlawfully enhanced her discipline for that incident, and that she had advocated such conduct among her fellow employees. Lastly, after investigating the November 11 incident, the Respondent had reasonable grounds for believing that Guzman deliberately permitted the tray of apples to fall to the floor again. Guzman's status as the leading union adherent does not immunize her from discipline for such deliberate misconduct. Thus, regardless of whether the Respondent unlawfully enhanced the warning given to Guzman on August 6 for her misconduct, the record amply supports a finding that the Respondent would have discharged her for her misconduct on November 11.

We recognize that the Respondent's warning of August 6 was that Guzman would be discharged if there were another incident of dropping fruit. However, this is not the same as saying that no discharge would have occurred in the absence of the warning. In addition, the November 11 incident was reasonably perceived as a deliberate dropping of fruit. We find that the deliberate dropping of fruit would have caused the discharge, even if there had been no prior warning.

III. THE RESPONDENT'S CONDUCT DOES NOT WARRANT SETTING ASIDE THE ELECTION[27]

A. Objection 23

On January 8, 1998, a Board election was held in the production and maintenance employees unit sought by the Union. The election results reveal that out of approximately 300 eligible voters, there were 121 votes for and 161 votes against the Union; with 1 void and 8 challenged ballots. The judge recommended, inter alia, that the election be set aside on the basis of the Union's Objection 23. That objection alleges that the Respondent failed to furnish correct addresses for employees whose names were listed on the *Excelsior*[28] list provided to the Union. We find, contrary to the judge and our dissenting colleague, that Objection 23 has no merit, and we, therefore, overrule that objection for the following reasons.

On December 2, the Respondent's attorney, Daniel Croley, timely faxed the *Excelsior* list to the Region who then conveyed the list to the Union. On December 16, the Union's attorney, Robert Gibbs, informed the Region that the *Excelsior* list contained incorrect names and addresses. The Region notified Croley that 12 addresses on the list appeared to be incorrect. On December 18, Gibbs informed the Region that 87 of 306 addresses on the *Excelsior* list (or about 28 percent) were incorrect, but that the Union, on its own, had found addresses for all but 28 employees.[29] Neither Gibbs nor the Region conveyed this additional information to the Respondent. On December 19, Croley informed the Region that it would correct the 12 inaccurate addresses. On January 5, 1998, the Respondent provided a revised *Excelsior* list correcting the 12 addresses.

In concluding that Objection 23 should be sustained, the judge incorrectly relied on *Woodman's Food Markets*, 332 NLRB 503 (2000), which involved the *omission* of names from an *Excelsior* list, not the inclusion of inaccurate employee addresses on the list. We find that the instant case is controlled by the Board's decision in *Women in Crisis Counseling*, 312 NLRB 589 (1993).

In *Women in Crisis Counseling*, supra, the *Excelsior* list contained incorrect addresses for 6 of 20 employees, a 30-percent inaccuracy rate. The Board stated that, "[I]n determining whether an employer has substantially complied with [*Excelsior*], the Board has consistently viewed the omission of names as more serious than inaccuracies in addressees . . . [because it] is far more likely to frustrate the Board's purposes [of ensuring communication] than inaccuracies in addresses. . . . A party with an employee's name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail." Id. at 589. The Board found that a 30-percent inaccuracy rate for addresses on the *Excelsior* list did not warrant setting aside the election there.[30] Compare, *Mod Interiors*, 324 NLRB 164 (1997), where the Board held that a 40-percent inaccuracy rate was sufficient to sustain an election objection.

Here, the Union claimed that 87 of the 306 addresses on the *Excelsior* list (or about 28 percent) were inaccurate. However, the Union admitted that on December 18 it had obtained correct addresses for all but 28 of the 306 employees (or about 9 percent). For the 3-week period preceding the January 8 election, the Union was in possession of accurate addresses for more than 90 percent of the employees whose names were included on the *Excelsior* list. Thus, the Union had the opportunity to communicate with at least 90 percent of the unit employees at their homes. In addition, there is no evidence or contention that the inaccuracies on the *Excelsior* list were the result of bad faith or gross negligence by the Respondent. Therefore, relying on *Women in Crisis Counseling*, supra, we find that the Respondent substantially complied with the eligibility requirements of *Excelsior Underwear*, supra. Accordingly, we shall overrule Objection 23.[31]

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[27] Member Walsh does not agree with this section of the decision. See his dissent in part.

[28] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[29] The record does not make clear whether some or all of the original 12 incorrect addresses were included in the Union's remaining 28 incorrect addresses.

[30] In *Women in Crisis Counseling,* supra, the Board also noted that the inaccuracies were not the result of gross negligence or bad faith. The Board recognized that its greater tolerance of address inaccuracies as compared to address omissions reflected a "pragmatic recognition" that an employer may not be able to maintain a completely accurate list of current addresses. See *Women in Crisis Counseling*, supra at 589. We note that in the present case the Respondent's controller and payroll clerk testified that employees are required to notify them if they change their address, but since paychecks and tax information are hand-delivered, the rule is not enforced.

[31] The following cases relied on by the dissent are inapposite. *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998), involved the failure of the union to timely receive the *Excelsior* list. In the instant case, the *Excelsior* list was timely received by the Union. With respect to *K.T.I., Inc.,* 330 NLRB 1293, 1294 (2000), a close reading of the facts reveals that the union may not have been able to communicate with as many as a third of the unit due to inaccurate addresses on the *Excelsior* list. Here, by contrast, as explained above, the Union had the correct addresses of all but 9 percent of the employees included on the *Excelsior* list well before the election.

Our dissenting colleague asserts that we should direct a second election because the number of incorrect addresses could be determinative in this case. We note that under existing precedent the number of *omissions* of employees' names from the *Excelsior* list may be considered in determining whether to set aside the election. However, the Board has not decided to extend that analysis to incorrect addresses. See *Woodman's Food Markets*, 332 NLRB 503 fn. 11 (2000).

B. December "No Union" T-Shirt Incident

The judge also recommended that the election should be set aside because the Respondent committed an unfair labor practice during the critical preelection period. The judge referred to a late December incident involving Shift Manager Christina Bautista and employees Aleida Barton and Rosa Garcia. The judge found, and we agree, that Bautista violated Section 8(a)(1) by unlawfully directing Barton and Garcia to wear a "No Union" T-shirt at work against their wishes. However, we do not agree with the judge that Bautista's conduct also warrants setting aside the election.

We recognize that "it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election'."[32] (Emphasis in original.) The only exception to this policy is "where the misconduct is de minimis: 'such that it is virtually impossible to conclude' that the election outcome has been affected."[33]

In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, and the size of the unit.[34] Other factors the Board considers include the "closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected." *Detroit Medical Center,* 331 NLRB 878 (2000) (citations omitted). Thus, in *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977), the Board declined to set aside the election despite 8(a)(1) violations consisting of interrogations affecting 2 employees out of a unit of 106 employees.

Here, there is no evidence that the December T-shirt incident, which directly involved only 2 employees, was widely disseminated among the approximately 300 employees in the unit. In addition, the incident occurred more than a week before the election. Given the isolated nature of the misconduct and the fact that the election was not close, we find it "virtually impossible" to conclude that the election outcome could have been affected.[35] We shall, accordingly, certify the results of the election.

ORDER

The National Labor Relations Board orders that the Respondent, Washington Fruit and Produce Company, Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees they cannot engage in union activity on company property.

(b) Threatening employees with loss of their jobs if they seek union representation.

(c) Coercively interrogating employees about their union sympathies.

(d) Interfering with employees' free exercise of their Section 7 rights by telling employees that those who wear apparel with a prounion message are "cutting their own throats" or are "putting their heads in a noose," or any similar remark.

(e) Ordering employees to wear apparel with a pro-company message.

(f) Issuing warnings to employees because they choose to display prounion placards on their personal vehicles.

(g) Issuing or enhancing warnings to employees because they are engaging in protected union activity.

(h) Intimidating employees by falsely accusing them of holding union meetings during work.

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

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

(a) Rescind the written warnings given to Indalecio Mata and Ana Guzman on August 6, 1997.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful written

[32] *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

[33] *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000), quoting *Super Thrift Markets*, 233 NLRB 409 (1977). Chairman Battista and Member Schaumber note that the "virtually impossible" standard reflects current Board precedent. While expressing no view on the appropriateness of the "virtually impossible" standard, they find that, in any event, that standard has been satisfied in the present case.

[34] *Super Thrift Markets*, supra. See also *Caron International, Inc.*, 246 NLRB 1120 (1979).

[35] The General Counsel claims that there was an additional unfair labor practice committed during the critical period when, in mid-December, Bautista allegedly threatened employees with the loss of their jobs. The incident was not specifically pleaded in the complaint and the judge did not address it in his decision. We previously stated above in fn. 4 of our decision that we find it unnecessary to reach this issue because it would be cumulative in any event.

However, assuming arguendo that Bautista's comment was a violation of Sec. 8(a)(1), we find, under the standard set forth above in this section of our decision, that it does not warrant setting aside the election. Employee Barton testified that only two other employees were close enough to have heard Bautista's comments. There is no evidence that the incident was disseminated within the 300-person unit. At most, therefore, the alleged incident directly affected only three employees, and the Union lost the election by 40 votes. Further, although the alleged threat was serious, it was made approximately 3 weeks before the election. Thus, we find it "virtually impossible" to conclude that this alleged misconduct affected the election results.

warnings given to Mata and Guzman, and within 3 days thereafter notify Mata and Guzman in writing that this has been done and that the warnings will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its packing plants in Yakima and Union Gap, Washington, copies of the attached notice marked "Appendix."[36] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Brotherhood of Teamsters, AFL–CIO, d/b/a Teamsters United for Change, and that it is not the exclusive representative of the Respondent's employees in the appropriate unit.

MEMBER WALSH, dissenting in part.

The majority erroneously dismisses the complaint allegations that the Respondent violated the Act by disciplining four employees for talking about the Union, by discharging the leading union adherent, Ana Guzman, and by videotaping employees participating in a union rally. In addition, the majority errs in overruling the Union's *Excelsior*[1] objection and failing to direct a second election. These issues are discussed in turn below.[2]

I. THE UNLAWFUL DISCIPLINE OF THE FOUR EMPLOYEES (PAM SMITH, MARIA ANDRADE, ROSA SALAS, AND SONIA ABUNDIZ)

A. Factual Background

Pam Smith, a long-term employee of the Respondent, was a particularly active union supporter. On September 4, 1997,[3] she spoke to two employees during working time about the advantages of unionization, but she did not present them with a card or petition to sign. The judge specifically found that "her efforts were simply talk." The judge also found that the "Respondent's employees . . . speak to each other frequently about all sorts of things and have never been disciplined for doing so." Nevertheless, on September 11, the Respondent issued Smith the following warning: "Pam was soliciting the union during work hours at the Union Gap plant. It is a violation of company policy to solicit during work hours. Future solicitation during work hours will result in dismissal."[4] Simultaneously, Smith was demoted and suffered a loss in pay.

On October 23, the Respondent issued similar warnings to prounion employees Maria Andrade, Rosa Salas, and Sonia Abundiz, allegedly because it had received reports from other employees about "harassment." The warnings threatened Andrade, Salas, and Abundiz with discharge if a similar occurrence were to take place. The warnings are identical and state: "Complaints from several employees for soliciting the Union during worktime." The judge found, however, that Andrade, Salas, and Abundiz did not solicit their coworkers to sign any documents, but merely talked to them about the Union. The judge also found that the Respondent made "no effort . . . to determine the actual facts," but summarily "concluded that [the employees'] talking about the Union qualified as harassment."

B. Analysis

As the judge recognized, an employer violates the Act when it prohibits talking about the union during worktime while permitting discussions about any other subject. *Jennie-O Foods*, 301 NLRB 305, 316 (1991).

That is precisely what occurred here. Although the Respondent permitted talking on the job about a wide variety of subjects unrelated to work, it discriminatorily singled out the four employees in question for discipline because they spoke in favor of the Union. Significantly, the four employees did not engage in "soliciting," as the

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

[1] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[2] In all other respects, I agree with the majority's decision.

[3] All subsequent dates are in 1997 unless otherwise indicated.

[4] The Respondent maintains a rule stating that employees may not "solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed."

Respondent erroneously alleged in the warnings it issued them. Under established precedent, "talking about a union" is not the same thing as "solicitation for a union." *W. W. Grainger, Inc*., 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). '"Solicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." Id. The judge specifically found [phrase deleted] that the four employees' conduct did not rise to the level of "solicitation" in violation of the Respondent's no-solicitation rule.

The majority concedes that the Respondent could not discipline the employees for merely talking about the Union. And the majority stops short of finding that the employees engaged in prohibited "soliciting." Nevertheless, the majority concludes that the discipline was lawful. The majority reasons that the employees' conduct fell generally within "the ambit of the rule," which prohibits not only "soliciting," but also "promoting" a cause. I disagree.

As set forth above, Board law is clear that an employer cannot prohibit employees from simply talking about a union, if it allows talking about other subjects. Despite the fact that the General Counsel has not challenged the "promoting" a cause portion of the rule as being overbroad in violation of Section 8(a)(1), it is improper, in my view, to allow the Respondent to enforce an otherwise clearly unlawful prohibition based on such highly ambiguous language. Rather than reach such a result, I would simply read the Respondent's rule narrowly, as prohibiting solicitation, rather than prohibiting simply talking about the Union. Since the judge correctly found that the employees did not engage in solicitation in violation of the rule, it follows that the Respondent violated Section 8(a)(3) and (1) when it issued Smith a warning and demoted her, and when it issued warnings to Andrade, Salas, and Abundiz, all because of their protected activities on behalf of the Union.

II. THE UNLAWFUL DISCHARGE OF ANA GUZMAN

A. Factual Background

Ana Guzman was the leading union adherent, and her union activity was well known to the Respondent. Indeed, the judge found, and the majority agrees, that, just months before her discharge, the Respondent unlawfully treated her in a disparate manner because of her visible union activity. Specifically, on August 6, Guzman and a coworker were issued warnings for their involvement in an incident in which fruit fell to the floor. The Guzman warning concluded with an admonition that she would be discharged if a similar incident occurred. The coworker's warning, however, contained no reference to a consequence if a similar incident should occur. The judge found that there was no explanation for this different treatment. Accordingly, he concluded, and the majority agrees, that the Respondent violated the Act when it "enhanced" the warning to Guzman because of her union activity.

On November 12, the Respondent discharged Guzman, allegedly for her involvement in another fruit-dropping incident. A supervisor claimed that Guzman purposefully let the fruit fall; Guzman, on the other hand, claimed that she did not see the fruit fall and that the fruit was not on her "line." The Respondent conducted an "investigation" that did not include an interview with Guzman. The discharge slip described the Respondent's reasons as follows: "After a thorough investigation it is clear that Ana Guzman purposely let a tray of apples fall to the ground at 11:20 p.m. last night. She has had repeated oral warnings and a written warning stating that this is absolutely prohibited and will be discharged if this occurred again." Guzman signed the slip under protest, asserting that the real reason was her union activity.

B. Analysis

Little need be said in support of the judge's finding that Guzman was discharged in violation of the Act. There can be no doubt that the General Counsel has satisfied his *Wright Line*[5] burden of showing that antiunion animus was a motivating factor in the Respondent's decision. Thus, the record shows that Guzman was the leading union adherent, that the Respondent knew of her participation in union activities, and that the Respondent demonstrated hostility toward the Union and employees who supported it, as evidenced by the unlawful warning the Respondent issued to Guzman on August 6.

The only real question is whether the Respondent has satisfied its *Wright Line* burden of showing that it would have discharged Guzman even in the absence of her union activities. That question can be answered simply by examining the reasons the Respondent gave for discharging her. Prominent among these is the Respondent's reliance on the unlawful August 6 warning. Since the discharge was based on the prior warning, and since the prior warning itself was unlawful, the Respondent could meet its *Wright Line* burden only by showing that the discharge would have occurred even in the absence of the unlawful warning. This it failed to do. To the contrary, the record shows a clear linkage between the unlawful warning and the discharge. Thus, the unlawful warning itself stated that Guzman would be discharged if a similar incident were to occur, and the discharge slip charac-

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

terized the November 11 event as just such an incident. Therefore, the Respondent has not shown that it would have discharged Guzman in the absence of the unlawful warning. Accordingly, the judge correctly concluded that Guzman's discharge violated Section 8(a)(3) and (1) of the Act.

III. THE UNLAWFUL VIDEOTAPING OF THE UNION RALLY

A. Factual Background

On August 11, the Respondent's president, Rick Plath, received a phone call from Mike Gempler, an official of the Washington Fruit Growers League. Gempler told Plath that the Union was planning a march to the Respondent's office the following day. Plath described the conversation as follows:

> Mike Gempler called me on the telephone at home and said that there was somebody from Washington, D.C., with the AFL–CIO, and some Teamster organizers from there as well, which would be marching from the train station to our packing line office tomorrow sometime. . . . He just said these were high-ranking officials, and there'd be a lot of people who would be with this group, and that was about it.

On the morning of August 12, Plath instructed the human resources manager, Alex Martinez, to videotape the rally. Plath testified that his instructions were based on "concern[s] about employee safety and their vehicles . . . and we have kind of sophisticated packing equipment, and I just wanted all of this preserved on tape if there was any damage which was going to take place." Plath added that violence and trespassing were also concerns.

On the afternoon of August 12, a group of about 50–60 people met at the Union's office at the local train station. By the time the marchers reached the Respondent's office, there were approximately 100 participants, including Richard Trumka, secretary-treasurer of the AFL–CIO, and a significant number of the Respondent's employees. The rally was entirely peaceful. Martinez videotaped the demonstration for approximately 20 minutes.

B. Analysis

The applicable principles are well established. Absent proper justification, an employer's videotaping of employees engaged in protected activities violates Section 8(a)(1) because "it has a tendency to intimidate." *F. W. Woolworth*, 310 NLRB 1197 (1993). An employer must "provide a solid justification for its resort to anticipatory [videotaping]." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). The mere belief that "something 'might' happen does not justify [videotaping] when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity." *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969).

In the instant case, the issue is whether the information Plath received from Gempler provided "solid justification" for Plath's decision to videotape the rally. The judge made the following findings about that conversation:

- Plath could not determine much from what Gempler had said. He did discern that it was going to be a Teamster operation.
- [T]he information which was relayed to Plath was minimal and came only the night before.
- All [Plath] had heard was that a lot of people would be marching on his plant.
- Plath was "mostly in the dark."

This falls far short of the required showing. It is no answer to say, as the majority does, that Plath was concerned about safety and trespassing issues. Providing a "solid justification" requires more than simply suspecting that unprotected activity might occur.[6] The employer must "demonstrate that it had a reasonable basis to have anticipated misconduct by the employees." *National Steel & Shipbuilding Co.,* 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Nothing that Gempler said would support a finding that Plath had a reasonable basis for anticipating misconduct during the rally. Significantly, there is no evidence of Union or employee misconduct on prior occasions.

A comparison of two Board cases is instructive. In *Saia Motor Freight Line,* 333 NLRB 784 (2001), the Board found that the employer established proper justification for photographing employees who were handbilling on the employer's premises. The evidence showed that the handbillers impeded traffic entering the employer's facility, raising the possibility of vehicular collisions and potential negligence liability for the employer. Significantly, the employer did not engage in anticipatory photographing. Rather, the employer resorted to photographing only when it became dissatisfied with the efforts of the police to minimize traffic congestion.

By contrast, in *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001), the Board found that the employer failed to establish proper justification for videotaping

[6] The Respondent's answering brief essentially concedes that Plath acted on nothing more than sheer suspicion: "Because Plath did not know what the demonstration would entail, he wanted to be prepared in the event that it was violent, involved trespassing, or caused damage to employee and/or Company property."

employees who were handbilling. The Board distinguished *Saia* on the grounds that the handbilling occurred on public, not private, property, and that the employer failed to show that it began videotaping only after becoming dissatisfied with the police response.

The instant case is closer to *Robert Orr,* supra, than to *Saia,* supra. Here, as in *Robert Orr*, the protected activity occurred on public, not private, property. In addition, here, as in *Robert Orr*, the Respondent began videotaping as soon as the protected activity commenced and before any incident occurred.

In sum, the Respondent's own testimony shows that it decided to videotape the Union's rally based on the "mere belief that something might happen." *National Steel & Shipbuilding Co*., supra. This is precisely what the Act forbids. Accordingly, the Respondent's surveillance of the union rally violated Section 8(a)(1) of the Act.

IV. THE UNION'S MERITORIOUS *EXCELSIOR* OBJECTION

A. Factual Background

On December 2, the Respondent timely submitted the *Excelsior* list. On December 16, the Union informed the Region that 12 of the individuals on the *Excelsior* list did not reside at the addresses specified. That same day, the Region requested that the Respondent correct the addresses. However, the Respondent did not provide the corrected addresses until 20 days later, January 5, 1998, which was just 3 days before the election.

In the meantime, the Union discovered additional inaccurate addresses. Specifically, on December 18, the Union informed the Region that addresses for 87 individuals on the *Excelsior* list were incorrect, and that, despite its efforts, the Union had not found correct addresses for 28 of the 87 individuals.[7] However, the Region never conveyed this information to the Respondent.

B. Analysis

"It is extremely important that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters." *Mod Interiors*, 324 NLRB 164 (1997). The *Excelsior* rule is intended "to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." Id.

In *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998), and in *K.T.I., Inc*., 330 NLRB 1293 (2000), the Board sustained *Excelsior* objections due to errors by the Regional Offices. In *Alcohol & Drug Dependency*, supra, the union did not timely receive the *Excelsior* list because (1) the Region provided the employer with the wrong due date; and (2) the Region, once it received the list, did not immediately mail it to the union. 326 NLRB at 519. In *K.T.I.*, supra, the union complained to the Region at least a week before the election that addresses on the *Excelsior* list were incorrect, but the Region delayed contacting the employer about the list's accuracy until the day before the election. The Board specifically held that when a union presents such a complaint, "the Region is obligated to promptly contact the Employer. . . . This the Region failed to do." 330 NLRB 1293 fn. 1.

In *Alcohol & Drug Dependency*, supra, and again in *K.T.I.*, supra, the Board identified "the relevant inquiry" as "whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights." *Alcohol & Drug Dependency*, 326 NLRB at 520; *K.T.I.*, 330 NLRB 1293 fn. 2. In both cases, the Board concluded that the delays caused by the Regional Offices interfered with this purpose and, consequently, that the elections had to be set aside.

In the instant case, there were substantial delays attributable to both the Respondent and the Region during the period between the initial submission of the *Excelsior* list on December 2 and the holding of the election on January 8, 1998. First, the Respondent failed to respond for almost 3 weeks to information it received from the Region on December 16.[8] This failure resulted in a delay in the Union's receipt of correct addresses for 12 individuals on the *Excelsior* list until just 3 days before the election. In addition, the Region failed to convey to the Respondent the information it received from the Union on December 18. This failure resulted in the Union's never receiving correct addresses for 16 other individuals on the *Excelsior* list. Thus, during virtually the entire 5-week campaign period, the Union lacked correct addresses for 28 employees on the *Excelsior* list, and the votes of these employees could have affected the election outcome.[9]

[7] The record does not make clear whether some or all of the original 12 incorrect addresses were included in the remaining 28 incorrect addresses. This issue should be resolved against the Union, the party with the burden of proof. Thus, under this approach, the total number of incorrect addresses is 28.

[8] *Women in Crisis Counseling*, 312 NLRB 589 (1993), relied on heavily by the majority, is plainly distinguishable. In that case, the employer submitted corrected addresses *on the same day* that the Region informed the employer of the problem. In the instant case, the Respondent waited almost 3 weeks to provide the corrected addresses. As the judge correctly concluded, the Respondent "did not give the task the professional attention that it deserved."

[9] The tally of ballots was 121 for and 161 against the Union, with 8 nondeterminative challenged ballots. Assuming that the challenged

In sum, the combination of delays by the Respondent and the Region interfered with the purpose behind the *Excelsior* rule of ensuring that all employees are fully informed about the arguments concerning representation. Therefore, the Union's *Excelsior* objection should be sustained and the election set aside.[10]

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that you cannot engage in activity on behalf of International Brotherhood of Teamsters, AFL–CIO, d/b/a Teamsters United for Change or any other union on company property.

WE WILL NOT threaten you with loss of your jobs if you seek union representation.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT interfere with your free exercise of your Section 7 rights by telling you that those who wear apparel with a prounion message are "cutting your own throats" or are "putting your heads in a noose," or any other similar remark.

WE WILL NOT order you to wear apparel with a procompany message.

WE WILL NOT issue warnings to you because you choose to display union placards on your personal vehicles.

WE WILL NOT issue or enhance warnings to you because you are engaging in protected union activity.

WE WILL NOT intimidate you by falsely accusing you of holding union meetings during work.

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

WE WILL rescind the warnings given to Indalecio Mata and Ana Guzman on August 6, 1997.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings given to Indalecio Mata and Ana Guzman, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.

WASHINGTON FRUIT AND PRODUCE COMPANY

Irene Hartzell Botero and *Miriam C. Delgado, Esqs.,* for the General Counsel.

Robert K. Carrol, Daniel A. Croley, and *Natalie A. Pierce (Littler Mendelson),* of San Francisco, California, for Respondent.

Robert H. Gibbs (with *Heather Houston* on brief) *(Gibbs Houston Pauw),* of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. Maitre d'. This case was tried before me in Yakima, Washington, over 53 hearing days during 1998 and 1999, on an amended consolidated complaint issued by the Regional Director for Region 19 of the National Labor Relations Board (the Board) on October 9, 1998. The complaint is based upon 11 unfair labor practice charges filed on various dates by the International Brotherhood of Teamsters, AFL–CIO, d/b/a Teamsters United for Change (the Union), from July 25, 1997,[1] through February 2, 1998, against Washington Fruit and Produce Company (Respondent). The complaint has been further consolidated with objections to a representation election filed by the Union on January 15, 1998, concerning an NLRB representation election conducted on January 8, 1998. Both the complaint and the objections tend to track one another, but they are not congruent. Moreover, some of the complaint allegations have been dismissed on the record. Insofar as the complaint is concerned, it alleges that Respondent has committed various violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint also alleges that Respondent's unfair labor practices dissipated the Union's majority status and Respondent thereby avoided its obligation to recognize and bargain with the Union after the Union demanded recognition. In addition, the General Counsel asserts that the unfair labor practices committed by Respondent are so egregious that a fair second election cannot be held and that a bargaining order is the only appropriate remedy. Respondent denies the essential portions of the complaint, and specifically objects to the bargaining order as an appropriate remedy. During the course of the hearing, I permit-

voters were eligible and voted for the Union, a change in 17 votes would have altered the election's outcome.

[10] In addition to sustaining the *Excelsior* objection, the judge recommended setting aside the election based on one unfair labor practice occurring within the critical period (the December 1997 incident in which supervisor Bautista ordered employees to wear antiunion apparel). Given that the *Excelsior* objection alone warrants setting aside the election, it is unnecessary to rely on this additional ground.

[1] All dates are 1997 unless otherwise noted.

ted the General Counsel to amend the complaint to allege that one of Respondent's attorneys violated Section 8(a)(1) of the Act while interviewing a witness. Respondent also denies this allegation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Washington State corporation headquartered in Yakima and having its office and main plant in that city as well as a cherry packing operation in the adjoining town of Union Gap. At those locations it is engaged in the business of nonretail packing and sale of fruit, including apples, pears, and cherries. From those locations it annually ships and sells fruit processed within the State to customers outside the State and to customers or otherwise engaged in interstate commerce, valued in excess of $50,000. Accordingly it admits that it is, and has been, an employer within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it admitted at the hearing that the Union is a labor organization within meaning of Section 2(5) of the Act.

II. INTRODUCTION AND BACKGROUND

Respondent's main office is located at 402 North 1st Avenue in Yakima. Immediately across the street, on the west side, is its main packing plant. They are located in an industrial area near downtown Yakima. The operation, together with its appurtenant support facilities, sprawls over at least two city blocks. In fact, the buildings of three other fruit packing companies are interspersed with those of Respondent. The Charging Party's John August referred to the area as "fruit row," but the charm that sobriquet might suggest is entirely missing. It is a relatively busy nonretail commercial sector of Yakima's downtown, filled with warehouses. For an overview see the aerial photograph (GC Exh. 23).

Respondent principally packs apples, but it also packs pears at one end of the warehouse. The cherries are packed at Union Gap. Apple packing proceeds on a near year-round basis; pears are packed much of the time, but the quantity is far less and the pear season may be shorter. Cherries are packed only in springtime. Respondent also has its own orchards and has an interest in a local food processing plant. It is a corporation which is principally owned by two families, the Plath family and the Hanses family.

Rick Plath is the president of the corporation and chief executive officer. During the 6 or 8 months preceding the January 8, 1998 NLRB election, Tommy Hanses was the warehouse manager. He reported directly to Rick Plath and was in charge of the packing operation. Reporting to Tommy Hanses were Day-Shift Manager Mel Sager and Night-Shift Supervisor Eric Hanses. Each of those had three supervisors reporting to him on his shift. These subordinate supervisors were in charge of the sorters, packers, and baggers. Also reporting to Tommy Hanses were the foremen from four other departments, the pear line, and the refrigeration, receiving, and shipping departments.

Respondent employs approximately 300 production and maintenance employees. The number varies depending on the season. During the period in question, July 1997 through January 8, 1998, the production and maintenance staff ranged from 293 to 311 employees. Apple packing takes place on two shifts, a day shift and a night shift which ends about 1 a.m.

Teamsters International Union Organizer Lorene Scheer testified that the Union began organizing apple packers in the spring of 1996. The evidence shows that the Union's organizing efforts were originally directed at Stemilt Growers in Wenatchee, an apple producing city about 110-road miles north of Yakima. Indeed, the Union sought to organize fruit packing sheds in both Yakima and Wenatchee. Much of the Union's effort was aimed at Stemilt. Scheer was involved in that effort as well. The Union established an office in Yakima at some point, and the organizers' first signatures were not obtained from Respondent's employees until March 21, 1997.

It appears from an amalgamation of testimony from various union officials, as well as lead employee organizer, Ana Guzman, that it was the Union's intention to obtain recognition from the targeted growers without invoking the representation election procedures available to it from the Board. The plan appears to have been to obtain as many signatures as they could on petition forms having spaces for four signees. Following the acquisition of a significant number of signatures, the Union intended to demand recognition. As will be seen, that occurred on August 12 during what can only be described as street theater. Several dignitaries from the Teamsters International Union and the AFL–CIO came to Yakima and participated. When neither Stemilt nor Respondent would grant voluntary recognition, the Union eventually chose to file election petitions. The petitions for both Respondent and Stemilt were filed on November 20. The Acting Regional Director approved a Stipulated Election Agreement with Respondent on November 26, setting the election for January 8, 1998.

Many of Respondent's employees speak only Spanish, although many others are bilingual to varying degrees. Some are perfectly fluent in English and Spanish; some speak no English at all; and, of course, there are some who speak only English. An official interpreter was required for much of the testimony. When witnesses described conversations in Spanish, they were directed to testify in Spanish. Where they described conversations or statements made by persons speaking English, they were directed to use the English words and sentences which they could remember. If they were unable to say the English words, they were permitted to describe the conversation in Spanish as best they understood. Moreover, some of the Spanish-speaking witnesses were not literate in Spanish. And, there are at least two English-speaking employees who are not literate in English.

This circumstance has created opportunities for misunderstanding at several levels: First, in the plant or other locations; second, during the organizing drive; third, during the NLRB investigation and, fourth, during the testimony. Occasionally, there were problems with NLRB affidavits. It was the practice of the bilingual Board agent to interview Spanish-speaking witnesses in Spanish, but to write the affidavit in English (without any Spanish draft being created), which the affiant

then signed. Later, when the witness testified, the English affidavit was translated back to Spanish and then turned over to Respondent's counsel pursuant to the *Jencks*[2] rule. This led not only to awkwardness, but to severe anomalies on at least two occasions. Fortunately, most translation issues were amicably resolved by Attorneys Botero and Delgado for the General Counsel and Carrol for Respondent, together with court translator José Chávez, all of whom are perfectly fluent in Spanish.[3] Even so, the scrivening technique used by the investigator tended to inhibit cross-examination because Respondent had no opportunity to review a witness's original words as adopted by signature. Respondent's counsel could only review a Spanish document which had been translated from English, not the original Spanish, even though the witness spoke to the investigator in Spanish. Original nuance is easily lost when a statement is filtered in that manner.

Initially, the complaint alleged that Respondent's unfair labor practices commenced about May 30. Although I dismissed on the record that allegation, paragraph 7(a) of the complaint, for evidentiary insufficiency the incident introduced one of the major employee organizers involved in the case, Ana Guzman.[4] Guzman is alleged to have been unlawfully discharged on November 14. In addition to her discharge, other allegations relating to hire and tenure of employment concerned an alleged unlawful demotion of Pam Smith on September 9, and the alleged unlawful refusal to rehire Maria Abundiz on December 4. In addition, Respondent is alleged to have issued warnings to some of its employees in reprisal for their having engaged in union activity. In addition, Respondent is alleged to have engaged in a variety of conduct designed to deter employees from obtaining union representation. In general, all of these incidents will be dealt with in a chronological manner. There are, however, a few issues which are replicated throughout the period. The first, and most repeated, is the issue of how Respondent's no-solicitation rule was enforced. Indeed, enforcement of that rule coincides with the first incident under scrutiny.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The No-Solicitation Rule

As of March 1997, Respondent's rule regarding the solicitation and distribution of literature at the plant was set forth in its newly revised handbook for employees. The language quoted below is taken from General Counsel's Exhibit 35, a posted notice consistent with the handbook:

Solicitation and Distribution of Literature

> Approaching fellow employees in the work place regarding activities, organizations or causes, regardless of how worthwhile, important or benevolent, can create unnecessary apprehension and pressures for fellow employees. Such conduct is inappropriate and unnecessary. The Company has established rules applicable to all employees which govern solicitation or distribution of written material during working time and entry onto the premises and work areas. All employees are expected to comply strictly with these Company rules.
>
> 1. No employee shall solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed.
>
> 2. No employee shall distribute or circulate any written or printed material in work areas at any time, or during his or her working time or during the working time of the employee or employees at whom such activity is directed.
>
> 3. [omitted]
>
> As used in this policy, "working time" includes all time for which an employee is paid and/or is scheduled to be performing services for the Company; it does not include break periods, meal periods, or periods in which an employee is not, and is not scheduled to be, performing services or work for the Company.

It should be observed that the no solicitation rule is somewhat more expansive then rules of this sort usually are. Not only does it prohibit "solicitation," it also prohibits "promotion." Despite that addition, the General Counsel has not specifically attacked that language in the complaint. Nonetheless, the use of the word "promotion" creates an ambiguity which is unfortunate. Instead, the General Counsel concedes that the language is nondiscriminatory on its face.

In any event, the language bars solicitation of employees who are engaged in work. The obvious intent of the rule is to prohibit employees from interfering with their own work and the work of others. It does not bar, on its face, employees from talking to one another, so long as such conversations do not interfere with work. The evidence is quite clear that Respondent's employees, particularly those on the packing lines, speak to each other frequently about all sorts of things and have never been disciplined for doing so. The work performed on these lines is rote and repetitive. The employees perform it automatically and with little thought. In that circumstance they can easily speak to each other about any subject they wish without any deleterious effect on their production. With that background in mind, I proceed to the events beginning June 30.

B. June 30 and July 1

1. Alfonso Barela

On and off from late 1996, a small group of employees had been involved in union organizing. There had been occasional protests about the treatment of individual workers who had run afoul of one rule or another. One of the themes of the organizing drive was to ask that Respondent treat the employees with respect, at least insofar as the employees perceived it. In June, cherries were being packed at the Union Gap plant. That evening, at the scheduled "lunch" hour for the night-shift cherry packers, a group of day-shift employees came to the Union Gap parking lot and set up a picnic table festooned with union banners. They styled the lunch, to which the night-shift workers

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[2] See Board Rule 102.118(b)(1).

[3] Respondent's attorney, Pierce, is also fluent in Spanish, but was not usually present during the hearing, being engaged in trial preparation for cocounsel.

[4] I also dismissed on the record complaint par. 12 for failure to prove conduct which violates the Act, relating to a preelection raffle. I permitted, however, a closely connected election objection to remain in the case, as it may have interfered with in the outcome of the election.

were invited, as a "Table of Respect." Although that location is about 20 yards inside company property, it is still about 100 yards from the plant entrance. Some cherry packers did come outside and visit the table for a snack. The individuals at the table also sought to distribute some union fliers to anyone who would take them.

Night-Shift Supervisor Eric Hanses observed the table's location and determined that it constituted a likely trespass. He told the employees that they were trespassing and that he was going to call the police, saying he hoped that none of them would end up in jail.[5] He telephoned Warehouse Manager Tommy Hanses and also called the city police. The police arrived first, passed by the picnic table, and went to the entrance of the plant. While Eric Hanses and the police officer were speaking together near the front door, Tommy Hanses arrived in his personal vehicle. He observed the group at the table as he passed by. He stopped his car about halfway between the table and the front door, about 50 yards away from each. He was eventually joined by Eric Hanses and the police officer. While there is some divergence in testimony, at some point Alfonso Barela went to them and had a conversation of some type. Barela, though Spanish-speaking, speaks English well enough to serve as an ad hoc, but not word-for-word, translator. At the time, Barela worked as a junior plant mechanic whose duties included setting up the apple lines in the mornings. That evening he was one of the employees at the Table of Respect and for the first time he had worn a union button. Some employees say that he served as a translator that night. More likely he simply told the employees his perception of what was happening, including his version of his conversation with Tommy Hanses. Tommy Hanses recalls that Barela simply walked up to them while he was talking to the police officer and asked what was going on. When Tommy told him nothing was going on, Barela returned to the table.

It is undisputed that Tommy Hanses concluded upon his arrival that nothing had occurred to warrant police intervention and so advised the officer. The officer left, apparently not speaking to any employee, and the incident, if it can be described that way, ended.

The following morning, July 1, at about 6:50 a.m., Tommy Hanses observed Barela handing an employee named Martin a colored flyer of the type which had been distributed the night before at Union Gap. Barela's normal start time was 6:30 a.m., about half an hour before packing actually begins. Barela's duties include making certain that the conveyors are operating properly. As a result, he is on duty before the production employees arrive.

Barela's testimony about what happened next is virtually nonexistent. His recollection was so poor that counsel for the General Counsel was obligated to use his NLRB affidavit as past recollection recorded. Moreover, he was confused, believing that the affidavit had been taken by a union official, rather than NLRB investigator Hurtado.

Barela inaccurately said in the affidavit that his shift began at 7 a.m., on the morning in question and that Tommy Hanses gave him a warning for the conduct and then angrily directed him to clean up a dirty floor underneath the dump tank. The complaint alleges that both the warning and the direction to clean that area were unlawful, together with a contention that Tommy Hanses closely observed him at his work thereafter.

Hanses readily agrees that he gave Barela the warning. It is in evidence as General Counsel's Exhibit 36. In that exhibit, Hanses recites that the incident occurred at 6:50 a.m. that day. He wrote: "Alfonso was observed soliciting union literature during work hours. Washington Fruit has a strict no solicitation policy which prohibits this activity during work hours. Any further solicitation during work hours will result in termination."

Barela is unable to say that he was actually off duty at the time that he distributed the flyer to Martin. Moreover, it appeared to me that in his affidavit Barela deliberately shifted his start time from 6:30 to 7 a.m. That would insinuate that the warning was for conduct occurring prior to the start of his shift, even though he knew the incident actually occurred during his own worktime. On that basis, I am unable to conclude that the warning was given inappropriately.

However, the warning demonstrates a problem which Respondent has throughout this proceeding. Barela was actually guilty of distributing material, rather than soliciting. Tommy Hanses' written description asserts that the conduct was solicitation. He made no distinction between the two types of conduct.[6]

While Tommy Hanses made an error here, that error is not fatal insofar as the Act is concerned. Rather clearly, the purpose of the rule is to prohibit employees from stopping their own work or the work of others to participate in nonwork-related business which should be conducted during nonwork periods. Clearly, Barela's stopping work to hand the flyer to another worker violated the rule against distribution. Tommy Hanses' misanalysis does not change that fact.

The General Counsel next asserts that what Tommy Hanses did immediately thereafter also violated the Act. Hanses says that as he was dealing with Barela, advising him that he had broken the rule, he realized that if Barela had time to distribute material, he might not have enough work to do. He asked Barela about his workload and Barela replied that he was basically caught up, although he had a bearing to replace. Tommy Hanses then told Barela that he wanted him to clean the area under the dump tank.

Although Barela worked under the direct supervision of Mel Sager, it was not unusual for Tommy Hanses to give directions such as he gave here. Moreover, even though Barela was a mechanic, cleanup duty was not unknown to him. Two weeks earlier he had been given a similar job, to clean the dump pit. That is a far more onerous job than cleaning under the tank. The area under the tank is a smooth flat floor painted with epoxy. The bottom of the tank is about 4 feet above the floor. It is relatively easy to clean that area with a scrub broom although one must crouch to reach all the way underneath. In contrast, the earlier job of pit cleaning required the employee to work below ground level in knee deep water in order to clear a drain.

[5] This remark is not alleged as a violation of the Act.

[6] Tommy Hanses: "—you're distributing—you're soliciting and you can't do that."

In fact, Barela didn't do very good job of cleaning the pit and he received a written warning from Mel Sager on June 18. However, he successfully cleaned the flat floor on July 1. Barela estimates that he took somewhere between 20 to 45 minutes to complete that task over a 3-hour period, interrupted by attention to other matters.

The General Counsel observes that this instruction came from Tommy Hanses rather than Barela's direct supervisor, Mel Sager. Hanses explained that this was not unusual as he has given similar instructions over the years to just about anybody who had no work to perform. I find this explanation entirely credible and consistent with Tommy Hanses's hands on approach to supervision.

I do not find this incident to have been coercive of any Section 7 right.[7] Barela had clearly left work to distribute the flyer, had been told not do it, had been found to have some time on his hands and was directed to perform cleanup work, a type of task (floor swamping) which was not particularly unusual. Even Barela did not claim that the work was onerous. At the time he was an agile 25-year-old used to working in odd, uncomfortable, positions. These allegations will be dismissed.

In addition, the General Counsel contends that Tommy Hanses unduly scrutinized Barela after this incident. Barela was unable to give any valid testimony about the incident, asserting a lack of memory. In his pretrial affidavit, utilized as past recollection recorded, he said that Tommy Hanses observed him about 20 times after he distributed the flyer and performed the cleanup task. On the witness stand he admitted that he was only guessing and that he had no independent recollection. Given his lack of memory and his tendency to exaggerate and shade, I am unable find his testimony or the account found in his affidavit to be sufficient to make a finding. Tommy Hanses denied watching him excessively although he did agree that he checked to make certain that Barela cleaned the floor.

I do not find the testimony presented here to be of sufficient weight to support the allegation in the complaint. It will be dismissed.

2. Christina Bautista

Christina Bautista was the day-shift apple packing line supervisor, a first-line supervisor. She had charge of anywhere between 20 and 70 apple packers, depending on the time of year. She was also in charge of the cold room. She reported to Mel Sager.

On July 1, Bautista approached two cold room workers, Rogelio Andrade and Ramiro Arteaga, who were standing in front of the cold room putting on their heavy jackets. Both of them testified that Bautista approached them and asked if they were putting on their "bulletproof vests." They asked what she was talking about and she explained, incorrectly, that the police had run some employees off from where they had been holding a meeting the night before. He remembers her saying that no one could make meetings on private property and if they did so, the Company would call the police and would remove them.

Andrade had attended the Union Gap Table of Respect meeting, while Arteaga had not. Arteaga replied that it was her bad luck that he had not been at the meeting because he would have liked to have been there. He says that she angrily asked him if he denied being in the Union. He replied he did not deny it, that he was in the Union. He says she asked him if he had no shame. He went on to describe her as saying that "employees should take more care with their jobs and should not be making meetings with the Union because outside there were many people who needed a job, and at any moment, they could take our jobs."

Andrade's testimony is quite similar. When Bautista misdescribed what had occurred at Union Gap, Andrade attempted to set her straight. She said that the police had taken the employees out of their union activities at Union Gap. When Andrade told her that wasn't true, she replied that "she knew." She went on to say that employees had jobs, to be careful about that job, not to get into problems. Andrade attempted to explain then that their organizing activities were protected by law, but Bautista scoffed intimating that they knew nothing about the law. Andrade says that she went on to say that he and Arteaga were putting their jobs at risk. He says she said that other people were asking for jobs, that he and Arteaga had theirs and should take care of them. She also said that it was wrong for the day shift to have gone to Union Gap to be with the night shift; the day shift had no reason to be there.

Bautista denies these versions and Respondent asserts that the testimony is inconsistent and should be disbelieved. I note that Andrade says that Bautista had actually spoken to Arteaga first, most of which he did not hear, and he had to ask her to repeat what she had said. Clearly, Bautista had the opportunity to say somewhat different things to each of them. Rather than demonstrating inconsistency, their testimony in that circumstance is mutually corroborative. Moreover, Bautista denied on the stand that she even knew Arteaga, but that testimony is belied by her prehearing NLRB affidavit in which she admits she supervised him.

Bautista's conduct here clearly violated Section 8(a)(1). First, she suggested that employees could not engage in union activity on company property. Second, she said that day-shift employees should not be supporting night-shift employees. Thirdly, she said that if they did so they would be putting their jobs at risk. These remarks are clearly coercive. They suggest that union activity equates with loss of one's job. Therefore, such a remark is an indirect threat of job loss. It also had the effect of interrogating Arteaga about his union sympathies. Her approach to him forced him to say that he had not been at Union Gap. Hearing that, she asked him if he denied being in the Union. He replied that he did not deny it.

Rather clearly, Bautista aimed to determine what Arteaga's union sympathies were. That was none of her business. Arteaga had done nothing to warrant such an inquiry. She began the conversation and through a ploy obtained his admission. He revealed information that she did not know. This

[7] Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities [exception not pertinent here].

allowed her to tell him that she thought the Union would lead to the loss of his job. That interrogation violates Section 8(a)(1).

I do not regard her banter about the bulletproof vests as coercive. It was simply a joke referring to the fact that the police had been called to Union Gap the night before. It was hardly a threat, but was instead a misguided attempt to make fun of the Union. It did however provide her with an opening to express her views on unionization.

C. Introducing Ana Guzman; July 29 Encounter with Mel Sager

Ana Guzman has previously been referenced as being the principal employee organizer. She was originally hired on January 3, 1995, and worked the night shift as an apple packer. She was discharged on November 12 and her discharge is alleged to be in violation of Section 8(a)(3). Her union activity was reasonably well known to Respondent's management. She began wearing union shirts and other paraphernalia in the spring and was a principal figure during the solicitation of signatures and at union meetings held at the Union's office at track 29.[8]

As a night-shift employee, Guzman's duties were under the immediate supervision of Guillermina Delgado, the line supervisor, and Eric Hanses, the night-shift packing foreman. She did not work for Mel Sager or Christina Bautista, who had charge of the day shift.

Shortly before noon on July 29, Guzman entered the back door of the packing plant carrying approximately 20 copies of a free Spanish newspaper called "Viva." There is some disagreement regarding what occurred next. She says she stood in the walkway between the machines and the center wall for a few minutes awaiting the noon shutdown. She knew she could not distribute material to employees while the lines were running and was waiting to go to the lunchroom which was down the wall only a few feet away. Nonetheless, she agrees that she gave out approximately 8 to 10 copies of the paper before Sager came to her. Sager says that he observed her from his position on the catwalk. He says at the time he first observed her, the lines were still running and that he saw her hand a newspaper to another employee. Shortly thereafter, he shut down the lines for the noon break. Within moments, he came down the catwalk to speak to her. He spoke to Guzman in English although her English is not very good. She speaks halting English and her comprehension is limited to very basic phraseology.

It is not clear on the record whether Sager knew anything about what she was distributing, except that it may have been recognizable as the Spanish-language newspaper. There is no evidence that he knew or was aware of the reason Guzman was distributing it. It certainly was not readily ascertainable that the newspaper contained an article regarding the Union's organizing campaign.

He admits he told her that she couldn't distribute such things in the plant and that she was to "take it outside." She began to argue with him saying that it was her right to distribute the paper. Guzman testified that he told her that if she did not cease he would call the police. He denies that he said any such thing. In his version, she seemed to be daring him to call the police. Within moments, Bautista arrived to try to assist their communications. They argued for a few moments about whether Guzman was doing anything improper. The discussion ended when Guzman walked into the lunchroom. While there, she distributed the remainder of her papers.

Counsel for the General Counsel contends that Sager improperly prohibited Guzman from distributing the papers because in her view the distribution did not begin until after the lines had been shut down. In addition, she contends that Sager's reference to calling the police constituted an illegal threat.

In my view, the factual analysis proposed by the General Counsel is incorrect. Guzman admits that she entered the plant 2 or 3 minutes before noon and that the lines were still running. Clearly the lines had not yet been shut down. She also admits that she stood in the walkway holding the newspapers in her hand. The walkway is adjacent to one of the bagging lines and there were people working in that area. Clearly she was in a working area while work was being performed, poised to distribute. Sager says he observed her actually hand a paper to an employee before he shut the lines down. She also admits that she handed out 8 to 10 papers before Sager came down to her. Since it only took Sager a few seconds to come down from the catwalk, the obvious question is: how fast could Guzman hand out 8 to 10 papers before he got there? It seems likely to me that she had handed out some papers before Sager ever saw her. She could not have handed out 8 to 10 papers in the short time that it took for him to come off the catwalk and walk over to her. Accordingly, I conclude that she was in a work area, the walkway, for the purpose of distributing newspapers. I further conclude that she distributed, according to her, 8 to 10 while the lines were still running.

In that situation, I am obligated to conclude that she was in breach of the company rule against distribution. That rule prohibits the distribution of printed material in work areas at any time. Clearly Guzman had failed to observe the rule. Sager was within his rights to point that out to her. Moreover, I'm not persuaded that Sager said anything about calling the police. All he told her to do was to "take it outside." There was certainly no reason for him to conclude that any crime had been committed, for Guzman had committed no crime and had not been accused of doing so. All Sager was interested in was getting the newspapers outside of his work area. When she took the remaining newspapers to the lunchroom, she satisfied his wishes, for he did nothing further about the matter.

To the extent that there is evidence that someone spoke of calling the police, I believe it was Guzman. She was aware that the police had come to the Union Gap demonstration and, I think, was hoping for similar publicity. Guzman, if nothing else, is relentless in her pursuit of seeking advantage on the public stage.[9] She would have easily recognized an opportunity

[8] Track 29 is a small shopping and business center about 3 blocks from Respondent's main office. Businesses in that center are located in remodeled railroad boxcars.

[9] Guzman has taken the limelight on numerous occasions on behalf of the Union. She has appeared on Spanish television and radio, has

to create publicity had she been able to induce Sager to have her arrested. Accordingly, I credit Sager's denial that he threatened to call the police.

It is true that Sager told Guzman to take the newspapers outside. In a sense that is somewhat ambiguous, and one could conclude that he was telling her to take them outside the building. One could also interpret his remark as a direction that she take the newspapers out of the work area. She seems to have so interpreted it, because she did not take them outside the building, she took them to the lunchroom, which was outside work area. Given her own interpretation, I conclude that there was no misunderstanding and that whatever latent ambiguity his remark may have had was resolved by his inaction after they parted and he saw her enter the lunchroom. This observation, too, supports the conclusion that he did not mention calling the police.

Accordingly, this allegation will be dismissed.

D. August 1; Christina Bautista

1. Remarks to Rosa Garcia and Socorro Barajas

Rosa Garcia and Socorro Barajas are daughter and mother respectively. They are both packers who work on the day shift under Bautista's supervision. Although they are not related, Bautista affectionately calls Barajas "mother-in-law."

About August 1, several employees wore union T-shirts to work. Sometime during the day Garcia and Barajas were working together on the same table. Behind Garcia, two other employees, Maria Tellez and Christina Valencia, were working on another table some distance away. They were wearing prounion T-shirts. According to Garcia, Bautista approached Barajas from behind and gave her a hug, saying, "Look, mother-in-law. Look at them. . . . Look at the T-shirts they are wearing." Barajas asked Bautista what that had to do with anything, and Bautista replied, "They are cutting their own throats."

Bautista denies the conversation occurred, and Barajas did not testify.

2. Remarks to Sonia Abundiz, Eva Perez, and Antonia

According to Sonia Abundiz, on that same day, three other packers were working together, Sonia Abundiz, Eva Perez, and another whose first name was Antonia. Sonia Abundiz does not know Antonia's last name. Abundiz and Perez had worn the union T-shirt that morning. She says that at some point Bautista, apparently performing her normal rounds, passed by their station. Abundiz recalls Antonia asking Bautista her opinion about the T-shirts. Bautista replied, "Oh, leave them alone. They are placing the noose around their neck." Perez was not called as a witness and Bautista denies making the remark.

3. Analysis

The General Counsel contends that these remarks violated Section 8(a)(1) as an unspecified threat of reprisal for engaging in the union activity of wearing prounion T-shirts. Respondent opposes such view, essentially asserting that the conduct did not occur, contending that Bautista's denial should be credited. I do not concur with Respondent's analysis with respect to credibility. I credit the testimony of both Garcia and Sonia Abundiz. Even though the two conversations occurred at different times that day, it appears that the simultaneous wearing of T-shirts became a conversation subject insofar as Bautista was concerned. The two incidents are mutually corroborative.

The context of both remarks is, nonetheless, subject to more than one interpretation. The first is that Bautista was recognizably expressing her personal opinion about the wisdom of the employees' union activity. The second is that it was a specific effort to coerce additional employees from joining the others in supporting the Union.

Bautista initiated the first conversation, speaking directly to Barajas and calling her attention to the fact that the other employees were wearing union T-shirts. When Barajas expressed unconcern, Bautista added some fuel to the fire by saying that the T-shirt wearers were in the process of cutting their own throats. The message to Barajas and to Barajas' daughter Garcia was that employees who chose not to wear such T-shirts were less likely to get into trouble. Whether that trouble would take the form of a reprisal or whether it would take the form of unfortunate circumstances in the long run was deliberately left to the listeners' imagination. In that situation, I am unable to conclude that it was merely Bautista's expression of personal opinion. Nonetheless, it does not amount to a threat of reprisal as alleged by the General Counsel.

Instead, I apply the rule of *El Rancho Market*, 235 NLRB 468, 471 (1978). The Board, in determining whether the conduct under scrutiny is coercive within the meaning of Section 8(a)(1) looks to see whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. Motive or success is not the touchstone. Here it is clear to me that in the first conversation Bautista sought to interfere with Barajas' and Garcia's Section 7 right to join those who chose to wear prounion T-shirts. The second conversation is not quite as clear. The conversation was not begun by Bautista, but by an unknown person whose first name is Antonia. As described by Sonia Abundiz, Antonia called the T-shirts to Bautista's attention and Bautista responded that those employees were putting their own necks in a noose. I find here that it makes no difference who began the conversation. No matter who started it, Bautista took advantage of that fact in order to convey the same message as before: that employees were better off not to wear union T-shirts, for if they did, they were likely to find themselves in some sort of trouble. Again, that response may reasonably be seen as tending to undermine the right of employees to engage in the protected activity of wearing prounion T-shirts. Accordingly, I find that both remarks violate Section 8(a)(1) of the Act.

E. Late July and Early August; Union Activism

As the General Counsel correctly points out, the Union collected the bulk of its signatures from Respondent's employees between March and May. Many of these signatures were solicited through the participation in some fashion of Ana Guzman. Guzman was involved in a particularly public manner. Indeed, she became a ubiquitous presence whenever publicity for the Union's cause could be obtained. Her efforts were not limited

been interviewed by the Spanish press and has taken political trips on the Union's behalf which have received extensive publicity.

to Respondent, but were aimed at the entire apple industry in central Washington. On July 23, a week before she sought to distribute "Viva" in the plant as described above, she was featured in a front page story and photographed in the local newspaper, the "Yakima Herald." (GC Exh. 28.) In that article she is quoted as accusing Respondent's supervisors of engaging in harassment of employees because of their union activities. She also appeared in stories published by the two Spanish-language newspapers. She was a frequent guest on a Spanish radio station, KDNA. Later she described the organizing drive on the local Spanish television station, Channel 17 (Hispanavision). In general, her message was that the employees were engaged in a just cause, often citing perceived employer mistreatment and urging the community to support it.

At work her approach was assertive as well. She constantly wore union apparel, buttons and hats. She was often the bearer of union flyers. She was perceived by all, management and employees alike, as the principal employee union leader. Respondent acknowledges being aware of her activity. Not only did it observe it first hand, but President Rick Plath read about her in the "Yakima Herald," as did Eric Hanses. Most of the Spanish-reading managers also read about her in the Spanish-language newspapers.

Guzman was often assisted by about 12–15 others. In no particular order they included Indalecio Mata, Rosio Diaz, Maria Abundiz, Sonia Abundiz, Maria de Jesus (Chuy) Andrade, Pam Smith, Marcelino Gonzalez, Rosa Salas, Antonio Salazar, Rigoberto Flores, Efrain Velasco, Pedro Arguello, and Judy Byrd (until she left Respondent's employ in August). Guzman is a true believer in her cause. She is willing to push the envelope insofar as union representation is concerned. This character trait seems to require her to take some risks in pursuit of her goal.

The Union, as noted previously, had no intention of utilizing the representation election procedures which the Board administers. At some point, probably late July, the Union determined that it would demand recognition with a show of strength in the streets. It also decided that it would be appropriate for the demand to be made by high-ranking union officials from Washington, D.C. These were to be representatives from the Teamsters International Union as well as the organizing department of the AFL–CIO.

Undoubtedly word of the arrival of such officials, together with their moral support, energized the employee organizers in a way that had not been seen before. Their appearance on August 12 was preceded by several incidents.

F. August 6 Warning to Indalecio Mata

The 400 block of North First Avenue divides the main office and the packing plant. The main office is on the east side, while the packing shed is on the west. There are no curbs marking the edge of the street nor are there any sidewalks. If there were, the street would be narrower than it already is. Both buildings are set off the roadway far enough to allow some painted angle parking on each side. It is typical of many industrial streets. In fact, this is the very area where the August 12 demonstration and demand for recognition took place, discussed infra. Employees generally are asked to park behind the main warehouse (on its west side) in marked spaces, a practice which allows adequate parking for office employees and business visitors working at or visiting the headquarters office. According to Respondent, there is a well-known, but unwritten, rule prohibiting employees from parking on North First Avenue near the office entrance during the day while the office is open. Near the south end of the block, some distance from the office parking area, is a small patch where two or three cars can parallel park.

Because for most employees the night shift began at 4:15 p.m. and the office didn't close until 5 p.m., there was some opportunity for persons who didn't want to park in the back of the building to seek open places near the front warehouse door, roughly directly across the street from the main headquarters' door. This is despite the fact that there are many more spaces in the back which are at least as convenient to a doorway as the fewer spaces in the front.

Indalecio Mata is a night-shift sorter. He was hired in 1995 and was under the direct supervision of Sorter Supervisor Kirk McGarity and Night-Shift Supervisor Eric Hanses. Mata was an early supporter of the Union and frequently wore union apparel to work. He drove an older bright pink Chevrolet Sprint. The vehicle is conspicuous not only for its color, but also for its miniature size. Nearly everyone knew the car was his. Mata usually parked behind the warehouse but says about 3 weeks before August 6 he began parking on North First. Sometimes he parked near the south end of the block away from the office spaces, but more often he parked in spaces used by the office workers. He claims he did this without drawing any comment. He had placed two prounion stickers on the vehicle but until August 6 it had not drawn any attention. He also says that he was unaware of any prohibition barring him from parking there.

On August 6, he put two prounion placards in the car's back side windows. Finding an open space, he proceeded to park in front of the main office about 4 p.m. Later that evening Eric Hanses issued him a written warning (GC Exh. 97). That document asserts that all warehouse employees know they cannot park in the office area until after 5 p.m., and that Mata had breached the rule. It concluded warning him that if he did it again he would be discharged.

Later that evening, Hanses issued a similar warning to another warehouse employee who had parked in that area, Oscar Moreno. Moreno, too, was told that if he did it again he would be discharged.

Respondent presented a sensible reason for limiting the parking area in front of the office, but offered very little to show that it was such a serious offense as to warrant the threat of discharge. Indeed, on the few occasions where the issue had come up, the employees in question had first been orally counseled. That did not occur with Mata or Moreno. Moreover, Respondent offered some rather noncredible testimony from Guillermina Delgado, the night-shift packing supervisor, that Eric Hanses had instructed her on one occasion to speak to everyone on the shift (115 employees) to see if they had parked in front of the office. Frankly, while there may have been a desire to keep spaces open in front of the office, its effort to compel such a result was desultory at best. There is evidence that at least one night-shift employee, Cecilia Padilla, had

parked in that area for 2 years without drawing any commentary. Finally, in November 1997 Delgado admonished her about it. Padilla also says that Delgado's claim of an earlier admonishment never happened. Delgado even gave testimony that she had announced the policy over the warehouse intercom on several occasions; yet Padilla testified she never heard Delgado make any such announcements. Certainly Padilla was never given a warning threatening her with discharge if she continued to park in front of the office at 4 p.m. Moreover, Padilla is a relatively disinterested witness.

Based on the foregoing evidence, I conclude that Mata's vehicle, adorned by two large prounion placards, attracted Eric Hanses' attention. The pink car clearly served as union advertising which was located in front of Respondent's headquarters office. That was an irritant which Eric could not stomach. While he was within his rights to ask Mata to move the car to the employee parking area, or even to remind him that it was parked in the wrong place, Eric went too far with the warning. The warning stated that in the event that it occurred again he would be discharged. Frankly, that is a severe overreaction to an extremely minor offense. Such warnings had never been given before. The only distinction between this offense and the others is that Mata's vehicle sported union advertising. That difference clearly produced Eric's reaction.

Respondent observes, however, that Moreno was given a similar warning that day. That treatment, it argues, demonstrates that Mata was treated no differently than any other individual who broke the rule. I am not impressed with that argument. The Moreno warning is a clear effort to sanitize the one given to Mata. What is more persuasive is Respondent's previous desultory, uneven, and half-hearted effort to enforce a preferred approach to employee parking.[10] That feeble attempt contrasts sharply with what it did on August 6. I conclude, therefore, that Eric Hanses' issuance of the warning to Mata violated Section 8(a)(1) of the Act. It was retaliatory at worst and had the necessary effect, at best, of restraining an employee in the exercise of his Section 7 right to express his prounion sympathies in public manner.

G. The August 6 Warning to Ana Guzman and Noemi Mendes

During the first part of the evening shift, Respondent was running at least one line of bagged apples. Respondent often packs three different sizes of apple bags: 3, 5, and 8 pounds. On that evening, the bags were being packed into large triwall bins. According to Eric Hanses, the lines can only be set for two sizes at a time. There is testimonial inconsistency about that point as well as the sizes of the bags being packed. It is unnecessary to unravel those inconsistencies.

Workers on that line work in pairs, one on each side of a bin. Each pair is obligated to recognize the size bag which they are assigned to place in the bin. They are then obligated to grab that size bag as it goes by on the belt. If the pair fails to remove a bag, the bag will pass by and be caught at the bottom of the line by a circular table. That table revolves and eventually the missed bags will be picked up and placed in the proper bins. The circular table serves as an overflow table. Employees rotate locations and job duties on these lines every half-hour.

Ana Guzman and Noemi Mendes were rotated to the station nearest the overflow table. Prior to their arrival at that station, it had run smoothly. Shortly after they arrived, problems arose. Approximately 15 bags fell from the overflow table to the floor. Approximately 35 bags remained on the overflow table. The line had to be stopped while the bags were picked up and culled while the bags remaining on the table were packed. Guzman testified that the lines were running too fast, while Mendes says that Guzman was grabbing only two bags at a time instead of four.

Lines Supervisor Frederico Gonzalez helped the two clean up. Shift Supervisor Eric Hanses had observed the incident and later spoke to Gonzalez about it. He did not speak to either Guzman or Mendes. Neither supervisor made any specific effort to determine the true cause of the incident. Instead, Hanses decided that since the two were supposed to be working as a team, they both warranted warnings. He was aware that the previous team at that station had worked without incident and that the line's speed had not changed. He simply concluded that they had not been working fast enough.

During the lunch period he issued warnings to both of them. The first was to Mendes. He basically described what had occurred, assigning blame to both and asserted that if they needed help they should call for it. The Mendes warning containing no reference to a consequence if a similar incident should occur. The Guzman warning was quite similar but concluded with a warning that she would be discharged if a similar incident occurred. There is no explanation for this different treatment. So far as the record shows, Guzman had not received any previous warnings. That raises the question: Why threaten her with discharge at this stage, but not also issue an identical threat to Mendes?

Hanses does say, although it is not by way of explanation, that when he asked Gonzalez what had happened, Gonzalez told him that Guzman claimed she did not know how to load the bins. He also says that when he spoke to Mendes, she told him that Guzman had told her, "Don't work so hard. Just let the bags fall." He says Mendes also requested not to have to work with Ana again because she didn't want to get in trouble or get fired because Ana wasn't working hard enough. However, he did not really discuss these issues with Guzman when he met with her.

Both of them say that the warning discussion took a different turn. It is clear that Hanses did not ask Guzman what had occurred. He simply gave her the warning and told her to sign it. At that point Guzman objected, essentially saying that the fallen fruit was not her responsibility.

She denied she had let the fruit fall and asserted that Hanses had never given the warning to any worker who had let fruit fall. She claimed that fruit falls every day. Then she testified she said to him:

[10] Respondent's reliance on the threat-of-discharge warning issued almost a year before to Martha Blas cannot be accorded any weight. On its face, it shows that Blas had earlier received an oral warning which she had disregarded. No oral warnings were given Mata or Moreno before being threatened with discharge.

> The only thing you're doing is "harassing me because of my union activity." And he said, "You're never at fault, right?" And I said, "No." And I told him I am going to sign this paper for you if this will make you feel happy. And I said, "If you want, I can sign two or three right now because you will know you're pressuring me because of my union activity, that's all." So I signed the paper and I put the protest on it.[11]

Aside from the issue of whether or not Guzman had engaged in misconduct sufficient to warrant a warning, is clear from her testimony that she is issuing him a challenge. Rather clearly she is ridiculing both Hanses and the warning. She is saying that she is signing the warning not because of any acknowledgement of his managerial authority, but sarcastically, to make him happy and that she would sign two or three of them, because they were essentially worthless. It can be seen from her response that she has become a risk taker. In a sense, she is daring Hanses to take additional action.

Even so, I'm not impressed with Hanses' reaction here. Certainly there is no evidence that Guzman's performance at the overflow table was the product of deliberate misconduct. Mendes never gave any testimony to that effect and even if she told Hanses that Guzman had said something to the effect that she was not working at normal speed, Hanses did not use that as a ground for the warning.

Instead, Hanses chose to treat Guzman and Mendes almost equally. Both received a written warning. However, those warnings were not equal. Guzman was told that she would be discharged if she committed a similar act. Mendes was not. The only difference between the two here was that Guzman had become visibly active on behalf of the Union. Respondent offers no alternative explanation. Accordingly, I conclude that Eric Hanses enhanced the warning to Guzman because of her union activity. That enhancement renders the warning illegal under Section 8(a)(1) and (3).

However, it does not follow that the warning given to Mendes was also violative of the Act. It cannot be said that Hanses' approach to the incident was entirely illegally motivated. Rather clearly an out-of-the-ordinary incident had occurred. Careful analysis was not required to assign responsibility to the two who were performing the task. Had the warnings been equal, it would be hard to say that Hanses had done anything wrong. What happened here is that he wrongfully enhanced the warning to Guzman. That enhancement says nothing about the validity of the warning to Mendes. The concept of warning both employees was valid; the enhancement to Guzman was not. To the extent to the complaint may be interpreted as being concerned with the Mendes warning, it should be dismissed.

H. The Warnings for Leaving Work Early

There are actually two incidents which occurred involving warnings to employees for leaving work before the work was done for the day. The first occurred on August 7 and involved employees Maria del Rosio Diaz (Rosio) and Rosa Quintanar. The second occurred on September 9 and involved only Ana Guzman. While Guzman was probably the leading union activist, Diaz was not far behind. In fact, she married professional union organizer, Andrew Barnes, whom she met during the campaign. She had worked for Respondent about 3 years before the election in January 1998. On the date of the election she resigned to begin married life in the Portland, Oregon area.

Respondent has utilized a shift-ending practice for many years. The routine is connected to the manner in which the lines are shut down in sequence. While the shift nominally ends at 1 a.m., and employees are regularly paid to 1 a.m., in reality employees at the end of the lines are always obligated to remain at their stations until the last bag or tray comes off the line, is packed, and the lines wiped down. The shutdown process takes about 10 or 15 minutes and employees in the beginning of the process are able to leave their stations earlier than the ones at the end of the process. This means that for those at the end of the line sometimes cannot leave until 3 to 5 minutes after 1 a.m. According to the managers, there are roughly the same number of times that the lines actually shut down earlier and employees, including those at the end, are actually able to leave their workstations before 1 a.m. In either case the employees' time is calculated as ending at 1 a.m.

Respondent points to a Department of Labor Regulation, 29 CFR § 785.48(b) upon which it relies to explain its practice.[12] Whether Respondent's reliance on this regulation is correct or whether it complies with the regulation is not before me. What is clear is that at least two of the employee union organizers, Diaz and Guzman, believed the practice to be illegal in that it required employees to work after 1 a.m. without being paid. Diaz concedes that she never spoke to any supervisors or managers about the validity of the practice. In fact, it is not clear that she actually spoke to any fellow employees about the perceived unfair nature of the practice before August 7. Indeed, it is not clear that she ever spoke to a fellow employee about her view of the practice before she chose to leave her line early on August 7.

1. August 7; Diaz and Quintanar

Diaz was called as a witness by the General Counsel; Quintanar was called by Respondent. Their versions are similar but are not mutually corroborative. In the early hours of August 7, both Diaz and Quintanar were working together at the end of a packing line. The line had continued to run past 1 a.m., and about 1:03 a.m. the incident occurred. The line itself seems to have stopped a minute or two later.

According to Diaz, she said that about 1 a.m. she turned to Quintanar and said, "Let's go. It's 1 a.m. and everyone has

[11] At the bottom of the warning she wrote in Spanish: "I signed this under protest. I am not in agreement with this. Eric is harassing me because of my union activity."

[12] In its entirety, 29 CFR § 785.48(b) reads as follows:

> (b) "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

left." She says Quintanar responded, "Let's go." Diaz says that Quintanar left first while she stayed a moment to pick up her belongings. At that point, Line Supervisor Frederico Gonzalez approached her to tell her that she still had to clean up. She declined and says she and Quintanar left the plant together. Later she modified that testimony to say they went in separate directions.

Quintanar, on the other hand, testified that even though she was working with Diaz at the time she simply left because no one had told her to clean up and that there was no other reason. She apparently thought her work was done or that Diaz would take care of it. She denies that Diaz and she even spoke before she left line. She also says she left by herself in order to meet her husband who worked in one of the cold rooms. She says Diaz did leave at the same time, but neither of them said anything to each other. She also says she told NLRB investigator Hurtado that she left about 1:05 a.m. If she left as late as that, the line would have either have stopped or have been in the process of stopping. Under her version, she just left quickly, leaving the cleanup to someone else, if it was necessary. She does not make any contention that she was stopping before 1 a.m. to protest any pay practice, nor does she claim that she was acting in concert with Diaz.

Line Supervisor Gonzalez reported the incident to Shift Manager Eric Hanses. The following afternoon Hanses prepared written warnings for each of them. The one for Quintanar reads: "Mrs. Quintanar left her job before it was finished. If Mrs. Quintanar leaves her work station before her work is finished again she will be dismissed." When the warning was presented to her, she signed it without protest and resumed work on her next shift.

The warning for Diaz was nearly identical. It states:

> Mrs. Diaz walked away from her job before she was done. Frederico saw her and asked why she left. She said "do I have to stay and finish." He said yes. She said it's already 1:00 and walked away. Mrs. Diaz may not leave her work station before her work is complete—if this happens again she will be dismissed.

It should be observed here that neither warning refers to an employee other than the one being warned. There is no suggestion that Eric Hanses believed that the two were acting in concert. Moreover, Quintanar, unlike Diaz, didn't say anything which might be considered a protest over having to work after 1 a.m. Diaz' remark that it was "already 1:00" does not clearly signify that Diaz was making any kind of protest. Certainly it does not signify that Diaz was acting in concert with anyone else. Nor does it signify that she was acting for the mutual benefit or protection of anyone else. She didn't even testify to what Hanses wrote per Gonzalez' report. Instead, she only acknowledges Gonzalez asked her to finish, but she apparently chose to ignore him and walked away.

Unlike Quintanar, Diaz would not initially sign the warning which had been presented to her in translation by Guillermina Delgado and Eric Hanses. She says she didn't agree with what was in the warning. Since she didn't sign, they wouldn't let her go to work and she went to the union office at track 29 where she obtained some assistance. There she complained that the warning was in English (although the statement she signed for the Union that evening was also in English). In addition, her statement to the Union does not refer to any concerted action by her and Quintanar. She simply says, "Last night, shortly after 1 a.m., I had finished working when Frederico Gonzalez asked me why I hadn't been at my table, he hadn't asked me earlier to clean the table. I answered that it was after 1 a.m. Rosa Quintanar also left at quitting time."

She attempted to present that statement to Eric Hanses later that evening. In doing so she was accompanied by a group of employees, apparently some of who came from the night shift. One of them was Ana Guzman. He told her that he would not deal with the problem at that time and Diaz should return the following afternoon and take up the matter with Tommy Hanses.

On August 8 another group accompanied Diaz in meeting with Tommy Hanses. Again the group included Guzman, and asserted that the warning was unwarranted and unfair. After discussing the matter for awhile, Diaz signed the warning and was permitted to go to work.

2. September 9; Guzman

Although it is out of chronological sequence, I include it here because the next-described incident closely mirrors the one described in the preceding subsection. At the time of the incident, Guillermina Delgado was the packing line supervisor. Ana Guzman and several others were putting apple trays into boxes. Guzman testified that in the early hours of September 9 she observed that it had become 1 a.m., and she chose to leave, telling others near her, "Let's go." Her testimony is:

I remember that day, that it was already 1 in the morning. I was working there with another group of workers close by. When I turned over to—when I looked over to see the clock, I saw that it was 1 in the morning. So then, I told them, let's go, it's 1 a.m. So then, I took three steps from where I was standing working, Guillermina Delgado was very close by there in front of me, and the part that's above. So then, she told me, "Ana, the apples are still coming out." And I told her, "Guilla, but it's already 1:00. So then, I went back and Maria Valencia was—had taken my place. So I remained there working again besides Maria Valencia.

Delgado's version is not significantly different except that she reports that Guzman did not return to the line, but ignored her admonition to return. She remembers Guzman saying in a loud voice. "It's now 1:00; let's go." She then observed Guzman walk away from her line toward the kitchen. Delgado called after her, "Ana, it's still not time for us to go, it's still—the machine has not been shut off yet. Return, go back; There's still a lot of apples." But Guzman responded saying, "It's now 1:00; I am not going to work after 1:00." Guzman continued on her way and left.

According to Delgado, there were several other employees in Guzman's vicinity, including Diaz, Maria Valencia, Lupe Martinez, a Rosales, Herrera, and possibly Quintanar. It is undisputed that none of the employees responded to Guzman's exhortation either verbally or by joining her in leaving. They all remained until the line was shut down a minute or two later.

Delgado was on the catwalk at the time of the incident and unable to immediately catch up to Guzman. As she went after Guzman she ran into Eric Hanses and reported to him what had occurred.

The following day Hanses and Delgado called Guzman to the office to issue her a written warning. The warning states "Mrs. Guzman walk away from her job before the work was finished. Her supervisor told Ana to finish. However, Mrs. Guzman ignored her supervisor and walked away. If Mrs. Guzman leaves early without permission, or if she fails to comply with her supervisor's instructions, Mrs. Guzman will be dismissed."

There are some slight variations regarding what transpired during the warning interview at 5 p.m. the next day. Delgado served as a translator for Eric Hanses. Guzman's version:

> She [Delgado] told me, "Ana, you are going to sign this paper." I asked why. She said, "Because last night, you left your line of work. You left before we were finished." So I told her, "Guilla, you saw that it was already 1:00 in the morning." She said, "Yes. But your obligation is to stay until the apples stop coming out [down]." I told her, "You saw that I did not leave by myself. A group left along with me, and there is no reason to work for free after 1:00 in the morning." And she said, "Yes." So then, I told her, "But you saw that I went back." And she said, "Yes, but you left again." And I said, "Yes, but it was along with a group of workers. I did not leave by myself." Then, I asked her, "Guilla, honestly, was it 1:00 in the morning by then or not?" And she said, "Yes." But she said, "You have to—your obligation is to finish, to finish—to wait until the apples are finished coming up [down]." So then, I told her, "I already spoke to Tommy [Hanses] about this. I already told him that we will not work for free after our shift." And I told her, "But I don't have any reason to be discussing this with you." So then, she said, "Sign it." So I signed it.

After signing it, adding a protest on the back of the form, Guzman returned to work. Her protest asserted that she was not in agreement with the warning and contended that it was because of her union activities. On the face of it, the warning makes no reference to any union activity, nor was there any union-related connection to her conduct the night before. Indeed, fellow union organizer Diaz made no move to join Guzman. (In fairness, that may have been because she had been warned against such activity 4 weeks earlier; Delgado says she was not aware of the earlier incident involving Diaz and Quintinar.)

Delgado also describes the warning interview:

> DELGADO: Eric said [in English], "Ana, I'm going to give you a warning for leaving your lines before the work is done."
>
> Q. BY MR. CARROL: All right. And at that point what did you say in Spanish to Ana Maria?
>
> A. [Through interpreter] I said [in Spanish], "Ana, Eric says that he's giving you this paper to sign, and it explains here that you left before your work was done."
>
> . . . .
>
> Q. Okay. Now, after you said those Spanish words to Ana Maria, what happened next?
>
> A. She said, "I left because it was already 1:00; I will not work after 1:00 without getting paid for it."
>
> Q. And she said that in which language?
>
> A. In Spanish.
>
> Q. Now, did you translate that to Mr. Hanses in English?
>
> A. Yes.
>
> Q. Tell the judge what you told Eric Ana Maria said in English.
>
> A. [In English] I told Eric that Ana said, "I'm not going to work after 1:00; I can work only—we have to work only till 1:00. After 1:00, we're not getting paid."
>
> Q. Now, who spoke next after you translated that Spanish statement to Mr. Hanses in English?
>
> A. Eric.
>
> Q. Okay. And what do you remember Eric saying, in English, if that's the word—language he used.
>
> A. He said that she had to stay and work like everybody else till the job was done.
>
> Q. Okay. And did you translate that to Ana Maria in Spanish?
>
> A. [Through interpreter] Yes.
>
> Q. And could you give us the Spanish translation?
>
> A. I told her, "Ana, Eric says that you need to stay and work like everyone else until the job is done."
>
> Q. Did Ana say anything in response?
>
> A. She argued back and said that she was—she would [only] work until 1:00.

Eric Hanses' testimony is very similar to Delgado's:

> WITNESS [ERIC HANSES]: Okay. I said, "You can't leave work early."
>
> Q. BY MR. CROLEY: And did she respond?
>
> A. Yes.
>
> Q. What was her response?
>
> A. Her response was, "It was 1:00 o'clock and I was going home."
>
> Q. And did you respond to that?
>
> A. Yes.
>
> Q. What did you do next?
>
> A. I said—I can't recall the specific words that were used in this transaction, so how do I—
>
> ADMINISTRATIVE LAW JUDGE KENNEDY: Well, just tell me what your best recollection is then.
>
> THE WITNESS: Okay. My best recollection of the conversation is that I again—I explained to her about the shift ending early and/or late, and I explained that I had a write-up for her, and that she can't—she cannot leave work early. And she signed the warning and went back to work.
>
> Q. BY MR. CROLEY: During this meeting did Ana ever indicate whether she had returned to the line?[13]

[13] Guzman testified that she had first left the line and then returned. Neither Delgado nor Eric Hanses agree. Hanses testified that when Delgado met him on the catwalk to tell him that Guzman had left, he walked part way down so he could see the area where he had last been

A. No.

. . . .

Q. BY MR. CROLEY: Is there anything else that you recall her saying during the meeting?

A. No.

Q. Did she say that she had left early in protest of anything?

A. She never said that she was protesting. No.

Q. And you indicated that you gave her a disciplinary notice at this meeting?

A. Yes.

Q. And what was your reason for giving her that notice?

A. Because she left work early.

Q. Okay. And was there any other reason that you gave her that notice?

A. No.

3. Analysis

The General Counsel asserts that both incidents were protected by Section 7 of the Act. The theory is that Diaz, Quintanar, and Guzman were all protesting Respondent's practice of requiring employees to work past 1 a.m. There are several problems with the General Counsel's approach. We may assume that Respondent knew both Diaz and Guzman were union activists, for they wore union apparel and buttons. Except for that, however, there is really no evidence that Diaz and Quintanar were operating in concert in these two incidents. There is no suggestion that anyone thought their leaving early was union activity. In fact, the General Counsel does not even make that contention. Quintanar's testimony suggests that she only left early to meet her husband, leaving cleanup to her partner. Neither Diaz nor, later, Guzman ever said anything to any manager suggesting that their actions on those evenings had the purpose of protesting the practice or had a union aim of some kind. Indeed, there is no evidence that they said much of anything until the following day when they received their warning slips. When they did speak they only remarked that it was "past 1 a.m." and they didn't want to work after 1 a.m. without being paid.

Moreover, I'm not impressed with Guzman's credibility regarding what she did in the September 9 incident. She says that she initially left the line, was called back, found Valencia at her place and then worked beside Valencia for a few moments and then left again with other employees. It would seem to me that if that were true, by the time she left again, the line would have been stopped. In that situation, when the others left it would have been because work had ended. No concerted work stoppage would have occurred. Yet she makes it sound as if others had joined her when they had not.

The more likely version is that Guzman had attempted to persuade others to leave with her while line was running, but had failed. She left, hoping they would follow her when she said, "Let's go." But no one did. She decided to keep going and did so. Delgado's admonition would not have stopped her. She believed she was on a mission, and it is unlikely that Delgado's direction to return to the line would have been heeded. Accordingly, I do not credit Guzman's contention that she returned to the line and that the others left with her moments afterward, but before the line stopped.

There is no suggestion in anything which Hanses or Delgado (or Gonzalez earlier) said or did which leads to the conclusion that the warnings issued were for any reason other than responding to an employee's decision to leave work before she was supposed to. It is true that Diaz and Quintanar seemed to leave simultaneously, but the warnings levied upon them did not even mention that the two had left at the same time. In fact, the evidence leads to the conclusion that it was Quintanar who left first, to avoid the cleanup and to meet her husband. In fact, Quintanar stood by the doorway waiting for her husband; she did not depart.[14] Had she been protesting, she would have left the building in order to avoid being told to return to her station. There was no reason for Gonzalez to conclude that any concerted activity was occurring. From his point of view, two employees were skipping out early. Neither he nor Gonzalez was aware of anything which would lead one to conclude that a concerted protest was being made.

But, assuming as the General Counsel does, that a concerted protest was in progress, it does not follow that it was also protected. It has long been a tenet of employment law that employees do not have the right to set their own terms and conditions of employment. Recent cases on that point are: *Scioto Coca-Cola Bottling Co.*, 251 NLRB 766 (1980); *Bird Engineering*, 270 NLRB 1415 (1984); *Interlink Cable Systems,* 285 NLRB 304 (1987); *House of Raeford Farms*, 325 NLRB 463 (1998); cf. *Specialized Distribution Management*, 318 NLRB 158 (1995). (Arbitrator entitled to assume that employees cannot set their own terms and conditions of employment.) Earlier cases are cited throughout those decisions.

The Act, of course permits employees to negotiate, through a collective-bargaining agreement, changes in terms and conditions of employment. That is quite different from employees unilaterally setting their own terms and conditions. Moreover, Section 7 of the NLRA protects employees who make common cause with one another for their mutual aid and protection. The pertinent language is set forth in the footnote.[15]

Here the employees accepted Respondent's terms and conditions when they were hired, including the so-called "rounding" pay practice at the end of the night shift as it affected the employees who tended the ends of the lines. On August 8 and again on September 9, Respondent did what it had always done; it allowed the shift to end less than 5 minutes after 1 a.m. (On other days it had apparently ended the shift before 1 a.m., also a practice it had always followed.) Respondent made no changes in the working conditions which the employees had accepted. Nonetheless, Diaz and Guzman decided to change those conditions simply by declining to work under them. Their act of

working. He said, "[W]e went part-way down the catwalk, and I was looking in the area that she—that I'd last seen her, and I didn't see her. And when I turned off the packing line two minutes later, I went—I walked all the way down to the end, and I didn't see her."

[14] Quintanar's sense of urgency was misplaced. Her husband did not meet her at the doorway until 10 minutes later.

[15] Sec. 7 states: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."

walking away from the lines was a clear effort to set their own terms and conditions of employment. Even so, it is not clear that they had made common cause with anyone; even if they had, neither Gonzales not Delgado could have been aware of it, for these employees said nothing about why they were leaving. And, we know that Quintanar was not a part of anything.

As the Board said in *Bird Engineering*, supra: "These employees did not engage in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with the Respondent's rule. Instead they simply chose to ignore the [Company's] rule in direct defiance of the direction and warnings of management. By treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination. These employees were attempting both to remain on the job and to determine for themselves which terms and conditions of employment they would observe."

The law does not empower employees to set their own rules, including their hours of work. Thus, even assuming these walkaways were concerted, they were not protected under the doctrine cited above. Accordingly, the allegations in the complaint asserting that the warnings given to Diaz, Quintanar, and Guzman were unlawful shall be dismissed. If the employees wished to have protested the rounding practice, they were free to file complaints with either the U.S. Department of Labor, the Washington State Department of Labor and Industries, or to go on strike in protest of the practice. They did not choose any of the protected paths; instead, they simply determined on their own when to work and when not to work. That has never been protected.

One other observation may be made. Guzman had become involved with the group who supported Diaz on August 8. She had served in some leadership capacity for that group and had spoken to Tommy Hanses on Diaz' behalf. She even told him she disagreed with the practice of requiring employees to work after 1 a.m. without additional pay. She was well aware of Respondent's view on the matter, that employees were obligated to do so, though the rounding explication may not have been clearly explained. Thus, when she chose to leave on September 9, she knew she was defying a company rule and deliberately put her job at risk. One may reasonably ask whether she was embarking upon a campaign of provocation when reviewing the subsequent events in which she was involved.

I. The Aaron Ayala Affidavit; Allegations of Threats and Surveillance on August 8

Aaron Ayala was a night-shift laborer who also performed some packing and some cleanup duties. Ayala was deported from the United States at El Paso, Texas, by the U.S. Immigration and Naturalization Service on October 29, 1998, a week before the instant hearing opened in Yakima. He had been hired in 1995 and continued to work for Respondent through some time after the NLRB election in January 1998.

Ayala does not appear to be able to read and write English; he says in an English affidavit that he is Spanish-speaking. The affidavit, taken by a Spanish-speaking Board agent, was offered by the General Counsel in support of paragraphs 7(f) and 10(a) of the complaint. Those allegations assert that Eric Hanses on August 8 engaged in excessive supervision and surveillance of union supporters and that on the same date Guillermina Delgado told employees that all union supporters were useless and would lose their jobs. Both are alleged to violate Section 8(a)(1).

Because Ayala had last been seen by an INS agent crossing the bridge to Mexico from El Paso, the General Counsel asserts that Ayala is unavailable as a witness. Respondent hotly disputes that contention. In any event, the General Counsel notified Respondent about a week before it was actually offered of its intention to utilize the residual exception to the hearsay rule, Fed.R.Evid. 807, formerly Rule 804(b)(5), to have the affidavit received in evidence.

As a matter of policy, the General Counsel has usually chosen not to obtain the personal presence of witnesses who reside in foreign countries. Indeed, it would appear from colloquy that the General Counsel does not wish to obtain the presence of individuals who have been deported by the INS. In any event, the General Counsel did not seek to bring back Ayala for the hearing; nor did it seek to depose him in Mexico under consular procedures.

The residual rule has several components: first, the witness must be unavailable to testify; second, the statement must have circumstantial guarantees of trustworthiness equivalent to live testimony; third, it must be offered as evidence of a material fact; fourth, it must be more probative than other evidence which the proponent can procure through other reasonable efforts; and fifth, the general purpose of the rules and the interests of justice will be served by admitting the document in evidence.

Board law appears to require that I receive the document and I did so at the hearing. (GC Exh. 99.) See *Custom Coated Products*, 245 NLRB 33 (1979); and *Weco Cleaning Specialists*, 308 NLRB 310 (1992). In general, the Board believes that affidavits taken by its investigative agents are sufficiently trustworthy to warrant receipt in evidence when a witness is not available. At least two circuit courts disagree. See *Central Freight v. NLRB*, 653 F.2d 1023 (5th Cir. 1981); and *NLRB v. United Sanitation Service*, 737 F.2d 936 (11th Cir. 1984).

Yet, Fed.R.Evid. 901 requires that evidence be authenticated as a condition precedent to admissibility. I note here that General Counsel's Exhibit 99 has not actually been authenticated by any witness. The Board investigator did not testify and so did not authenticate the exhibit. I accepted counsel for the General Counsel's representation that the Board agent had taken the affidavit and it is what it purports to be. However, the exhibit is certainly not self-authenticating and it is troubling in at least one other respect—it incorporates by reference an English statement taken and written in the first person by a nongovernment person. That attachment is not authenticated for purposes of admissibility by anyone. Accordingly, I must conclude that General Counsel's Exhibit 99 has not been authenticated sufficiently to warrant its admission in evidence and I must reverse my earlier ruling. See *National Family Opinion*, 246 NLRB 521, 532 fn. 1 (1979). I reach that conclusion even though I authenticated Ayala's signature on his union authorization petition (GC Exhs. 20-88) based on exemplars. The stipulation governing that signature does not run to his affida-

vit, and I am unwilling to authenticate it for admissibility purposes. That duty rests with the General Counsel, not with the judge.

Even beyond the question of authenticity is the question of whether this affidavit and its attachment have circumstantial guarantees of trustworthiness. I have real doubts in this regard and earlier expressed them on the record. First, the Board agent interviewed the witness in Spanish. It is unclear to me from the face of the statement whether the Board agent actually identified the witness and if so, how. Second, although he interviewed the witness in Spanish, no Spanish document was prepared. The Board agent then reduced whatever notes he had taken to an English statement, read it to the witness in Spanish, and then had him sign it. No Spanish version was ever presented to the witness; indeed no Spanish version was ever created.[16]

Moreover, the Board agent's written version and the unknown union official's written version are not consistent. Written in the first person, the writer (not Ayala, but writing as if s/he were Ayala) says that he put on a union button at 6:15 p.m. and that about 4 hours later he was subjected to a statement from Delgado that individuals who were involved with the Union were useless and would be kicked out. That statement does not appear anywhere in the affidavit taken by the Board agent. The affidavit which the Board agent did write does not mention Ayala putting on a union button, but does describe Eric Hanses as giving Ayala special scrutiny that evening, including a scolding for working on the bag line when he had been instructed to work on the box line. That affidavit contains no reference to any remarks made him by Delgado.

These factors, when added together, leave me without confidence in the trustworthiness of what the documents describe. First, the witness was asked to sign a document which he could not read as it was in English and the only language which he really understood was Spanish. Second, judges are all familiar with the difficulty of dealing with nuance in affidavits. Chief Judge Markey commented on the problem in *Central Freight,* supra at 1026, quoting from another case: "As stated in *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 565 (N.D.Ohio 1975): 'The court is well aware of the subtle shifts in meaning that can occur when one's statement is recorded by another.'" I can only add that the problem is dramatically enhanced when the statement goes through translation from a foreign language. Indeed, here, we cannot even present an original Spanish statement to a court translator to compare with the English, because it does not exist. Moreover, the identity of the translator of the attachment is unknown, as is his/her translation skill and objectivity.

Finally, there is the question of whether Ayala was truly unavailable, although I think he was, having departed for a foreign country. Yet, I cannot say that the General Counsel has utilized all the reasonable means that the Government has available to it to secure his presence. For all we know, he may have remained in Juarez, across the border from El Paso. Or he may have gone to a city with a U.S. Embassy or Consulate where he could readily be deposed. He may have been only a telephone call away. Of course, he may also have retreated into deep rural Mexico and become totally unavailable. While I cannot say what level of effort could reasonably have been made, I know that the General Counsel did not direct his staff to look much past Yakima and environs. I doubt that is enough. However, I base my conclusion on more narrow grounds.

If the General Counsel wants his allegations to be sustained, he must provide admissible evidence. The Ayala affidavit remains unauthenticated and is hearsay which is not admissible under any of the recognized exceptions. It simply has too many shortcomings, the worst of which is a lack of trustworthiness, having been cluttered on the one hand with a non-NLRB scrivener and bare of a Spanish original on the other. Respondent need not meet inadequate evidence such as this.

Since the General Counsel has offered no other evidence, paragraphs 7(f) and 10(a) of the complaint must be dismissed.

J. The August 12 Demonstration; Videotaping; Demand for Recognition

1. Descriptive facts

Although the Union had made plans to demand recognition from Respondent in a public manner, it did not advise anyone from Respondent's management that it was going to do so. Apparently, however, the Union did notify the news media. Several television stations and the "Yakima Herald" newspaper were on hand for the event. Respondent's officials were kept in the dark about the Union's intentions. In fact, Rick Plath had been on vacation through Sunday, August 10.

Sometime during the evening of Monday, August 11, Plath received a telephone call from Mike Gempler, an official of the Washington Fruit Growers League. Although intended as a "heads-up," Gempler's intelligence was obviously based on incomplete, possibly inaccurate, data. Plath describes the information which Gempler transmitted to him:

> Mike Gempler called me on the telephone at home and said that there was somebody from Washington, D.C., with the AFL–CIO, and some Teamster organizers from there as well, which would be marching from the train station [Track 29] to our packing line office tomorrow sometime . . . He just said these were high-ranking officials, and there'd be a lot of people who would be with this group, and that was about it.

Plath could not determine much from what Gempler had said. He did discern that it was going to be a Teamster operation.[17] Yet, he did not know what the purpose of the march was, he did not know who the march leaders would be, he did

[16] For *Jencks* purposes [Board Rule 102.118(b)(1)], written Spanish translations of the English were provided for witnesses who actually testified. Even so, those translations had never been seen by the witnesses prior to their being on the witness stand. Indeed, they were not necessarily translated back to Spanish by the Board agent who interviewed them. I find this procedure to be irregular.

[17] At that time, the Union was operating under a newly minted trade name, "Teamsters United for Change." That name's connection to the International Brotherhood of Teamsters was not well understood at that time. It could easily have been mistaken for a splinter group of some kind as well as a nascent independent union. Yakima has long had its own Teamsters Union, Local 760.

not know who would be involved (company employees or outsiders), he did not know how many people would be participating in the march, nor did he know when it would take place or how long it would last. In fact, he could not be sure the march would be entirely peaceful, although he had no reason to believe that it would be especially aggressive, either. He simply did not know what to expect. He nonetheless believed that it would be unwise to be unprepared.

The following morning he met with Tommy Hanses and Alex Martinez.[18] Plath says he gave the following instructions to Martinez: "[I] asked Alex if he would get the video camera ready, because there was going to be a march on our plant sometime that day, and I was concerned about employee safety and their vehicles . . . and we have kind of sophisticated packing equipment, and I just wanted all of this preserved on tape if there was any damage which was going to take place." . . . . "We were concerned about violence at that time." Martinez adds that possible trespassing was also an issue.

Sometime between 2 and 3 p.m. a group of about 50–60 people met at the Union's office at track 29. The march was led by John August, who is the coordinator of organization for the International Brotherhood of Teamsters in Washington, D.C. He was accompanied by Richard Trumka, secretary-treasurer of the AFL–CIO. The International organizers in charge of this campaign all reported to August. There were approximately five of them assigned to this drive. The chief organizer was Lorene Scheer. She, too, participated in the march. While the testimony does not clearly reveal whether her fellow organizers also participated, it seems likely that they did. Certainly the video evidence suggests that they did.

August testified that the group grew larger as the march progressed. He estimated that it exceeded 100 people by the time they arrived in front of Respondent's main office on North First Avenue. Upon arriving at that location, they erected a large folding table, styled as a symbolic bargaining table.

The crowd consisted of men, women, and children. In some respects it took on a festive atmosphere. They were carrying balloons. Even so, the area in which they gathered was not very large and the gathering did block and/or slow traffic on the street. Martinez shot approximately 19 minutes of videotape during the demonstration. For the most part he stood on the west side of the street aiming toward the east. From this vantage point much of his filming was directed at the backs of the demonstrators as they faced the office doorway. He shifted positions several times, sometimes retreating into the wide-open warehouse doorway. At some points he was clearly visible to anyone who chose to look, while in others he was less obtrusive.

August says that the demonstration lasted 15 to 20 minutes. Martinez recalls it lasted about an hour. He only videotaped 19 minutes. He explained that his camera was not continuously turned on during the entire rally and the camera battery became too low.

Martinez also testified, after he reviewed the video, he could only recognize about 12 of the people photographed as being Washington Fruit employees. His testimony contrasts with Scheer's who says that when she viewed the video she recognized 26 employees by name plus additional employees by sight, for a total of about 40. If Scheer is correct, then the crowd included 60 individuals who were not employees. If Martinez is correct, then more than 80 of the demonstrators were not employees. In viewing the videotape I observed that there were people carrying banners and flags identifying themselves as supporters or members of the United Farm Workers Union. If so, they were no doubt strangers to Plath and Respondent.

In the very first portion of videotape, Scheer can be seen giving some instructions to a colleague. That individual promptly approaches Martinez with his own camera and smilingly takes Martinez' picture. Later in the tape another individual approaches Martinez and, in good humor, tells him that he is engaging in "illegal surveillance," saying, "[W]e'll talk about it in court." Further into the tape another cameraman appears and photographs Martinez as he operated his camera. In addition, toward the end of Martinez' tape several commercial television cameramen are seen, apparently gathering news footage.

The rally leaders sat at the table while others crowded around them. It appears from an early portion of Martinez' videotape that the crowd began to chant "We want Rick!" The chanting lasted for a few minutes, followed by a cheer when Plath appeared. Plath can be seen later in the video momentarily as he returns to the building. From the testimony of both Plath and August it appears that when Plath learned that Trumka was one of the officials, he went outside to greet him. Trumka did not know Plath and had to be convinced by bystanders that Plath had actually come out to meet him. The "Yakima Herald" took a picture of the two shaking hands. Apparently the encounter was so unexpected and so brief that August was unready to hand the demand for recognition letter to Plath although he says he attempted an oral demand. Either Plath ignored August or was engaged with Trumka. Plath denied speaking to August at all. Plath spent little time there and promptly returned to the building.

Martinez' tape does show that the crowd behind the table had spilled well into the street and that people were milling around on the roadway. It also shows vehicle traffic, both smaller vehicles and tractor-trailers attempting to negotiate their way through the crowd. There is no question that traffic was slowed to a snail's pace. In addition, there is testimony that smaller vehicles which entered the block at either end frequently decided to make a U-turn to avoid the crowd. It appears from the videotape, but not from the testimony, that after Plath appeared the table was moved from the office side of the street to the warehouse side. After the table was moved, traffic flow seemed to improve. It seems quite likely that the table had originally been placed on or partially on the roadway and needed to be moved.

The tape also shows, about the 15th minute, a large number of demonstrators, some with small children, entering the office

[18] Martinez is alleged in the complaint to be the human resources manager. Martinez has worked for Respondent for 11 years, starting out as a forklift operator and then working his way up into the office, translating, working on unemployment and workman's compensation claims, helping with the hiring paperwork and the like. He appears to be a capable young man. He had utilized video equipment as part of his job in handling workman's compensation issues.

en masse. Their activity is peaceful in the sense that no misconduct occurs, but it is also clear that their number far exceeds what would be expected to enter an office of that size. Those individuals are also seen to be leaving shortly after they entered. The purpose of the entry cannot be determined simply by viewing the tape.

From the table's new location, about 18 minutes into the tape, the Union decided to send Guzman and two other employees into the office with the written demand for recognition. The tape shows Guzman and two others running across the street, into the building and appearing to deliver some sort of paper. They exit shortly thereafter. Guzman says that the letter was given to her by August and she took it up the stairs. That letter has never been found.

In addition, Scheer says the Union made an effort to send an original of the letter to Respondent by certified mail, although there is no proof that it was delivered. The Union did not preserve a copy of the original. Despite those failures Respondent acknowledges that it received a fax version of the recognition demand on the following day.

2. Analysis

The complaint alleges that Martinez' videotaping the demonstration violated Section 8(a)(1) of the Act. It is true that the Board is rightly concerned about the coercive effect photography might have on employees who are engaged in protected activity. Such photography has been described as "pictorial recordkeeping" which would have the tendency to create the fear of future reprisals. *Waco, Inc.*, 273 NLRB 746 (1984). Furthermore, the Board has said that photographing in the mere belief that something "might" happen is not justified when balanced against the tendency of that conduct to interfere with the right of employees to engage in protected activity. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), citing *Flambeau Plastics Corp.*, 167 NLRB 735 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968), and *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). The Board quoted, with approval, the *Colonial Haven* court's statement that "the Board may properly require a company to provide solid justification for its resort to anticipatory photographing."

Despite that language the Board has taken a generally realistic view of photographing protected activity. Indeed, it has engaged in a balancing of interests approach. There are circumstances where photography has been found lawful in a variety of circumstances. Clearly picture taking of protected activity cannot be not a per se violation of the Act. *U.S. Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982). The Board has permitted photographs of pickets in circumstances where recent strikes have been violent, *Bozzuto's, Inc.*, 277 NLRB 977 (1985), and where it is necessary to preserve or collect evidence of illegal picketing. *Roadway Express*, 271 NLRB 1238 (1984); *Concord Metal,* 295 NLRB 912 (1989). The test is not whether the violence or illegal activity is actually occurring, but whether it is reasonably likely to occur. "Mere belief" that something might happen is not enough, but a belief greater than "mere" would seem to qualify as a justification. That requires a fact finder to undertake an assessment of what sort of belief the employer had at the time he ordered the photos to be taken. I do so here.

The entire demonstration was obviously planned very carefully. It required the presence of two high-ranking union officials who had to travel cross country. It required the gathering of individuals at a specific time at track 29. It required a scenario to be played at the site—here a symbolic bargaining table. It required an audience, and the news media were invited. Most importantly, it required an unsuspecting employer who would not be given time to duck. Thus, keeping any information about the plan from Plath was essential.

Indeed, the information which was relayed to Plath was minimal and came only the night before. Gempler had told him that a lot of people would be coming from track 29 accompanying some high-ranking union officials. He had a good idea that it was a Teamster-sponsored event. He could also conjecture that nonemployees would be involved. If he made that surmise, he was right, for well over half of the demonstrators did not work for him and he had no idea who they would be.

It is now clear that the Union had no intention of violence and, being a well-orchestrated demonstration, the Union may have had controls in place to thwart any misguided persons. If so, that information was unknown to Plath. All he had heard was that a lot of people would be marching on his plant. The information he had was not even known to be reliable. He was, as the Union wanted, mostly in the dark. He didn't know who the leaders were, he didn't know who the followers were, he didn't know their purpose and he didn't know when the march would begin, how long it would last or what they would do when they arrived.

It may even be conceded for the purpose of this discussion that Plath did not think that the company was going to be attacked by a lawless mob. Still, he had safety to think of. The area in front of the office is constantly used by employees crossing from one building to the other, the office itself is not secured by guards, the plant doors are usually open, employees are found in both places, expensive equipment is located just inside the door to the warehouse, and autos are parked in the spaces on each side of the street between the buildings. It would be an imprudent business practice for Plath to have ignored the property and safety issues that a crowd of unknown proportions and purpose would present. He had to take steps of some sort.

When he arrived at the plant in the morning he undoubtedly became aware that most, if not all, of the morning shift was at work and things seemed entirely normal. He didn't have a strike on his hands, but the day was still young and he didn't know what might happen. Without any immediate threat there was no point in obtaining security services or calling the police. Indeed, Plath probably had doubts that Gempler's information was correct. Maybe nothing would happen.

Still, he couldn't very well do nothing. He chose to take what he perceived to be an unobtrusive way to deal with the as yet ephemeral demonstration. That was simply to ask Martinez to videotape it if it took place. At the very least, he reasoned, if an untoward incident occurred, Martinez would be in a position to collect evidence about it. Clearly it was less coercive in the

circumstances than calling the police or bringing in security guards, not to mention more cost effective.

When the marchers actually arrived, almost the first thing which occurred was Scheer's noticing Martinez and deciding to obtain proof of his photography for herself. She instructed a colleague to take a picture of Martinez. Those two focused their cameras on one another in an amiable manner. Later, another person, probably an organizer, joked with Martinez that he was engaged in illegal surveillance and they'd "talk about it in court." Martinez' work also shows the crowd in the street as well as the traffic impedance. Still later, Martinez captured a large group entering the office en masse and then exiting. Most of the people throughout the video are shot from behind, and there are no instances where Martinez focuses on any one person except for those who deliberately sought to be photographed.

Keeping in mind that this entire demonstration was deliberate "street theater," I have great difficulty in concluding that Martinez' videotaping was actually coercive. Here, the Union planned a demonstration, invited the public, and invited both newspapers and local television stations to the event. It kept Respondent in the dark about its intentions and now complains that the Company's moderate response is censurable. The irony is self-evident. It seems to me that in a very real sense the Union is setting the Company up for a fall. It may even reasonably be argued that the Union was seeking to provoke some sort of illegal response from Plath for its own advantage.

Whether or not that is true, there is really no question, as I observed that the hearing, that placing a large number of persons in a small area such as this for confrontational purposes runs the risk that those individuals will not behave. Here, most of the individuals in the crowd had no real stake in the security of the area and its contents, such as automobiles, property and machinery. They were not employees whose livelihood depended on that property. Moreover, they were caught up in a social cause in which Respondent was being portrayed as some sort of wrongdoer, an exploiter of labor. It would have taken only one person, whether demonstrator or interloper, to have ignited the event.

Any reasonable person would have concluded, as Plath did, that there was a sufficiently high level of risk connected to such a demonstration to warrant some level of cover. In that circumstance, I am unable to conclude that Plath's decision to direct Martinez to videotape the demonstration was unreasonable. There is no evidence that Plath had directed Martinez to pick out specific employees to be photographed. Plath's concern turned out to be reasonably well founded. At least one incident occurred which might have become misconduct, the en masse entry into the office. Indeed, the vehicle hindrance which occurred might have resulted in an unfortunate incident as well. Had one of the demonstrators been struck by a car or truck, Martinez' videotape might well have provided evidence that Respondent was not legally responsible for the pedestrian's injury.[19]

Balancing the employees' Section 7 right to be free of coercion against Respondent's obligation to maintain a safe working area (including vehicle parking), even if that area crosses a public street, I conclude, based on the facts here, that Respondent's measured use of the video camera did not violate Section 8(a)(1) of the Act. Plath had legitimate reasons for videotaping portions of the demonstration.[20] Accordingly, this allegation will be dismissed.

K. Improved Health Plan Costs

1. Facts concerning the copayment decrease

For a number of years Respondent has provided its employees with health insurance through a plan known as PacifiCare. It provided coverage via multiple options. These options included medical/vision and medical/vision/dental coverage. It was available to the employee, the employee plus dependent, the employee plus spouse, or the employee plus spouse plus dependents. Each of the options requires the employee to pay different amounts, while the employer pays a separate amount of the total premium. The employee's portion is called a "copayment." This system was in place at the time the Union began its organizing drive in the Yakima Valley in 1996 and later when the Union obtain its first signatures from Respondent's employees in March 1997.

Curiously, not very many employees had ever signed up for the plan. Only 41 of the more than 300 employees (about 14 percent) have actually chosen coverage. Since the employee-only copayment is just $24 per month, such paucity is surprising.[21] Even if employees thought spouse/dependent coverage was too high, coverage for the breadwinner alone was (and remains) fairly inexpensive.[22]

It is uncontested that Respondent usually conferred additional benefits in May of each year. In May 1997, Respondent announced a 4-percent-across-the-board wage increase and also reduced the annual work hours required to qualify for vacation pay. The latter was due to the recent installation of more efficient equipment which had reduced the likelihood of employees qualifying for vacation pay under the old rule. Neither of these benefit grants is alleged to be unlawful.

At the same time, according to both Tommy Hanses and Rick Plath, Plath had become concerned that the level of the health insurance copayment was not competitive with that of other nearby packing houses. He contacted Don Reed of the Yakima Valley Growers-Shippers Association to ask him to

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[19] Workmen's compensation claims are not unheard of in demonstration injury cases assuming the injured party was an employee, whether protestor or bystander. Moreover, a negligence claim against an employer by a nonemployee injured in such a demonstration is hardly farfetched.

[20] After the incident, Plath told the local newspaper that he had been "wrong" to have videotaped the demonstration. Such a remark does not qualify as a binding admission on a question of law. It only amounts to a hindsight recognition that the demonstration had turned out to be peaceful. Had he known the Union's plan in advance, his decision to videotape might have been different.

[21] The copayment was $54 for employee and his/her dependents. For employee and spouse it was $82, while for employee/spouse/dependents it was $112.

[22] Observing that many of Respondent's employees are married women, my concern is likely without foundation if they are relying upon health insurance from their spouses.

survey the Association's members to determine the copayment other companies were offering. In late June, Reed responded by telephone advising Plath about the copayment rates of some of the other plants as well as that required by the plan offered through the Association. Plath asked him to put the information in writing and Reed did so in mid-July. At that point Plath became certain that the copayments required by Respondent were higher than what was being offered elsewhere in the industry.

Plath then turned the matter over to Tommy Hanses, instructing him to make adjustments. During the last week of July and the first 2 weeks of August, both Plath and Hanses were absent due to overlapping vacations. Hanses was able to complete proposed changes in the copayment structure before he left and put the proposal in Plath's inbox. It was there on Monday, August 11, when Plath returned. The evidence does not reflect whether Plath approved the proposal that day or the next. The following day, of course, was the day of the march and demonstration.

On Wednesday, August 13, Respondent distributed General Counsel's Exhibit 32, the announcement of the changes which Plath had approved. The employee-only rate for medical/vision coverage remained the same, $24 per month. For all the other options the copayment was reduced. Those reductions ranged from $8 to $25 for medical/vision coverage. For medical/vision/dental, the copayment rate decreases ranged from $8 to $52.

Between the date of the announcement, August 13 through December 1997, seven additional employees added themselves to the plan. Two of those chose employee-only coverage and did not benefit from the new copayment schedule. The remaining five had earlier filled out applications to join the plan and joined when they had worked sufficient hours to become eligible. That means that slightly more than 1-1/2 percent of the employees added themselves to the enhanced plan during that period. Yet, it is impossible to conclude that any of those were induced to join based upon the reduced copayment schedule, for they had signified their intention to so before the plan was changed. Moreover, the record does not show how many of the 41 covered employees had chosen coverage for family members other than themselves. As a result, the percentage of employees actually affected by the change is unknown, though we can surmise that it is less than 14 percent, since only 14 percent were covered at all.

Additionally, as Plath's and Tommy Hanses' testimony describing the manner in which the copayment matter was handled is unchallenged, I conclude that it occurred in the manner they described. Thus, it appears that beginning in May Respondent had some misgivings regarding the level of copayment the plan required and began to explore whether its levels were appropriate. It conducted an investigation which led it to the conclusion that adjustments were needed.

The issue then is whether Respondent's adjustment of the copayments was due to the Union's organizing effort[23] or whether it was a step which Respondent would have taken in the ordinary course of its business.

2. Analysis regarding the copayment benefit

It is almost self-evident today that if an employer grants a benefit in order to dissuade its employees from seeking union representation, he violates Section 8(a)(1) of the Act. The Supreme Court held in 1964 that such a grant during the pendency of an NLRB election petition was timed to influence the outcome of the representation election and a violation of Section 8(a)(1). *NLRB v. Exchange Parts Co.*, 375 U.S. 405. Although the case was decided in an election petition context, the concept was quickly recognized as applying to the organizing drive itself. See *Famous-Barr Co.*, 174 NLRB 770 (1969).

In addition, *Famous-Barr* applied the principles set forth in *McCormick Longmeadow Stone Co.*,[24] to an organizing campaign rather than simply to the preelection critical period. In *McCormick,* the Board adopted Trial Examiner Reel's decision which held: "[A]n employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act." See also *J. & G. Wall Baking Co.*, 272 NLRB 1008, 1012 (1984).

Indeed, in *American Sunroof Corp.*, 248 NLRB 748 (1980),[25] the Board observed that it "has long held that the granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. [Citations omitted.]" It went on to say that an employer can meet his burden by showing that the benefits granted were part of an already established company policy and that the employer did not deviate from that policy upon the advent of the union.

Later, in *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1091 (1984), the Board adopted Judge Brandon's statement that grants of benefit during union election campaigns raise a strong presumption of illegality. More recently, in *Holly Farms Corp.,* 311 NLRB 273, 274 (1993),[26] the Board said that it does not rely upon a presumption of illegal motive from such a grant, but will draw an inference of improper motivation and interference with employees' free choice from all the evidence presented and from the employer's failure to establish a legitimate reason for the grant.

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[23] There is no evidence that any of Respondent's managerial staff was aware that one of the items in the Union's signup petitions was health related. See the GC Exh. 20 series where the Union says the employer should agree to eight bullet points, one of which was "a livable family wage with quality health benefits and retirement with dignity." If improved health benefits was a union talking point with the employees, it was included with improved wages and mixed with a myriad of other issues. It is has not been shown that Plath was aware of any those points when in May he directed that the copayment issue be studied. Certainly the Union had not identified the size of the copayment as an issue. Therefore, he could not have been responding to anything the Union had said.

[24] 158 NLRB 1237, 1241 (1966).

[25] Enfd. in pertinent part 667 F.2d 20 (6th Cir. 1981).

[26] Enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. (1996).

Keeping these varying approaches in mind, I am obligated to find that the General Counsel has at the very least established an inference that Respondent's grant of the reduced copayment benefit violated the Act. It occurred after the Union's organizing drive was known to have begun. It was aimed at all its employees including those in the bargaining unit which the Union sought. Moreover, it occurred the day after a union demonstration in which it demanded recognition.

Since the evidence here only creates an inference and not a presumption, in order to rebut that inference Respondent needs only to present evidence showing that it would have done what it did whether or not the Union was on the scene or that it had a legitimate business purpose unrelated to union organizing. Here, I must conclude that its unchallenged evidence is sufficient to defeat the inference of illegality raised by the General Counsel. First, in May 1997, a time period during which Respondent normally focused on benefit increases, Plath put into motion a course of action whose natural end was the decreased copayment benefit. He began his investigation by contacting a local employer association to determine whether or not his company offered competitive copayment rates for its employees. That question was not definitively answered until mid-July.

In July, Reed provided him with the necessary written documentation which Plath and Tommy Hanses could follow. Hanses used it as a roadmap to propose changes which were consistent with the industry practices. Respondent is in competition for employees with dozens of other apple packers in the Central Washington area. It is an entirely appropriate business decision to become and remain competitive with like employers insofar as fringe benefits are concerned.

While it is true that in May, when Plath decided to investigate the circumstances, the Union was well into the process of collecting signatures, the timing of Plath's decision does not appear to be in response to the Union's activity. In addition, his announcement of the change on August 13 is fully explainable by the timing of when the written survey came to him, mid-July, Tommy Hanses' completion of the project and by the timing of their overlapping vacations. When Plath returned from vacation on Monday, August 11, Hanses' work on that project had been completed and was waiting in his inbox for action. All Plath did thereafter was to approve it and send it through the clerical process for finalization. That process no doubt occurred on Monday and Tuesday (perhaps interrupted on Tuesday by the march) with distribution of the notice occurring on Wednesday.

Furthermore, Respondent notified the employees in a neutral manner, as the notice (GC Exh. 31) made no reference whatsoever to the union organizing campaign. It appears to have been distributed in the same manner as all other normal employment matters were communicated to employees.[27] It all seems perfectly consistent with the Board's approach in *American Sunroof*, supra.

Finally, one cannot help but notice that the change in copayment rates affected only a few. Barely 14 percent of the eligible employees were covered by the plan from the outset. Fewer than that chose the type of coverage affected by the rate change. While the record is not clear, it seems likely that that number is less than 10 percent. In such circumstances, it is difficult to conclude that the change had a great impact on the employees the Union sought to represent.

Considering the entire matter as a whole, I conclude that the General Counsel's inference of unlawfulness has been rebutted. Both the purpose and the timing are credibly explained on neutral terms. Respondent proceeded as if the Union were not in the picture, thereby complying with the Board's rule in *Famous-Barr*, supra. The affected number of employees was quite small and Respondent never in any way connected the benefit to the union organizing. Moreover, no representation election petition was pending,[28] so the timing cannot be inferred to have been have been for the purpose of influencing an election outcome.[29] Finally, if Respondent were seeking to dissuade employees from union representation it would not have targeted such a small group. Under those circumstances, the conduct may not reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. Cf. *El Rancho Market*, 235 NLRB 468, 471 (1978). Accordingly, I conclude that this allegation of the complaint should be dismissed.

L. No-Solicitation Rule Enforcement

1. Pam Smith

Pam Smith has worked for Respondent for approximately 23 years. For the most part she has served as a sorter/packer. Since 1992 she has been paid forklift wages (a premium of about 70 cents per hour over packer scale) because she was on call to serve as a parts runner. This meant that Smith would report to her day-shift job, most likely packing, and would work at that task until called to pick up or deliver parts. She visited local vendors and suppliers and nearly every one of Respondent's buildings in both Yakima and Union Gap. She was often able to use a company pickup truck for that purpose, but sometimes was obligated to use her personal vehicle when the pickup truck was unavailable. She usually took instructions from Mel Sager. She is in her fifties and is considered a highly responsible employee.

Smith became active in union organizing early on. She was one of five or six employees who were particularly active. She solicited cards, attended union meetings, urged others to do so, and had responsibility for communicating union ideas to the English-speaking employees. She also wore union apparel, including union buttons and hats.

On September 4, Smith was called to deliver an electric motor to the Union Gap plant. That plant is used in the springtime, as previously noted, for cherry packing but it also serves to

[27] Employees did not connect the change to the Union's presence. Employee Pam Smith, one of the leading proponents of the Union testified:

> Q. (BY MR. CARROL) All right. Now with respect to the health plan, you don't know why, do you, the cost of the health plan changed?
>
> A. No.

[28] The Union did not file its election petition until November 20, over 3 months later.

[29] *B & D Plastics*, 302 NLRB 245 (1991), and cases cited.

store apples. When functioning as an apple warehouse, it is usually manned by two individuals. In September, those two were Clayton Johnson and Gabriel Villarreal. Johnson appears to be in charge of the plant and has described himself as a supervisor, although he does not meet the definition of a supervisor as set forth in Section 2(11) of the Act. At best he would be a lead person.

That day Smith had been obligated to use her personal vehicle for the delivery. The motor was heavy and had been placed in the trunk of her vehicle by someone else. When she arrived at the Union Gap facility she says she first encountered Villarreal who was outside near the entry. They greeted one another and Smith told him that she had a motor for Clayton Johnson. Villarreal called for Johnson who came outside a few moments later. In the meantime she and Villarreal engaged in some small talk. Johnson came out, lifted the motor from the trunk and then carried it inside. Johnson says she accompanied him into the warehouse speaking to him about the Union as they went, making him walk excessively slowly. She denies it, saying she remained outside. He says the workbench where he placed the motor was only 20 feet from her car, but that because of the baby steps he says she used, it took 2–3 minutes for him to reach the bench. I do not credit him on the point. The motor only weighed about 20 pounds and he could walk as fast as he chose to. Moreover, that distance would have been no impediment to her talking to him as she could easily have been heard over that distance even had she remained by the car as she said.

While there is some dispute about what actually occurred and what Smith said, it is clear from the evidence that Smith did not interfere with the work of either Villarreal or Johnson during this portion of the encounter. The small talk between Smith and Villarreal had apparently triggered Smith to take her break and she smoked and drank coffee while waiting for Johnson to take care of the motor. There is evidence that Villarreal turned the conversation to the Union as they waited for Johnson by saying that he liked Smith's union T-shirt. At some point when Johnson returned she asked both what they thought of the Union. Johnson says that he walked away at that point. Villarreal told her that he was happy with the job and got along well with Sager.

At some point, Johnson asked her if she could obtain an odd-sized bolt from the Eagle Hardware store located about two-thirds of a mile away. After some discussion, Johnson decided it would be best to send Villarreal with her so he could be certain that the correct bolt was obtained. The bolt was a replacement for one on the backrest of Villarreal's forklift.

Accordingly, Smith drove Villarreal to and from the hardware store, taking 10–15 minutes[30] to do so. I conclude that the trip took about 15 minutes. Whether the trip took 9 minutes as estimated by Smith, or 20 minutes, the maximum which would be expected, Smith clearly returned Villarreal to his workstation within an acceptable timeframe. During this period, Smith says Villarreal continued the conversation about the Union asking if having a union would mean more money. She says she told him that if he was interested he should attend a union meeting.

I limited Villarreal's testimony, which occurred on the 51st day of trial, to describing the length of the trip and what he reported to Johnson after it was over. It is apparent from the testimony of both Villarreal and Smith that there is some personal animosity between them. Furthermore, I found Villarreal to be more hostile to the proceedings than necessary. At some points he seemed to be evasive.

Indeed, although that trip might possibly have been accomplished in the 9 minutes of Smith's reenactment, realistically such a trip could be expected to take about 20 minutes without drawing any concern for the absence. Villarreal describes Smith as driving extremely slowly and prolonging the trip, even though he says it took only 15 minutes. Even if she did drive slowly I fail to see the point of his testimony unless it was simply to malign Smith. He did not return late nor is there any suggestion that any of his work was delayed as a result of slow driving. Villarreal's approach to describing the facts is questionable.

When Respondent's counsel asked Villarreal to describe what he told Johnson about what occurred, he gave some testimony which can only be described as missing the point. Instead of describing anything, he says he asked Johnson if Smith had asked him the same questions. Furthermore, he used words which seemed out of character for they have legal meanings. In fact, he admitted later that those words were not used during his conversation with Johnson. Villarreal testified:

> Q. (BY MR. CARROL) Okay. Near as you can recall, what did you tell Clayton [Johnson] about what had happened with Ms. Smith.
>
> A. (WITNESS VILLARREAL) I just asked him if she had asked him some of the same questions as—that she asked me. And that if he knew that, you know, what—what was going on as far as her soliciting on—you know, company hours—the union. Or organizing one.
>
> Q. Okay. So you asked Mr. Johnson that?
>
> A. I just asked him if he—if she had the same—if she asked him any of the same questions.
>
> MR. CARROL: Did you tell him that that's what she had said to you?
>
> MR. GIBBS: Objection, leading.
>
> ADMINISTRATIVE LAW JUDGE KENNEDY: Just—just—yeah. Sustained. What did you say? What did she say?
>
> Q. BY MR. CARROL: Oh, okay. What did you say in addition to what you've already said to Mr. Johnson about what Pam Smith said to you?
>
> A. He just said that—

[30] When the length of time involved in this round trip became an issue, Smith reenacted it, accompanied by NLRB Attorney Botero. Smith testified that the reenactment of the round trip, including a few minutes to buy the bolt, took 9 minutes and that the entire round trip was only 1.3 miles. Frankly, the brief time spent surprises me because Eagle Hardware stores (a regional chain in the Pacific Northwest) are large warehouse type stores. A customer would be extremely fortunate not to have to wait in a checkout line. I think Smith's original testimony that she took 10–15 minutes is more probable. Villarreal also says it took about 15 minutes.

ADMINISTRATIVE LAW JUDGE KENNEDY: No, what did you say?

THE WITNESS: I just asked him if he—if she asked any of these same questions.

Q. BY MR. CARROL: Okay.

A. And that it was kind of funny.

ADMINISTRATIVE LAW JUDGE KENNEDY: Well, okay, now, what—did you describe the questions to him?

THE WITNESS: I just told him that on top of that she had given me a ride over and solicitated [sic]—well, asked me if I knew—if I—how I would vote on a union and on to say other—asking me other questions about how I felt about it. I just, in response, told him that I told her I didn't want any damn union and that—then I'd asked him if he'd—if she'd ever tried any kind of crap with him, you know, if she ever—I told him that she'd put her hand on my leg and told me that they needed every vote they could get.

ADMINISTRATIVE LAW JUDGE KENNEDY: Okay.

Q. BY MR. CARROL: Okay. Just keep thinking, did you tell him—ha—have you told us everything that you reported to Mr. Johnson about what Pam Smith said or did?

A. Well, it's been such a while back that it's hard for me to recall exactly what exactly I said.

Q. Uh-huh.

A. But I just let him know what had happened, and I told him exactly what I had said, what I had stated. You know, and I asked him a question if—if she had any—any of the same questions for him or how he felt—

Q. All right.

A. About being harassed or badgered about—on—you know, during his working hours about the union.

. . . .

Q. Just focus in, Gabriel, and just see—see if you can remember any other words that you might have said to Clayton about that whole incident.

A. Just that I thought it was kind of crummy that she put her hand on my leg.

Q. All right.

A. And that I didn't expect that.

Q. Any—anything else?

A. That was kind of what really stayed on my mind. That was really all I could remember about the—the incident.

Q. All right. Did you tell Mr. Johnson that that was how you felt?

A. I just told him I felt crappy about it, yeah. And I thought it was uncalled for.

Q. All right. Did—did you use the actual word "solicited" or "solicitated" when you made your report, or did you say it [—] another word?

A. I don't think I said "solicitated." I think I just said that—that she tried to—"Did she try to ask you some of these same questions she asked me," and then I went on to say something like, I thought that it was, you know, a—a real point that I let it—I had to let somebody know—just that I had to let somebody know what was going on.

Johnson's testimony about what Villarreal told him is rather brief:

> THE WITNESS (CLAYTON JOHNSON): [Villarreal] told me that she was—she asked him to join the union and told him that he'd—asked him how much he made an hour and he told her it was none of her business, and said, "Well, you know, you'll—you'll make more wi—if the union comes in." And then he said that she grabbed him by the knee and gave him a little squeeze on the knee.
>
> Q. BY MR. CARROL: Anything else Gabriel reported to you about this conversation?
>
> A. That's all I can remember.
>
> Q. All righty. And did you say anything to Gabriel at that time?
>
> A. I said—well, I told him about the conversation that I had with Pam.

According to Johnson, he and Villarreal talked about what had happened and Johnson decided to report it to Tommy Hanses. Accordingly, he phoned Tommy. He testified: "Yes, I told Tommy everything that we just said . . . Yeah, everything that I—everything that Gabriel told me and—and my conversation with Pam."

A week later, on September 10, Tommy Hanses prepared General Counsel's Exhibit 37, a warning. Threatening discharge for a future offense. It states: "Pam was soliciting the union during work hours at the Union Gap plant. It is a violation of company policy to solicit during work hours. Future solicitation during work hours will result in dismissal." It was presented to Smith on September 11 and she signed it. She was also removed from the parts running job because, as Hanses said, "Well, being parts runner, she's able to leave the—the plant and go out to different areas of the warehouse and different facilities and she's not able to be under supervision when she's doing the job."[31] Simultaneously, Smith lost the forklift wage premium and was assigned only to duties within the warehouse.

2. The warnings to Maria (Chuy) Andrade, Rosa Salas, and Sonia Abundiz

On October 23, three packers were issued warnings by Tommy Hanses and Mel Sager. They were Chuy Andrade, Rosa Salas, and Sonia Abundiz. The warnings threaten discharge if a similar occurrence were to take place. The warnings are identical. They state: "Complaints from several employees for soliciting the Union during worktime."

Through an interpreter, Tommy Hanses explained, according to Sager, "He said . . . that the reason that they were—that we brought them up to the office was because of our no solicitation or distribution policy, and that there was some complaints from some of their co-workers that they were being harassed about the union." They were directed to sign the slips; if they did not do so they would not be permitted to return to work. Andrade became upset and called the Union to get advice. After speak-

[31] Sager did not immediately remove her from parts running, but did so shortly afterwards when Plath asked why she was still doing it. He told Sager that she needed to be removed from that job.

ing to someone there she signed, but wrote a protest at the bottom, saying that the accusation was not true. The other two signed as well, but did not write a protest.

According to Sager, the entire incident began the same day when Day-Shift Sorting Supervisor Sheri Dallman[32] advised him that five employees had complained to her that they were being harassed by Andrade, Salas, and Sonia Abundiz regarding the Union. He said: "Sheri just—she told me there was a problem in the sorting booth, and I go, 'What's the problem?' and she said some of her ladies had complained to her about while they were working they were getting harassed about the union, signing up for the union." According Sager, he understood Dallman to be saying it wasn't the first time. He reports Dallman saying, "that the ladies didn't want to say anything, because they were afraid of retaliation from these ladies—these other ladies." He recalled two of the five complainants as being Flora Zink and Maria de Bautista but was unable to recall the others, assuming Dallman actually mentioned them by name.

Almost immediately, Sager called Tommy Hanses on the phone to report what Dallman had said. He testified, "I told him that Sheri Dallman just—just left my office and said that there were some complaints about some of the ladies during working hours harassing the—harassing some of the other ladies about union—about the union." He reported, too, that it wasn't the first time.

On cross-examination he testified:

> (BY MS. BOTERO) And now, you testified that Sheri told you that these three women were harassing other employees about the union. And I believe you also testified that they were talking to them about signing up for the union. Do you recall that recent testimony you gave?
>
> A. Yeah. Signing cards or something. They were stupid if they didn't.

The parties stipulated that in his NLRB affidavit Sager never mentioned anything about these three employees relative to signing cards. However, I do not think the witness was embellishing here. Instead, he was recalling that the "harassment" consisted of one or more of the three employees telling the others that they were 'stupid' not to sign. Indeed, there is no suggestion that any of the three had actually handed signature petitions to any of the five during worktime. In fact, Sager seems to have understood that the entire incident was only one of union talk.

How much of that understanding found its way to Tommy Hanses is not clear. Even so, Hanses never spoke to Dallman to find out what she had observed first hand; neither did he speak to either the five "harassees" or any of the three "harassers" to inquire about what had happened, if anything. Instead, he immediately drew up the warning slips.

3. Analysis regarding no-solicitation/no-distribution rule

While the fact patterns are somewhat different in the two incidents described above, Respondent has dealt with them in an identical fashion. It has concluded that both incidents constituted violations of its no-solicitation/no-distribution rule. Indeed the rule might also be characterized as a "no-solicitation, no-distribution, no-promotion" rule. The prohibition on promotion, together with a lack of understanding regarding what constitutes solicitation, has led to a restrictive view of what the rule actually bars. Respondent has argued that talking about the Union is solicitation as intended by the rule. Respondent's contention is unpersuasive. Indeed, Respondent has no blanket rule prohibiting talking on the job.[33]

First, it should be understood that the while Section 7 appears to grant employees the absolute right to engage in union organizing at all times and in all places, both the Board and the courts have recognized that working time is for work and employees do not have the authority to set their own terms and conditions of when they will work and when they will not. Indeed, Justice Frankfurter said in *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 362 (1958): "Employer rules prohibiting organizational solicitation are not in and of themselves violative of the Act, for they may duly serve production, order and discipline." The Board has long approved of such rules. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); and *Our Way, Inc.*, 268 NLRB 394 (1983). The last is the Board's most recent clarification of its recognition that "working time is for work." It is therefore clear that the primary, if not only, purpose of such a rule is to keep employees at work when they are supposed to be working. See also *Gooch Packing Co.*, 162 NLRB 1, 6–7 (1966), where Trial Examiner Goerlich said in discussing the factors to be considered to make out a violation: "(5) Prior to the advent of the Union a breach of the so-called no-solicitation rule was limited to interference with production; thereafter, 'talking union' became a breach even though it did not constitute an interference with production. [Footnote omitted.] (6) At the time the so-called no-solicitation rule was invoked there was no evidence of the impairment of production by union solicitation."

Two things can be gleaned from Trial Examiner Goerlich's commentary. He first makes the point that such a rule's purpose is to prevent disruptions to work; second he says that if the rule is applied as a warrant for interfering with the Section 7 right of employees to talk about the union, such an interpretation will be deemed to be unlawful absent a showing of actual interference with an employee's work. Therefore, the fact that a lawful no-solicitation rule may be established does not mean that its enforcement cannot be unlawful. The Board has faced the problem frequently.

Often the question depends on how an employer defines the word "solicitation. Here, Respondent has characterized solicitation" to mean talking about the Union during worktime. In two cases Judge Dyer was faced with the same question. Both

[32] Dallman was called as a witness by the General Counsel, but was not asked what, if anything, she knew about the events leading up to the warnings.

[33] The evidence is clear that employees who work on the lines talk to one another almost constantly throughout the day. Other workers also talk to one another although the circumstances may be more difficult due to the nature of their jobs. It is simply more difficult for forklift operator to talk to another forklift operator as they drive around the facilities.

analyses were adopted by the Board. The first was *International Signal & Control Corp.*, 226 NLRB 661, 665 (1976). There he said:

> The word solicitation is used fairly loosely in a number of areas. Here "solicitation" is defined by Supervisor Jacobs as meaning talking favorably for a union. *Solicitation ordinarily means that someone is asking an employee to join union by signing a union authorization card; similarly, charitable solicitation means asking someone to contribute to a charitable organization or in the commercial context exhibiting a product or a picture of a product and asking the person to buy it. That is not the same thing as talking about a subject.* Tuley's talk to Trostle, Scott, and Frey did not occur after an investigation which led Respondent to believe they were guilty of violating company rules, but rather was a blanket warning to them not to "harass" employees by telephone calls to their homes or by solicitation during working hours. Tuley's definition of harassment included a person saying something to another person which the second person did not want to listen to or which irritated that individual. While Tuley may have thought he was justified in his comments from what his supervisors allegedly told him, it would appear from the context that Tuley overspoke himself, since the implicit accusations were not founded on knowledge of the guilt or innocence of the three employees on everything of which he accused them, and they were discriminatorily inhibited by his speech from exercising their Section 7 rights. I conclude and find that Tuley's speech to the employees and Respondent's discriminatory application of the no-solicitation rule both violate Section 8(a)(1) of the Act. [Emphasis added.]

Later, in *W. W. Grainger, Inc.*, 229 NLRB 161 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978), Judge Dyer analyzed it this way:

> The main question in this case is whether Respondent discharged Talaber for "soliciting for a union" or for merely talking about a union and if such action was taken in enforcement of its no-solicitation rules. A supportive question thus raised is, "What is solicitation?" From the evidence in this case it seems clear that Respondent equated talking about a union with "solicitation" and once it found a "solicitation" violation which it felt was "flagrant," moved to discharge the main union proponent. Therefore, it has been found that Respondent promulgated and enforced overly broad, invalid no-solicitation rules in violation of Section 8(a)(1) of the Act and, by using its definition of "solicitation," discharged Talaber in violation of Section 8(a)(1) and (3) of the Act.
>
> . . . .
>
> It should be clear that "solicitation" for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad. *"Solicitation" for a union usually means asking someone to join the union by signing his name to an authorization card in the same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization or having the employee sign a chance book for such a cause or in the commercial context asking an employee to buy a product or exhibiting the product for him from a book or showing the product.* [Emphasis added.]

Clearly it takes something more than just talking to qualify as "solicitation." Obviously the Board, accepting Judge Dyer's analyses, agreed that somehow work had to be stopped by the alleged solicitor to make out a violation of the rule. It is here where I have trouble with Respondent's "no-promoting" portion of its rule. Rather clearly if solicitation requires an interference with someone's work, "promoting" a cause does not. Promoting can be, and most likely is, through talking. Therefore, when it says it is barring solicitation, defined simply as talking, it is also invoking the rule against promoting a cause. Both bar talking.

Although in theory it is conceivable that a valid rule against any talking whatsoever during worktime might be valid, for its purpose might be to enhance production, in practice it is not very likely, for a no-talking blanket would be impossible to enforce at most businesses. In any event, company rules which prohibit talking about the union during work while permitting talk about any other subjects violate the Act. *Jennie-O Foods*, 301 NLRB 305, 316 (1991); *Meijer, Inc.*, 318 NLRB 50, 57 (1995). Indeed, where an employer imposes a restriction on employees' conversations, it violates Section 8(a)(1) of the Act if the talking restriction applies only to union-related talk. *Opryland Hotel,* 323 NLRB 723 (1997), citing *Teksid Aluminum Foundry,* 311 NLRB 711, 713–714 (1993); *T & T Machine Co.,* 278 NLRB 970 (1986); *Orval Kent Food Co.*, 278 NLRB 402, 405 (1986); and *Cerock Wire & Cable Group,* 274 NLRB 888, 897 (1985).

In one of the two incidents described above Respondent made an effort to demonstrate that the so-called solicitor interfered with the work of two other employees. In the other, it made no significant effort, only attempting to characterize the employee conduct as "harassment." Indeed, in the latter incident Respondent made no real effort to investigate what had actually happened.

In the Pam Smith incident, Johnson asserted that Smith somehow impeded his reentry into the building while he was carrying the motor. However, even under his version her so-called baby steps could not have appreciably slowed him. He only had to walk about 20 feet in total. How Smith could have slowed him down from that task escapes me. Assuming she was talking about the Union the same time she was accompanying him hardly qualifies as any sort of interference with his duties.

Similarly, Villarreal's testimony fails to persuade me that anything untoward occurred. Johnson directed him to ride over to the Eagle Hardware store a short distance away to obtain a part. During the drive, according to him, Smith asked him questions about his pay, suggesting that union representation could possibly increase the amount. He says that she somehow interfered with his personal space by placing her hand on his knee to emphasize the need for unionization. This interference, he says, constituted harassment. Moreover, he asserts that she deliberately drove slowly so that she could extend her conversation with him.

First, Villarreal is 34 years old, is 6-feet tall and weighs about 250 pounds. Smith is in her 50s, is of relatively slight build and hardly an imposing figure. However, she is a persistent individual. I have no doubt that Smith pursued Villarreal for the purpose of having him sign up with the Union. There is no evidence, however, that she presented him with such a document. Indeed, there is no evidence that she had such a petition with her at that time. Instead, her efforts were simply talk. She sought to persuade Villarreal to attend a union meeting if he wanted to learn more about the benefits of unionization. She undoubtedly did inquire about his wage, no doubt asserting that it could be better through collective bargaining.

For some reason, Villarreal, despite his own assertive personality, was unable to stop her from continuing her inquiry. He claims that he told her he did not want to talk about it, but if he had, I think she would've honored that request. She did not testify that he made such request and it seems unlikely that the request was ever made. Certainly their conversation did not slow their progress to and from the hardware store. The entire round trip, including the purchase, took only 15 minutes. It would have been unrealistic for Johnson or any manager to assume that the trip could have been shorter. Therefore, insofar as Respondent is concerned, Smith's errand with Villarreal was carried out in a timely manner. No interference with production occurred. Therefore, Respondent's contention that Smith interfered with Villarreal's duties is misplaced.

Moreover, Villarreal's contention that she somehow harassed him is unpersuasive. At worst she earnestly urged him to consider learning more about what the union could or could not do for him. Patting him on the knee could hardly have been mistaken for anything other than in an altruistic and charitable way. A reasonable acquaintance, would not have taken it any other way. I do not think that Villarreal actually responded to her overture in the self-offended way which he describes. In fact, Johnson did not describe Villarreal's reaction in such terms.

I conclude that all Smith did during these two encounters was to speak about the Union and its benefits in a persuasive way. She did not interfere with their work nor did she take an excessive amount of time so far as her own work was concerned. Respondent's warning to her was therefore unlawful and in violation of Section 8(a)(1). She did not violate Respondent's no-solicitation rule. In effect, Respondent was imposing a no union talk rule against Smith. Such a rule clearly violates the Act. See *Opryland Hotel*, supra. Her demotion immediately followed and, because it was connected to the improper application of the no-solicitation rule, it too, violated Section 8(a)(1); moreover, since she was demoted for engaging in the union activity of talking about the Union, protected activity, the demotion became a hire and tenure issue within the meaning of Section 8(a)(3);[34] thus, her demotion violated Section 8(a)(3) as well as Section 8(a)(1). *Direct Transit*, 309 NLRB 629, 633 (1992).

[34] Sec. 8(a)(3) of the Act states in pertinent part: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage union membership in any labor organization."

The same observations can be made for the warnings issued to Andrade, Salas, and Sonia Abundiz. The only report which was made about the incident came from Dallman who did not testify about the incident. Moreover, there is no evidence that any manager spoke to the five offended employees or to the three employees who were penalized about the incident(s). Sager simply accepted Dallman's word that five employees had complained that they were being harassed about the Union, but made no effort to determine what constituted the harassment. Instead, he concluded that their talking about the Union qualified as harassment. Again, no effort was made to determine the actual facts. Instead, Respondent invoked the no-solicitation rule. It interpreted that rule to bar union talk. There is, of course, absolutely no evidence that this talk interfered with the work of any of the sorters on the line. Moreover, Sager's secondhand recollection that one of the women may have told the five complainants that they were "stupid" not to join the Union cannot be characterized as anything other than part of the debate over whether or not the employees should unionize. It did not carry any threat, but was only the expression of an opinion. In that circumstance, the warnings violated Section 8(a)(1) of the Act. They also violated Section 8(a)(3) of the Act, for the warnings weakened the tenure of these employees, having been threatened with discharge upon receipt of the next warning. *Litton Microwave Cooking Products*, 300 NLRB 324, 325 (1990). Their tenure was lessened because of their protected union talk. *Jennie-O Foods*, supra; *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1028 (1996); *McClain of Georgia, Inc.*, 322 NLRB 367 (1996).

M. Christina Bautista and Rigoberto Flores

Rigoberto Flores was hired in October 1997. He was assigned to the cold room under the direction of Christina Bautista. He testified that sometime in November, apparently during the last 2 weeks of the month, he and two other cold room employees, Martin Alvarez and Clemente Gomez, halted work momentarily to discuss how certain tasks should be shared. Bautista saw them talking together and, according to Flores, told them that she "did not want them having any union meetings there in the cold room." None of the three responded and Bautista then approached a fourth worker, Antonio Salazar, who had been working off to the side. He had not been a part of the group and had not participated in that conversation. Nonetheless, Salazar was known by Bautista to be a union adherent. Salazar regularly wore union paraphernalia and clothing.

Flores testified that Bautista spoke to Salazar for a few minutes, although he was unable to hear what she said, and then returned to where the group was still standing. He recalls her saying, "Antonio Salazar had made her upset with him, and she would like to be a man so that she could take out her anger with him."

Neither Bautista nor Salazar testified about the incident.

The General Counsel contends that this event constituted an unlawful interrogation and a threat against employees because of their union sympathies and the union sympathies of other employees. Respondent asserts that Flores' testimony fails to make out an 8(a)(1) violation of any kind. It argues that

Bautista was simply urging employees to return to their work, reminding them that union activity was not permitted during worktime.

I view the matter somewhat differently. Rather clearly Bautista saw the three speaking together and observe that they were not actually working with the apple pallets to which they were assigned. Instead of asking why they had stopped, which would be the first line supervisor's normal question, she told them that there were to be no union meetings while working. Whether she intended it as a jest, or was referring to their attending union meetings, or intended it as some sort of gibe at Salazar is unclear. I do not agree with Respondent that her remark was simply the enforcement of the no-solicitation rule or direction that employees should not stop working. It seems to be more than that. If she had simply wanted the employees to return to work, she would have said something to that effect. Instead, she seems to have wanted to send a message. I think the most likely message that she was sending was "I have instructions to keep people from talking about the union while they are working. If I see groups of people talking I will assume that they are talking about the Union even if they are not, and they are subject to discipline for doing so."

Unlike the General Counsel, I do not find her remark to have been an interrogation. It was not intended to, and did not, solicit any response. Nor did it get one. Instead, the remark was intended as an intimidation, even if it was meant as a bad joke. In essence she was threatening employees with discipline in the event that they were perceived to be talking about the Union at work. In a very real sense, her remark was a continuation of Respondent's view that it was against the no-solicitation rule to talk about the Union during worktime. Plath, Tommy Hanses, and Mel Sager had interpreted similar conversations in the same fashion over the previous 2 months. Employees talking among themselves, particularly in circumstances where managers could not hear, had become something to fear.

I observe that the Union had filed its NLRB election petition on November 20, shortly before this conversation occurred. During this time Respondent was beginning to construct its campaign to persuade the employees to vote against union representation. It was sensitive to any debate occurring in the workplace in circumstances which it did not control. For that reason Respondent wished to squelch union conversations among the employees. It knew that it probably could not interfere with two employees talking, but it knew that if more than two were talking such a conversation would have a greater likelihood of being about the Union than any other. That is what attracted Bautista to the conversation in the first place—three employees were conversing and Bautista could not hear what they were saying. Without waiting for an explanation, she injected herself and Respondent's policy of interdiction into the conversation.

Accordingly, I conclude that Bautista's comment constituted an unlawful threat within the meaning of Section 8(a)(1).

Insofar as Bautista's commentary on Salazar is concerned, I find that it is not cognizable under the Act. Flores did not hear their conversation and could not testify about it. When she returned, sputtering about Salazar, her remark was not associated with the Union in any way. Salazar was an energetic union activist and was no doubt wearing his union paraphernalia, but whatever conversation she had just had with him is unlikely to have been union related. If it had been, she would have said something about it to the three whom she had just threatened. To the extent the complaint is aimed at her anger against Salazar for unknown reasons, the evidence is insufficient to warrant any unfair labor practice finding.

N. The Discharge of Ana Guzman

On November 12, Respondent discharged Ana Guzman following an incident which had occurred the previous evening. The discharge slip, signed by Tommy Hanses, describes the reasons given: "After a thorough investigation it is clear that Ana Guzman purposely [sic] let a tray of apples fall to the ground at 11:20 p.m. last night. She has had repeated oral warnings and a written warning stating that this is absolutely prohibited and will be discharged if this occurred again." Guzman signed the slip under protest asserting that the real reason was her union activity.

The explanation in the warning slip is somewhat misleading. First, there is no evidence of "repeated oral warnings" in this record and second, as noted previously in section G, the written warning given her on August 6 was for reasons prohibited by Section 8(a)(3) and (1). Second, it is true that Guzman at some point appears to be willing to risk her job in favor of becoming the Union's *cause celebre* (the September 9 warning) and she is quoted by some coworkers as having asserted that employees should not work so hard and that they should let apples fall in circumstances which would demonstrate that there were not enough workers to perform the job. The issue here, however, is whether or not Respondent correctly assessed her conduct as purposeful when it discharged her. If so, the Act will not protect her. If not, I must determine whether Respondent's evidence is sufficient to rebut the General Counsel's prima facie case of discrimination as set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The underlying facts are not in dispute. That evening Guzman was working at the end of line 35 where it was her duty to pick apple trays from the conveyor belt, turn, and slide the tray into a prepared shipping carton. The conveyor belt lines are in pairs. Thus, she was working on the right side of the 34–35 pair and immediately to her right (as she faced the length of the belt) was line 36. Its pair, line 37, was not operating that evening. Usually, each line has two persons assigned to it, the packer (Guzman) and an apple turner (arranger). The employees switch positions every half hour or so. When the incident occurred, about 11:20 p.m., Maria Cristina Herrera was arranging apples on Guzman's line. In addition, Herrera was being assisted by Ramona Castillo whose primary duty was to pack line 36. Line 36 was running slowly that evening, apparently because Castillo was the only one assigned to it. As a result she was able to both arrange and pack trays on line 36, but still had time to assist Herrera as line 35 was running much faster.

On the other side of Guzman were Olivia Suarez, the packer on line 34, and Antonia Fernandez who was packing line 33. Above them on the catwalk were the regular supervisors

Guillermina Delgado and Frederico Gonzalez, who really did not observe the incident being several feet away. However, one of the sorting supervisors, Kirk McGarity, had joined them and was standing immediately above Guzman. He says he was there "killing time."

Unnoticed by Castillo, a tray of apples moved down line 36. As it neared the end, McGarity called out to Guzman, the person nearest the end of line 36 to warn her. She did not respond and the apples fell into the carton, although some may have fallen onto the floor.[35] There is a great deal of conflicting evidence regarding what had actually occurred. McGarity concluded that Guzman had purposefully let them fall. She testified, in essence, that she heard him yell about the same moment she heard the tray fall and that she was attending a tray of her own and could not have reached line 36 in time to prevent the spillage.[36] Moreover, she added, it was not her line. Indeed, Castillo made a futile effort to catch the tray as well. In answer to McGarity's asking Guzman why she wasn't watching, she simply replied she hadn't seen it. He persisted and asked again. She said, "I didn't see the apples and it wasn't my line. I didn't see when the apples fell."

McGarity reported what he had seen to Eric Hanses who then began an investigation of what had occurred. On Eric's request, McGarity gave him a written statement. The following day employees who had been working nearby were called to the office to give statements as well. Eric did not seek an explanation from Guzman because he incorrectly believed that her only response was that she had said it was not her line. He then sent Guzman home for the remainder of the shift.

Later, based on his assessment of the statements, Tommy Hanses decided to discharge Guzman. At the time he made the decision Tommy Hanses knew that the evidence conflicted, even without Guzman's version, but concluded that since there was evidence that she had declined responsibility for line 36, and she had supposedly offered no other explanation, that McGarity's assessment was probably correct. In fact, however, Guzman's full explanation was ignored as was Antonia Fernandez' supporting (and corroborating) statement.[37] It is certainly true that Guzman said that the line was not hers, but she also said that she had not heard McGarity in time and had not seen the tray. Furthermore, he discounted Castillo's attempt to accept responsibility.

One thing which Tommy Hanses did not do was to recognize that line 35 was moving fast enough to warrant three, instead of two, workers. Castillo did not leave her line to help Herrera without reason. That being the case it is entirely likely that Guzman was extremely busy loading trays into the cartons and had little opportunity to watch for problems on other lines. Another thing he did not do was to scrutinize McGarity's statement. On its face, it has at least one serious problem. In the statement McGarity says that he only yelled, "hey!" at Guzman and that she did not move in response. Since he was not her supervisor, his was a call by an uncustomary voice, one which did not even direct her to look at line 36. Moreover, her lack of response is perfectly consistent with someone who was either busy, who didn't heed for a moment or who did not instantly recognize the shout was directed to her. If she had responded to such a yell, it would have been to look up at him on the catwalk, not to a line to which she was not assigned. Under McGarity's own version, set forth in his note, it is entirely likely that McGarity's shout either occurred too late to catch the tray or was so vague or poorly instructive that it did not allow Guzman time to realize the tray needed to be caught. Hesitation, not action, was the natural response to such a call, even if it had been heard in time. Yet, Tommy Hanses did not consider that fact at all.

During the hearing, McGarity's testimony rendered his entire factual description even more unworthy of reliance. McGarity acknowledges that he didn't observe who was helping on Guzman's line; he had not noticed either Herrera or Castillo as they turned line 35 apples. That failure suggests that he wasn't really watching very carefully.[38] While that is understandable since the area wasn't under his supervision and he was only "killing time," it seriously undermines both his testimony and the claim in his statement to Eric Hanses: "It was obvious that she knew the trays were going to fall." It is evident that McGarity's perception of what had transpired is suspect.[39]

Finally, in failing to interview Guzman herself, Hanses blinded himself to any defense she may have had, even though he had the evidence of one witness (Fernandez) who had heard Guzman in English utter more than the denial of any obligation to line 36. Fernandez had also heard Guzman say she hadn't seen the tray. Hanses discounted Fernandez' version simply by looking at the statements of the other employees, most of whom were not able to understand or see what had actually happened. It would also appear that Guzman had not helped herself with at least some of her coworkers by earlier making remarks to the effect that line personnel should let apples fall in circumstances where the lines were undermanned. That attitude led many of her coworkers here to simply believe that she had carried out

[35] Fallen apples are considered culls, even if they fall into the box.

[36] I accept as a fact that line employees are obligated to assist other line employees when needed and as those needs are observed. Having accepted that as a plant practice, however, it does not follow that responsibility for the work of others falls upon an employee who might be in a position to assist where her own work would be disrupted and endanger the product for which she is primarily responsible.

[37] Fernandez' statement says that when McGarity yelled, Guzman responded that she was "taking care of my line and I didn't see that they were dropping from the other line." She also testified consistently with her statement: "She [Guzman] only replied, [to McGarity] 'I was packing on my line only and I didn't see that the apples were going to fall.'"

[38] McGarity also expanded the simple "hey!" of his note to Eric to "'Hey, Ana, go'—this is just out of memory; I'm not sure of my exact words, but 'Hey, Ana, those are going to fall; go get those.'"

[39] Adding even more confusion, and further lessening McGarity's credibility, is his statement to Eric Hanses as they discussed what had happened, that he had been watching the tray as it came down the conveyor wondering when Guzman would notice it. Had the tray become some kind of amusement to him as he idled there? Why didn't he call attention to it sooner? If he had, perhaps Castillo would have seen it and taken care of it. Moreover, why didn't McGarity include that observation in his note to Eric? If he had, what would Tommy Hanses later have made of such information? Was McGarity setting Guzman up for a fall?

that opinion in not stopping the fall from line 36. Their feelings appear in their statements, but they cannot be accepted with confidence as eyewitness reports. Indeed, Guzman's viewpoint, to the extent it was known by management, may have been used in part as a justification for the shallow analysis which Tommy Hanses gave her in this incident.

However, keeping in mind that the earlier warning to Guzman was discriminatory, in November she was in greater danger for discharge than she should have been. Her tenure had been illegally weakened and she was at risk for any legitimate incident which would warrant discharge for a second like event as well as for a second discriminatory discipline. Noemi Mendes, Guzman's coactor in the first apple-dropping incident, was not at the same level of jeopardy, even though both warnings were their first for that type of conduct. Therefore, it is inescapable that Respondent treated Guzman more harshly here than it would have treated Mendes had she been on line 35 that night and reacted the same way. Mendes was not at risk for discharge, because she had been given a lesser level of discipline in the earlier incident.

This leads me to conclude that Respondent's discharge of Guzman was for an illegal reason. At the very least, her tenure had been unlawfully undermined so that a second apple-dropping offense would be treated more harshly than a warning. Independent of that, Tommy Hanses' treatment of her for the line 36 incident was less than fair. He did not ask her version, he relied on a supervisor whose report was suspect and he relied on the versions of coworkers who, for the most part were busy at their own lines and either did not see, or could not have seen, what had happened. Nor did they understand (or even hear) what Guzman actually said to McGarity. They were doing their own work. In discounting Fernandez' corroboration, he also ignored the fact that McGarity later scolded Guzman in English and Guzman responded in (broken) English. Fernandez, though Spanish-speaking, has taken classes in English and had a better ability than any of her coworkers to understand what Guzman, at least replied. Tommy Hanses should have given her version superior weight.

The Board has often held shoddy investigations such as this to be evidence that an employer was using such an incident to justify an illegal discharge. *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988); *Hickory Creek Nursing Home*, 295 NLRB 1144, 1159 (1989); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); and *Woodlands Health Center*, 325 NLRB 351, 365 (1998). I find that analysis to be applicable here.

O. Maria Abundiz

1. Facts

Maria Abundiz is an immigrant from Mexico. She has lived in United States for over 20 years and toward the end of 1997 had been employed by Respondent for approximately 8 years, mostly as a sorter. She speaks very little English. She has an adult daughter, Trinidad Rivera, who, at the time of the hearing, had recently graduated from Central Washington University in Ellensburg and had just begun teaching kindergarten in Walla Walla. During her 8 years of employment with Respondent, Abundiz has neither been counseled nor disciplined for her work performance.

Abundiz is 1 of about 15 employees who comprised the core of union organizers. She had begun wearing a union T-shirt in April and wore it about three times per week. She was involved in nearly every employee protest or rally which occurred at the plant, including the Union Gap luncheon on June 30, the August 12 recognition demand rally (where she carried a banner), and the protests involving Diaz and Smith. Her union sympathies and activities were well known.

Once a year, according to Rivera, Abundiz would return to Mexico to visit her mother. In late October 1997, Abundiz sought permission from Eric Hanses (assisted by an employee who often interpreted) to take 4 weeks off for that purpose instead of the two normally allowed by the Company. She told him that she would not lie to him (as she believed others had) and claim some sort of emergency justifying an extended absence. She simply asked for 2 additional weeks. There is very little disagreement regarding what Hanses told her. He said:

> I can only give you two weeks off for vacation. And if you go longer than two weeks, you know, that's it. You'd be—you'd be fired. And she replied back to me that, "I'm being honest with you. I'm not going to lie like some of the other people who say that they have emergencies." And that—she informed me that she was driving down, and so she needed more than two weeks. I told her, "I'm sorry. I can't give you more than two weeks leave. After that two weeks is up, you will be replaced." At which point, she asked me if she could, when she came back, come and check for work . . . I said, "I'm not going to guarantee you a job when you come back.". . . She said, "Thank you. I'm going to be leaving. I'm going." She told me, "I'm going.

Her version is not much different:

> I told him that I was not lying to him, telling him that it was an emergency, that we wanted to go to the family and go to Mexico. So then Eric told me if I was going to take the four weeks, and I answered him "Yes," so then he said, "Okay, maybe when you return you'll have to wait for your job." . . . The reason I told him that I was telling him the truth was because there were other people that would leave, and they would tell him that it was because of an emergency, and they would leave and then when they came back, they would have their job, but that I was speaking to him the truth.

Abundiz left as planned and did not return to Yakima until early December. On December 4, accompanied by Rivera, Abundiz decided to inquire about her job. About 5 p.m. that day the two arrived at the plant office and spoke with Eric Hanses. Rivera did not serve as a word-for-word translator, but had discussed with her mother earlier what she would say to Eric Hanses. She testified:

> I said that my mom was back from Mexico, and she would like to know when she could start working. Eric then said that her position was already filled, so she was going to be able to—[he] didn't need her. So then, I said, "Well, can we come back and just be checking to see when another position opens up? And he said that that wouldn't be necessary because she took a long time—she was—she left to Mexico—from Mexico, and she took a while to come back, and that she wasn't a

> very good worker. He said, and I quote, "And besides, she's not a very good worker."

Eric Hanses' version:

> Her daughter informed me that, "My mother is back." She said, "My mom is back. Do you have work for her? Is her job still available?". . . . I said that—that there was no—that I had—I said that her job had been filled. . . . The daughter said, "Well, can my mom—should she come every day and check?" And I said, "No, tell her not to bother to come in." And her daughter asked me why. "Why shouldn't she come back in?" And I said to her, "Frankly, your mom is not a very good worker, and I'm not going to rehire her."

At that point the two engaged in a short argument. Rivera observed that Abundiz had worked for the Company for 8 years and then recalled that during an April conversation Hanses had said, in essence, that Abundiz was a valuable worker, having given her long experience as a reason for denying Abundiz the opportunity to transfer to the day shift. He denied the assertion. At that point, Tommy Hanses, who had been on the telephone nearby interjected, saying, "They know why she's not going to come back to work. . . . Don't talk to them any more."[40] At that point Rivera and Abundiz both left.

There is a testimonial difference regarding what was said in the April conversation, but I do not believe it necessary to specifically resolve it. Whatever may have been said in April bears little upon what occurred in December for the contexts are quite different.

Eric Hanses testified that after 2 weeks had passed in November he replaced Abundiz by hiring a new employee named Sara Perez. He considered Abundiz to be a quit. Company records show her termination date to be October 31, 1997.[41] In fact, what transpired here is best described as "job abandonment." Rather clearly, Abundiz knew from what Eric Hanses had told her at the end of October that if she took more than the 2 weeks allowed under company policy, it was likely that she would be replaced and unable to return. She knowingly risked her job to take 4 weeks of vacation instead of the allotted two.

2. Analysis

Before analyzing the factual circumstances, it is appropriate to review the allegation in the complaint insofar as it relates to Abundiz. Paragraph 13(d), as amended, asserts "About December 4, 1997, Respondent refused to reinstate its employee Maria Abundiz." Rather clearly, the complaint does not allege that Abundiz was unlawfully discharged; further it does not allege that Respondent refused to "rehire" her. Instead, it alleges that it did not "reinstate" her. Use of the word "reinstate" implies that Respondent never took steps to separate her from employment. Yet the General Counsel argues, somewhat unnecessarily, that Respondent fired her. I am not exactly certain what those differences in approach serve, if anything. I do know that the evidence demonstrates clearly that Abundiz abandoned her job when she did not return to work after 2 weeks and she lost her job. Whether it is characterized as a quit or a discharge seems immaterial.

Eric Hanses had clearly told her that if she did not come back at the end of the 2 weeks she would be fired and that he would not guarantee that she would get her job back. Rivera's version, to the effect that he said Abundiz might have to wait for her job, seems unlikely. While close, it is entirely inconsistent with Respondent's needs. Respondent is willing to make adjustments in manpower needs to cover excused absences. There is no evidence that it is willing to suffer manpower shortages to make accommodations beyond its attendance rules. Here, Abundiz is admitting that Eric Hanses had told her that her job would go to someone else if she did not return in a timely way. Obviously, Respondent must be able to rely on the availability of employees on a daily basis. When she told him that she was going to stay in Mexico for the 4 weeks, no matter what, she was putting her needs above those of her employer. Eric Hanses recognized that and prepared to replace her when she did not return. He saw her job abandonment coming and readied himself for it.

Therefore, it is clear that both Respondent and Abundiz knew that a separation from employment would occur if she did not appear for work at the end of the 2 weeks. Thus, the complaint's use of the phrase "refused to reinstate" is really inapplicable. She was not an employee who remained in some sort of limbo such as a layoff or other inactive payroll status. She had left Respondent's employ. There was no job to which she could be reinstated—she had disengaged herself from it. Accordingly, I shall treat the matter as a refusal to hire/rehire.

At the time the case was tried, all parties were aware of the Board law with respect to allegations of an unlawful refusal to hire as set forth in *Big E's Foodland*, 242 NLRB 963, 968 (1979). On May 11, 2000, the Board revisited the discriminatory refusal to hire principles when it decided *FES*, 331 NLRB 9. In *FES,* supra at 12, the Board clarified the elements of a discriminatory refusal to hire. It said that the General Counsel must, under the allocation of burdens set forth in *Wright Line*:[42] (1) the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicant had experience or training relevant to the position; and (3) antiunion animus contributed to the decision not to hire the applicant.[43] In many respects the *FES* factors are not greatly different from those of *Big E's Foodland,* supra. See the footnote below.[44]

[40] Rivera recalls Tommy's interjection as "Now you know why your mom is not getting her job back." I find her to be mistaken here as it is most likely that Tommy was cutting off the argument and because Eric's version is consistent with that intention.

[41] For what it is worth, contrary to the contention of the General Counsel, R. Exh. 3–23 is not evidence of a discharge. It is simply a sheet which includes "termination" dates without regard to the logic concerning the termination. R. Exh. 3 includes both discharges and quits.

[42] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[43] I have not quoted *FES* exactly, but have omitted nonrelevant language.

[44] "Essentially, the elements of a discriminatory refusal to hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an

A review of the facts with respect to Abundiz' circumstances shows that on December 4 she made an oral application for work.[45] It also shows that she specifically asked for her job back but that her job had gone to replacement employee Perez. It does not, however, show that Respondent was hiring at that time. Even so, it is evident that both Eric and Tommy Hanses were aware of her union activity and propensity. In addition, there is evidence of antiunion animus. Certainly various types of 8(a)(1) conduct had been committed and Respondent had earlier unlawfully discharged Guzman and wrongfully reassigned/demoted Smith to prevent her from having access to other employees.

In analyzing what was going through Eric Hanses' mind at the time she applied for her job back on December 4, it is almost self-evident that he was annoyed with her because she had taken the extra 2 weeks. Her attitude in taking those 2 weeks bordered on defiance or insubordination. Certainly he thought she had put her personal interests ahead of the Company's. He undoubtedly had no desire to treat her positively at that stage. I find, therefore, under *FES*, that a prima facie case has not been made out. First, there is no showing that Respondent was hiring sorters on December 4. Second, even though there is some general antiunion animus to point to, that animus has no real nexus to Hanses' negative response to Abundiz' application. He would have responded the way he did no matter what because he could not simply ignore her misconduct. To rehire her would have rewarded her misbehavior. That he would not do. Therefore, even if a prima facie case had been made out, it has been persuasively rebutted.[46] Accordingly, this allegation will be dismissed.

P. Betty de Weese

The complaint alleges that about December 11, Pear Supervisor Betty de Weese denied employees the opportunity to contribute to funeral flowers for a "coworker" because of the Union's organizing campaign. The coworker in question was actually one of the managers, Rumsey Abdullah, the shipping supervisor, whose mother had recently died. De Weese supervises about 40 employees.

According to Janine Bliss, a pear packer with 20 years experience, over the years there have been numerous instances in the pear packing room where individuals had made solicitations of one kind or another. Many of these occurred before the no-solicitation rule was changed in March 1997.

When it was learned that Abdullah's mother had died, De Weese decided to follow a longstanding practice and take up a collection for flowers or some other remembrance. Bliss remembers contributing a few dollars to De Weese in her office. After a few hours had passed, Bliss remembers De Weese returning the money. On direct, Bliss reported De Weese' explanation: "[S]he stated when she was handing it back to me that Tommy Hanses had talked to the lawyers and they said, return it because it was solicitation and because of the union thing." On cross, when Bliss was asked to use the words that De Weese used, she said that she "was returning the money because it was considered solicitation." She did not repeat her reference to the Union. She did, however, remember being scornful of De Weese's use of the word "solicitation" asking if they were soliciting the dead.

De Weese testified that she returned the money after having had discussion first with, Mel Sager, and later Tommy Hanses. Sager had alerted her that the new rule might bar her from such a solicitation and she then checked with Hanses who confirmed that the new rule prohibited her from taking up such a collection.[47] As a result, she returned the money, explaining either that it "was" or "might be" considered soliciting. She denies making any reference to the Union in her explanation.

Based on the foregoing, I am unable to conclude that the allegation in the complaint has been sustained. Bliss' hesitant and uncertain testimony, testimony that De Weese put blame on the Union for canceling the collection, is simply not credible. When she was asked to use the words that De Weese supposedly used, she referenced the no-solicitation rule, even making fun of it. Nor, did she repeat her earlier testimony. In addition, De Weese's explanation makes perfect sense. She learned from a fellow supervisor that the solicitation might be breaking the new rule, checked with a higher authority, learned that the rule applied and made an appropriate explanation to her crew. In that circumstance, I cannot find that De Weese blamed the Union for her decision to return the money. This allegation of the complaint will be dismissed.

Q. Christina Bautista and Frederico Gonzales as the Election Approached

1. Bautista

It will be recalled that the election petition was filed by the Union on November 20. When that occurred, Respondent began to marshal its arguments and propaganda to oppose the Union's drive. It hired outside consultants and put together a campaign designed to persuade employees to vote against representation. Among other things, it decided to counter the prounion T-shirts with "no union" T-shirts and to counter the prounion buttons with "no union" buttons. Once the election was set, it put together a calendar of presentations, short speeches, videos, small group talks, and an "educational" raffle, all designed to present Respondent's view in opposition to union representation.

Although the date is not firmly fixed by the parties, sometime in late December a video was shown to groups of 10–15 employees in the lunchroom. Eventually, the entire voting unit saw the presentation. As part of the presentation, Respondent

animus against it, and refused to hire the applicant because of such animus." *Big E's Foodland*, supra at 968.

[45] Respondent does not utilize a written application process. It will accept oral applications made to shift supervisors as in this instance.

[46] Counsel for the General Counsel point to the fact that there were instances where employees overstayed leaves but didn't lose their job upon their return. I have reviewed those incidents but cannot find that they were comparable. If nothing else, those individuals waited for time to pass (a self-imposed 'penance' period?) before seeking to return. Abundiz did not.

[47] That advice was no doubt correct but see *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982), which permits a small number of "beneficent acts" such as an annual United Way campaign as a narrow exceptions to a no-solicitation rule.

had placed a large box of "no union" T-shirts[48] to be taken by any employee who wished to do so. Many of the prounion employees chose to wear their prounion T-shirts as an expression of opposition to the programs being presented. One of the groups included Chuy Andrade, Marcelino Gonzalez, and Rosa Salas who were all wearing their prounion shirts. After the presentation was completed, Andrade went to the box and began distributing the "no union" shirts to Gonzalez and Salas and perhaps others who favored the Union. At that point, Shift Manager Christina Bautista observed them and asked Andrade who had given her permission to take them. Andrade replied that no one had done so, that Bautista had given them to others and that she wanted one. Bautista told her to stop but Andrade refused. As a result a number of "no union" T-shirts were distributed to union activists. Bautista did nothing thereafter despite Andrade's refusal to abide by her directive.

The General Counsel asserts that this incident constitutes an unlawful interrogation. I do not agree. Certainly no interrogation took place. Bautista did not inquire about their union activities, feelings, or desires and nothing she did was designed to get them to reveal those beliefs. The union sentiments of these employees were not only already known to Bautista, they were emblazoned on their chests. Indeed I have difficulty in finding that Bautista did anything at all that can be characterized as coercive. First, following *El Rancho Market*, supra, I am unable to conclude that anything Bautista said here can reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. All that happened was that Bautista saw some known union activists taking material which the company wished to give to employees who agreed with the company's viewpoint. Bautista can reasonably be seen as protecting company propaganda items from being removed from the debate platform. In essence she was preventing prounion employees from making off with opposition material—she was attempting to prevent what she perceived to be a campaign "dirty trick." No interrogation occurred and nothing she said had any tendency to deter the manner in which Andrade, Gonzales, and Salas were exercising their Section 7 rights.

The same cannot be said for other incidents which occurred that day. Aleida Barton and Rosa Garcia testified about two separate incidents after the video was shown. Barton testified:

> All the women who were around me had the T-shirt, the "No Union" T-shirt. But I was not wearing it. So Christina Bautista told me, "Girl, everybody has a T-shirt. Go to the bathroom and put it on." And I said that I was not going to put it on. And so she asked me why, and I said that because I was a Jehovah's Witness and I was not going to put it on. And so for the second time, with a very authoritative voice she told me "Go to the bathroom and put it on."

She continued to refuse and Bautista sarcastically remarked to others nearby that Barton was refusing because she was "a sister," meaning a religious woman such as a nun. Barton stood her ground.

Similarly, Rosa Garcia testified that Bautista, still in the lunchroom after the video, handed her the shirt and told her to go put it on, saying all employees had to wear one. Garcia at first objected, but later relented. She remembers Bautista told her to wear the shirt the following week, and when she appeared at work without it, Bautista demanded to know where it was. Garcia tried to avoid answering that she was refusing to wear it, and claimed the shirt had shrunk in the laundry. Upon hearing that, Bautista obtained a larger size and ordered her to put it on. Again Garcia declined, but Bautista insisted and Garcia again relented and wore the oversize "no union" T-shirt.

A few days later, Bautista was handing out antiunion buttons and Barton, in what she perceived as an effort to placate Bautista, said she would take one. Bautista told Barton she could have one if she promised to wear it. Barton could not do that, so she simply said, "As you wish," and let the matter drop.

Bautista testified in a stiff and clipped manner. She answered with only one-word denials when asked about these incidents. She clearly did not want to be a witness and was reluctant even to appear. Her demeanor was of someone who did not wish to cooperate in the truth-finding process. Her denials are rejected in favor of the versions offered by Barton and Garcia.

First, although the complaint characterizes Bautista's conduct here as coercive interrogation, the conduct is actually stronger than that. Bautista directed employees to wear an antiunion garment against their specific wishes. She did it in an insistent manner, managing to step on one employee's religious beliefs in the process and intimidating another on two occasions to actually wear the shirt. This was straightforward coercion: "Wear these shirts or suffer my ire."

In addition to the coercion, Bautista's requirement also constituted an unlawful interrogation as alleged. When individuals resisted wearing the shirts or the buttons, that resistance undoubtedly labeled the employee as one who, if not actually perceived as a union supporter, needed more attention. Similarly, if an employee willingly took and wore the shirt or button, it signaled that the employee was already in the Employer camp and less likely to be a campaign target.

It should be observed here that those perceptions might not actually turn out to be accurate, for secret-ballot voting is not way of inducing individuals to reveal preferences he or she might not otherwise disclose. It is an unlawful inquiry into an employee's sentiments and which can only be described as a coercive interrogation. *Garland Knitting Mills of Beaufort, South Carolina, Inc.*, 170 NLRB 821 (1968), enfd. in pertinent part sub nom. *Ladies' Garment Workers v. NLRB*, 414 F.2d 1214 (D.C. Cir. 1969); *American Metal Climax, Inc.,* 164 NLRB 983 (1967), enfd. in pertinent part 413 F.2d 191 (6th Cir. 1969). The fact that employees may not have been aware that they were being scrutinized is not a defense. Employees are entitled to either express their opinions about labor unions and unionization and they are equally entitled to keep their opinions to themselves. It is entirely inappropriate for an employer to surreptitiously dig into an employee's heart to determine his or her union sentiments. It is no answer to say that such things are done by advertisers or by political campaigns in other venues. Here, the venue is the workplace. When it

[48] On the front it said, "Washington Fruit." On the back it said, "[N]o union" together with a small box containg a check-mark.

comes to representation elections, the rules are different. Employees should never be placed in a situation where they reveal their union sentiments, even if that sentiment is revealed by inaction. Bautista's behavior in these incidents violated Section 8(a)(1) of the Act. *Kurz-Kasch, Inc.,* 239 NLRB 1044 (1978); *Tappan Co*., 254 NLRB 656 (1981); *Houston Coca-Cola Bottling Co.*, 256 NLRB 520 (1981); and *Automotive Plastic Technologies*, 313 NLRB 462, 468 (1993).

2. Frederico Gonzales

Frederico Gonzales, one of the night-shift supervisors, was present at several of the video meetings (different supervisors attended others). Called by Respondent to testify about a variety of matters including T-shirts, counsel for the General Counsel cross-examined him about what occurred after the videos had been shown. She asked whether he "observed" employees taking "no union" T-shirts from the box as he sat or stood about 15 feet away. He replied that he had. He also testified that he was in and out of the lunchroom that day; sometimes he stayed for the video, sometimes he left.

I had permitted the General Counsel to inquire because the subject matter was similar to that adduced in support of paragraph 7(h) aimed at Bautista's conduct described above, thinking that additional light would be shed on Bautista's conduct. I later granted the General Counsel's September 28, 1999 motion to add paragraph 7(i) to the complaint to deal with these facts.[49] In their brief, counsel for the General Counsel asserts that Gonzalez' disclosure that he "observed" employees taking shirts from the box constitutes an 8(a)(1) surveillance violation as alleged.

Frankly, I am not particularly impressed with counsel for the General Counsel's analysis here. First, she reads too much from Gonzalez' acceptance of her suggested word, "observe." Clearly he saw people take shirts. Whether that was an "observation" on his part, constituting surveillance is an entirely different question. He apparently had been assigned to be the supervisor of the moment to be present during several, repetitive video showings. (Bautista had been assigned the duty for other meetings.) Gonzalez' presence in the lunchroom could not have been missed by any employee. Indeed, there is no evidence that he was in any way surreptitious. Anyone in the room would have seen what he saw and would know that he was seeing it. They did whatever they did knowing he could see if he chose to pay attention. In a real sense they exposed their views themselves.

Gonzalez says he made no record (mental or otherwise) of what he saw or who took shirts and who did not. I find his testimony to be credible. He was present, but was uninterested in the meetings and didn't care much about them. It is unlikely that anyone thought he was watching with any purpose. Moreover, Gonzalez has not been shown to have been coercive as was Bautista. There is no evidence that he even spoke to the employees as they departed the meeting and passed by the box of shirts. This is quite different from what Bautista had done, ordering her employees to wear one and later passing them out to her staff, forcing them to make a decision and later forcing them to wear the shirt.

For there to be an actual surveillance violation of Section 8(a)(1), the employees being surveilled must actually be (or perceived to be) engaging in conduct protected by Section 7. Normally, of course, an employer engages in unlawful surveillance when he observes employees who are doing something in support of a union. While Section 7 equally protects employees who choose to refrain from supporting a union, it seems anomalous to hold that an employer commits an 8(a)(1) surveillance violation when he observes employees engaging in conduct opposing a union, particularly where the employer himself gave them the means and opportunity to express their views. Here, all the employer did, after showing a video which apparently met the free speech parameters of Section 8(c), was to leave a box of "no union" T-shirts to be taken by any employee who wanted. If a supervisor such as Gonzalez saw an employee take one, his observation could not be coercive of the right to refrain. Certainly, picking up such a shirt would not constitute any Section 7 activity on behalf of the Union.

Second, employees who chose to go back to work without a shirt would not be perceived by Gonzales or anyone else as being engaged in the Section 7 activity of refusing the shirt. They were simply doing what they were supposed to do, return to their workstations upon completion of the presentation. Accordingly, I fail to see what Section 7 activity on behalf of the Union Gonzales was supposedly observing. The employees who did not pick up a shirt were not engaging any union activity so there was no activity to be surveilled, much less protected by the statute. In any event, the General Counsel's question was whether Gonzalez had observed employees taking shirts, not whether he had observed employees not taking shirts.

In these circumstances, I cannot find a surveillance violation. Gonzalez' supposed admission is much less than the General Counsel wishes to make it. It is nothing more than an honest answer that he did see some people taking the shirts. It is not an admission that he was keeping watch over the employees under some mandate or suspicion. Furthermore, those employees were not engaged in activity which had the Employer's disapproval. The elements of the violation are simply not present.

R. Natalie Pierce and Rigoberto Flores

1. Introduction

I take this next incident out of chronological order. Among other things, it demonstrates that there is a patina of witness dissimulation with respect to testimony about statements made by the consultants as described in subsequent sections. That tarnish appeared when Rigoberto Flores testified concerning statements supposedly made by consultant Mayra Berrelleza in late December 1997.

Flores had been called by the General Counsel and gave testimony regarding an alleged threat made by Berrelleza to the effect that if the Union won the election the boss would prefer to close rather than negotiate with the Union and it would be useless to negotiate with the Union. On cross-examination, Flores reluctantly admitted that he had told one of Respondent's attorneys, Natalie Pierce, something quite different dur-

[49] The amendment, found as the last document in GC Exh. 109, alleges that Gonzales had surveilled employees by openly monitoring whether employees had selected the "procompany, antiunion" T-shirts.

ing an interview in November 1998. His testimony about the interview immediately resulted in the General Counsel moving to amend the complaint to allege that Flores had improperly been called to the interview and that Pierce had improperly interviewed Flores in violation of the safeguards set forth in the Board's decision in *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965).

During his cross-examination Flores gave the following testimony:

> Q. BY MR. CARROL: In a meeting with the company lawyers did you say that at the union office the union asked you to tell the federal agents things that did not happen?
>
> A. (WITNESS FLORES): It was not exactly people from the union.
>
> Q. Okay. Well, who was it that told you to go tell the federal agents things that did not happen?
>
> . . . .
>
> THE WITNESS: A co-worker.
>
> Q. BY MR. CARROL: And who was that?
>
> A. May I say the name?
>
> Q. Sure.
>
> A. His name is Jose Zarate.
>
> . . . .
>
> Q. BY MR. CARROL: Did you also—did you say to the company lawyers that the union representatives came to your home and one of the representatives who was young and had a beard told you that the more accusations the union has against the company, the more benefits we'll get?
>
> A. Yes.
>
> Q. Do you remember who that union representative was, the young one with the beard?
>
> A. I do not remember his name.
>
> Q. Was it Andrew Barnes?
>
> A. No, I do not remember his name.
>
> . . . .
>
> Q. Do you remember telling anybody from the union, "It's not true what you're telling me to say, and I don't want to lie"?
>
> A. No.
>
> Q. You didn't say that to anybody from the union?
>
> A. Not—it was not from the union. It was to a co-worker.
>
> Q. Oh, and this—was this Mr. Zarate?
>
> A. Yeah.
>
> Q. And you said that you didn't want to lie? That you could get into problems?
>
> A. Yes.
>
> Q. And he said, "There won't be any problems. The union will support you at any moment"?
>
> A. He said that the union would support me. He didn't say that there would not be any problems. He only said that the union would support me.
>
> Q. And after he said that, it's true that union representatives went to your house?
>
> A. Yes.
>
> Q. And they called you on the telephone every day?
>
> . . . .
>
> THE WITNESS: They would call me twice a week.
>
> Q. BY MR. CARROL: And that was before you met with the NLRB agent?
>
> A. Yes, sir.

It can be seen from this testimony that Flores has admitted to Respondent that pressure had been brought to bear against him to give testimony which, to Flores' knowledge, was not true. He ultimately contended that he did not accede to this pressure.

2. The facts relating to Pierce's meeting with Flores

In December 1998, Natalie Pierce had been out of law school about a year. Because she speaks Spanish, she had been assigned to investigate and interview company employees who might be called as witnesses. She was aware of the Board's rules regarding interviewing employee witnesses in preparation for trial as set forth in *Johnnie's Poultry*, supra, and endeavored to follow them.

Flores testified that on the day of the meeting, December 9, 1998, a fellow employee named Francisco Juarez[50] had told him that Pierce wanted to meet with him in a meeting room in the headquarters office. As a result, he met with Pierce as he believed he had been instructed. He says that the meeting began with her asking about a union photo booklet in which his picture is alleged to have appeared shortly before the election in January 1998. He says she asked him whether he appeared in the book and asked about the opinion of his coworkers who had appeared in the book. (He answered they were "discontented.") He testified that Pierce asked him what he didn't like about the Union and what bothered him about it. He agrees that she did not ask him the names of the coworkers.

Yet, Pierce had no reason to ask about such a thing. The booklet was not part of any election objection or unfair labor practice allegation. She says she didn't know such a book existed until he told her about it. Flores' testimony is peculiar and such an inquiry by Pierce seems very unlikely.

Pierce recalls the interview entirely differently. She testified that as she drove to work that morning, Juarez called to her from the forklift on which he was riding. She stopped her car and he came over to speak to her. She says he said, "Hi, a friend of mine would like to speak to you. He came to me and—and he said that he was having a lot of problems with the union and the union has asked him to say things that didn't happen and now they wanted [him] to go to court."

She replied that his friend could come meet with her if he wanted.[51] About half an hour later she met Flores in the building entry, they introduced themselves (with Flores describing

[50] Juarez had served as one of the Employer observers during the election.

[51] Juarez corroborates Pierce's version. Moreover, careful analysis of Flores' own account leads to the conclusion that Flores chose to see Pierce because he had some private concerns of his own.

himself as Juarez' friend), and took him to the conference room on the second floor where she normally conducted her business. Speaking in Spanish, the first thing she did was to read him General Counsel's Exhibit 95(a), then allowed him time to read it for himself. The document is in Spanish but the court interpreter has translated it to English in General Counsel's Exhibit 95(b). The original is a Spanish version of a *Johnnie's Poultry* purpose and rights slip. Flores signed the form sometime before he left Pierce that day.

Pierce says she asked Flores why he wanted to see her. He responded that he wanted to talk to her because he'd been having a lot of problems with the Union. She says he further responded saying the Union had tried to get him to say things that hadn't happened, had tried to get him to do (provocative) things, that he'd had enough problems with the Union and now they wanted him to go to court. He told her he'd received a phone call the night before from lead organizer Lorene Scheer telling him that he would need to go to court, and he said that he had told Scheer he'd think about it.

Pierce asked for some clarification and, after a false start regarding a union photo book, Flores went on to say that the Union had asked him to "do things" which would cause him to get warnings but he had declined.

She then asked if there was anything else. He replied, "After the election, the Union called me to the office to give another declaration. And they wanted me—the—at the Union, they wanted me to tell things about—to, I guess, give a declaration about meetings that I had with consultants." She recalls he said that after he gave the declaration, union representatives started calling him every day, started coming by his house twice a week and telling him that he would need to speak with federal agents, and that he—the more accusations that he could make against the company, the more benefits he would get.[52] And he said one day, when he was at the union office, one of these union representatives who had come to his home asked him to say things to the federal agent that hadn't happened.

3. Discussion

As can be seen, both versions are to a great extent mutually corroborative. Flores, however, had been most reluctant to reveal what he had reported to Pierce. Indeed he was reluctant to testify at all. Curiously, he attributed to Berrelleza the remarks in support of the threat to close and the threat that it would be useless to negotiate with the Union.

Berrelleza had first come to Respondent's facility on December 15 with Steve Highfill, the lead consultant who Respondent had hired to run the campaign opposing unionization. Berrelleza frequently works in representation election campaigns opposing unionization. She usually speaks to Spanish-speaking audiences (her English is limited[53]) because she has had a unique experience which Highfill has come to believe effectively rebuts union organizing campaigns. She had previously worked as a packer in the strawberry packing industry in Watsonville, California, where 12-1/2 years earlier, in July 1985, she had become involved in a violent strike by a Teamster Local there. She tells a graphic story about the breakdown of negotiations, the 18-month strike which ensued, the loss of respect for human safety which she underwent, followed by violence and the commission of criminal acts which the strikers came to believe they needed to commit as their cause became lost and as desperation overtook them. She presents herself as a remorseful victim of circumstances beyond her control, one who has been given the opportunity to tell others about her experience, cautioning them about the risks unionization may present.[54] Insofar as I could determine, her tale appears to be true; she supports it with newspaper articles. Certainly the General Counsel has not effectively countered it.

The main point to be made here is that Berrelleza's principal function in this campaign was to describe her experiences as a unionized, striking worker. It was not her function to do much else. More specific information regarding the effects of unionization was provided by Highfill on December 15, not Berrelleza. Similarly, in the late December, early January meetings, she again went over her Watsonville experience, leaving much of the general information about the union representation to the professional consultant, José Ybarra.[55] Berrelleza's credibility with the employees depended on her being a witness/participant to a real event. Anything more would have made her an advocate, which would have undermined her effectiveness. Therefore, it seems unlikely that Berrelleza would have made any remarks at all to Flores regarding what "the boss's" preferences were or whether it was "useless" to negotiate with the Union. She denies saying such things and Highfill, Ybarra and the third consultant during the December 15 presentation, Maria Carmona, all deny that Berrelleza said any such thing.

Flores is obviously a man of conscience, but whose sense of integrity is not unwavering. He knew that he had been importuned by others to make false statements to the NLRB investigators. He had been told that the Union would back him up, even though both he and his solicitor knew that it was wrong. His conscience sent him to Pierce either to warn her or to tell her that he had given a statement which was not true, seeking a way to avoid having to testify. Yet he could not bring himself to tell her what he had actually said. Even on the witness stand, while loath to admit that he had given a false statement, he was nonetheless willing to say that a fellow employee and an unidentified union official had urged him to falsify and exaggerate during the course of the investigation. He was driven to point out what he perceived as a general problem but did not want the finger pointed at himself. Until he was cross-examined, it no doubt seemed to him that whatever he had told the investigators would not be subject to scrutiny, and that his story would stand unchallenged.

[52] Allowing for some misunderstanding of the Spanish, even the General Counsel allows that what Flores may really have been saying, according to Pierce, was the more accusations he could make, the more beneficial it would be. In fact, Flores accepted Carrol's use of "benefits" as the word which was said while probably meaning "beneficial."

[53] Consultant José Ybarra said she spoke "not great" English to the pear packers at a meeting in late December.

[54] Her speech is found in Tr. Vol. 34, pp. 4979–4984.

[55] Both Highfill and Ybarra operate management consultant businesses.

When probed on cross-examination, however, his sense of cover vanished. He knew that he had not revealed to Pierce what the truth actually was, apparently perceiving by her demeanor, that she could not help him. All he had done was to alert her to a problem. On the stand, though, he realized that he was obligated to tell the truth about what little he had said to her about being suborned, because she might testify about what he had said. As a result, his testimony and her testimony about what he had told her, vary little on that point. Accordingly, I conclude that he is telling the truth when he says that a fellow employee and a union official[56] told him to exaggerate. In fact, he was contacted numerous times and undoubtedly succumbed to their call. Even so, he still believes in the Union and will not squeal on it.

Obviously, Flores' testimony demonstrates that employees have been urged by someone, whether union official or overzealous fellow employee, to go beyond the truth: the more accusations, the better. While I am hesitant to conclude that such measures were taken with respect to all of the General Counsel's witnesses, or that all of them fell victim to such overtures, it is clear to me that there is a patina or tarnish of unseen instruction which blurs the truth regarding what the consultants said.

A good example is Indalecio Mata's testimony that during one of the sessions conducted by Highfill, he called Highfill a liar, whereupon Highfill rushed him, pointed a pen in his face and angrily told him to shut up. Highfill denied the incident occurred and no employee corroborated Mata.[57] Since Highfill's purpose was to convince employees that union representation was unwise, and since he had facts and figures which he was using to support the view he was espousing, it would have been self-defeating to be seen physically threatening an employee in front of 20–25 others. Highfill is a smooth salesman. He would not have been put off stride by some verbal hostility. His eye was on employees he could convince. He was not about to drive them to the other camp by a public verbal or physical altercation with one of their fellows.[58] Mata's testimony is simply a fabrication. Yet it fits perfectly with what Flores told Pierce he had been asked to do, cause problems and say things which were untrue.

Clearly, when it comes to reciting and analyzing what the consultants said during the preelection period, great care needs to be taken before drawing any conclusions regarding the relative credibility of the employee witnesses. This is not to say that the consultants don't have their own problems. Careful parsing of the testimony is required.

4. Conclusions regarding Pierce's interview of Flores; safeguards

At the hearing, I granted the General Counsel's oral motion to amend the complaint to challenge Pierce's interview of Flores. The allegation reads: "On or about December 9, 1998, Respondent by its employee agent Francisco Juarez at its facility and by its attorney agent at its main office, coerced and interrogated employees regarding their and other employees' union sympathies and Section 7 activities in violation of Section 8(a)(1) of the Act." As can be seen, the allegation starts with Juarez, not Pierce. Indeed, it alleges that Juarez' bringing Flores for a pretrial interview is itself a coercive act. Then it goes on to assert that the attorney-agent (Pierce) improperly interrogated Flores.

The allegation is based on Flores' testimony that Juarez told him to go see Pierce. At that time, Juarez was a forklift driver who had come to know most of the people who worked for Respondent.[59] He certainly knew Flores who worked in the cold room which is frequented by forklift drivers such as himself. He had served as the Employer's observer during the election and during trial preparation had been called upon to notify those employees who Respondent's lawyers wished to interview in preparation for trial. Respondent was interviewing employees as prospective witnesses with respect to two major issues, the unfair labor practice allegations and the Union's objections to the outcome of the election.

The General Counsel seems to think, first, that Juarez became Respondent's agent when it asked him to be the individual who told employees they were wanted in the main office. Second, it argues that the very act of telling an employee, such as Flores, to go to the office interferes with a Section 7 right. All Juarez did, according to Flores, was to tell him that he had a meeting in the office. When Flores asked what it was about, he says Juarez simply told him, "The young lady will explain." Nothing else was said.

Assuming this version is correct,[60] it does not make out an 8(a)(1) violation. First, assigning an employee to the duty of telling employees to go to the office is insufficient to make him an agent for unfair labor practice purposes. Juarez was a forklift driver, nothing more. He had no other authority. Clearly, under Flores' rendition, Juarez was simply a messenger. Carrying messages is one of the duties asked of most employees at one time or another. If that makes them an agent, it is one of extremely limited power and authority—to simply carry the message. In this case the message was: "You're wanted in the office." Second, Juarez did nothing more on his own, although he did answer Flores' inquiry regarding what the meeting was about, but essentially only replying that Flores would find out when he got there. No interrogation took place whatsoever, much less a coercive interrogation. Quite simply, from Flores' own account, this portion of the allegation never had any factual basis and was without merit from the outset.

Insofar as the allegation is aimed at Pierce's conduct, it is without merit as well. The facts lead to the certainty that Flores volunteered to see Pierce. Pierce's account is set forth above and I have alluded to Juarez' corroboration. Specifically, Juarez described how Flores came to him, saying he had a problem with the Union and with giving testimony, how he told Flores Pierce might be able to help, and how he mentioned the

[56] I think it likely that he does know the name of the union official, but will not reveal it because to do so would damage the Union's cause.

[57] Concepción (Concha) Loera-Rivera attended the same meeting. If such an incident had occurred, she would have recalled.

[58] Highfill appears to be in his 50s. Based on age as well as stature, he is an unlikely physical aggressor. Mata is in his 20s, somewhat immature, and aggressive enough to call a stranger a liar.

[59] In June 1999, Juarez became one of the bagging supervisors.

[60] In fact, I credit Pierce's account, supra.

matter to Pierce one morning as she drove up. Considering the testimony of all three, I have no difficulty in concluding that Flores, through his coworker Juarez, initiated the meeting. That being the case, the interview was not for the purpose of pre-trial preparation. In fact, Pierce didn't know what the purpose of the meeting was, since she hadn't called it. Despite that, out of caution, she did read the *Johnnie's Poultry* rights slip to him and later had him sign it.

Since Flores had come forward on his own, the warning slip which Pierce read to him and which he signed was really not apropos, for it speaks in terms of seeking information which occurred before the election, and about the election. The main thing which it did for Flores, was to include the statement that he was under no obligation to talk to her, to advise him that there would be no harm or gain from speaking to her, that he could answer or not answer as he chose, that there would be no punishment if he refused to speak to her and that she only wanted the employee to tell the truth.

Moreover, there is no credible evidence that Pierce did anything other than to ask Flores what he wanted to tell her and ask him to clarify what he was saying as he attempted to focus on his concerns. His testimony about what Pierce supposedly asked him at the outset makes little sense. She knew nothing of the Union's photo booklet before he told her about it and certainly had no inceptive interest in asking about it. He testified in a conclusionary manner, unable to use the words which she said. He even agrees that she did not ask him about something she may have been charged to look at, the circumstances under which he signed the union petition. Obviously, she was just listening to him as he told her in a truncated fashion about the efforts to suborn him. At some point he stopped, realizing that she was not going to be able to advise him what to do or help him to avoid testifying. Was it her noncommittal manner which stopped him? I think so.

In *Johnnie's Poultry*, 146 NLRB at 774–775, the Board said that both it and the courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring 8(a)(1) liability. The purposes which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended, involved in the preceding discussion, and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case. In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation.

Specifically, the safeguards are that the employer: must communicate to the employee the purpose of the questioning, assure that no reprisal will take place, and obtain his/her participation on a voluntary basis. The questioning must occur in a context free from employer hostility to union organization and must itself not be coercive in nature and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

The Board went on to say:

> In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent [footnote. omitted] for such questions have a pronounced inhibitory effect upon the exercise by employees of their Section 7 rights, which includes protection in seeking vindication of those rights free from interference, restraint, and coercion by their employer.

First, it is clear to me that Pierce did not interrogate Flores about any affidavit which he had given to a Board agent. She simply let him talk about whatever issue had prompted him to come to her. It turned out that the issue did deal indirectly with what he had said to a Board agent, but it was not as a result of anything she asked him. It was something he wanted to get off his chest. Indeed, he provided no details at all about what was in his affidavit, but implied that whatever was in it was not the truth as he had been suborned, hinting that others may have been corrupted as well.

When he stopped talking about it, she did not pursue it any further, as tempting as that must have been. Instead she honored what had been said in the warning slip and let him leave without any pursuit on her part. She made some notes about what he had said and nothing further occurred until he testified, whereupon he confirmed that at least two people had urged him to say false things to the Board agent.

Accordingly, I find that the General Counsel has failed to prove that Pierce violated Section 8(a)(1) in her encounter with Flores on December 9, 1998. First, he approached her and the entire matter was voluntary on his part. Second, she provided him with the safeguards required by *Johnnie's Poultry* and honored them as he began having second thoughts about proceeding further with her. Third, the entire conversation was private and occurred in a second floor conference room where they were unlikely to be seen. Finally, she did not proceed beyond the bounds of lawful subject matter or take advantage of him in any way. This allegation will be dismissed.

S. The Preelection Meetings

1. The consultants

Steve Highfill is a business consultant in California Hot Springs, California. His business is known as Ag-Relate. He advises employers, usually in the agricultural domain, with respect to labor relations and connected management issues. Although he operates as a one-man business, he does contract with other individuals who assist him on an ad hoc basis. Much of his work is concerned with the representation of employers who appear before the California Agricultural Labor Relations Board. He has also represented employers before the NLRB.

In May 1997, Respondent retained Highfill to conduct a supervisory training session and to speak to employees regarding their right to union representation under the NLRA. None of those meetings are under scrutiny by the instant complaint.

However, he had been accompanied in May by one of his contract assistants, Maria Carmona. Carmona is a former organizer for United Farm Workers Union, one who was trained by the AFL–CIO in the art of organizing unrepresented employees. As a result of their May visit, both Highfill and Carmona became recognizable to many of Respondent's employees.

After the election petition was filed on November 20, Respondent again engaged Highfill to conduct its election campaign. Virtually simultaneously, Stemilt Growers in Wenatchee hired him to conduct their election campaign. The Union had filed a petition seeking to represent that employer's employees on the same day that it filed its petition to represent Respondent's. As a result, Highfill found himself in need of other assistants. On December 2–3, he conducted meetings with groups of about 25 employees, with Rick Plath present, but not participating. On December 15, he held 10–12 smaller group sessions with Respondent's employees assisted by Carmona and Mayra Berrelleza. Later, on December 28 those three, together with a fourth consultant, José Ybarra, arrived in Yakima to present the final portions of the campaigns with both companies. On that day the four prepared some posters to be placed in Respondent's lunchroom. At that point, Highfill and Carmona traveled to Wenatchee for the finish at Stemilt, and did not participate further in the Washington Fruit campaign. Ybarra, like Highfill, operates his own consulting business, J. C. Ybarra Management Services, from his office in Fresno, California. He says about 50–75 percent of his business is concerned with union organizing drives. The other 25 percent deals with supervision, safety, and communication issues. He says that he became involved in the Washington Fruit drive at Highfill's request, as Highfill was overextended by both campaigns. Both he and Highfill have extensive backgrounds as management consultants. Their backgrounds may be contrasted with those of Carmona and Berrelleza. Carmona had just begun working with Highfill earlier in 1997, no longer being a union organizer. Berrelleza is much more experienced than Carmona, having served as Highfill's exemplar for a number of years. She says she has been involved in about 70 election campaigns. As noted above in section R,3, her participation consists primarily of describing her experiences during the 1985 Watsonville strawberry packing strike. Neither Carmona nor Berrelleza qualifies as a professional in the field of management consulting.

Ybarra says his first contact with Respondent's employees came on December 29, the day after putting up the posters, as he and Berrelleza began speaking with small groups of employees, as well as making an initial presentation to the pear packers who had not previously been addressed. He says between December 29 and January 5, 1998, the two spoke to about 300 people. He remembers only one video presentation, which overlapped January 5–6, 1998. During that same period, Plath also spoke to small groups of employees, while Ybarra served as his translator.

All of these individuals are paid well for their services. Highfill's normal rate is $185 per hour, including his time testifying; Ybarra, $145 per hour; Carmona $50 per hour; and Berrelleza $600 per day, which for an 8-hour day, works out to $75 per hour. While testifying, their lodging and transportation expenses were picked up (through Ag-Relate) by Respondent.

2. The evidence

The complaint, paragraph 11 and its subparts, alleges that during December and January before the election, the consultants made a variety of 8(a)(1) transgressions. Boiled down, they cover multiple threats of job loss such as through plant closure, sending fruit to other packing sheds, INS raids/deportation, as well as threats to blacklist union supporters and/or undocumented employees. In addition, it alleges threats of unspecified reprisals, statements that union representation is a futility, claims that if the Union won the election it would force the employees to go on strike, and that wages would be frozen and/or lowered.

The General Counsel relies on the testimony of nine witnesses to support the allegations. Although these witnesses attended a variety of meetings, each of the witnesses tended to focus on evidence supporting a particular allegation, though some described more than one. Moreover, as might be expected, they are not always clear with respect to when meetings were, the sequence of meetings, the identities of the individuals conducting the meetings, or the factual context in which remarks were made. Their testimony is often curt and incomplete.

The consultants, as might be expected due to the planned nature of their presentations, describe their remarks within the context in which they occurred and in a logical, neutral manner.

In view of the fact that there is no cohesive manner in which to present topic by topic or sequential evidence, I conclude that it is best to simply present each witness and to analyze each on his or her own terms.

Concepción (Concha) Rivera-Loera: Rivera-Loera attended a meeting conducted by Highfill which she mistakenly says occurred on December 8. The General Counsel offers her testimony in support of a closure threat, a threat of job loss and a statement that the Union would force employees to go on strike. She is a night-shift sorter who testified through the interpreter.

She testified that Highfill called the Union "a bunch of liars," saying that if the Union came in, the "only thing" it would accomplish would be to close the plant. Then she said: "He said also that if the union were to succeed in coming in, the only thing that they would do would be for us to have strikes. And the only thing that would happen, would be that they would fire us, and it would only cause problems for us, the employees."

On cross-examination she admitted that she had poor recall and recanted to some extent, acknowledging that Highfill used the word "could" not "would" when referring to closing the plant or going on strike.

In observing her testify, I had the distinct impression that this witness was attempting to follow a script. Moreover, her acknowledgement of poor recall is unhelpful to her credibility. And, changing her testimony to describe Highfill's words from the certainty of prediction to the uncertainty of possibility is worth noting.

Highfill, on the other hand, acknowledges that he referred to the Union's history of corruption and the convictions of its international presidents for the purpose of asking the employees

whether they wished to trust such individuals. In Rivera's hands that became calling the Union a bunch of liars. In addition, Highfill denies that he ever said that the plant would close if the Union came in, observing that he actually described the obligation to bargain in good faith. That very obligation led to his discussion of the bargaining process and what might happen in the event the parties could not agree. One of the possibilities left to the Union was to go on strike, he said, and he distributed a list of then-current longest strikes in United States. See General Counsel's Exhibit 102 (Spanish on one side, English on the other). Of the 10 strikes listed on that exhibit, 6 of them were being conducted by the Teamsters. The exhibit also showed the length of each strike, ranging from 131 to 273 days. The central portion of the document contains five "bullet points"—"1. No one can predict whether or not there will be a strike; 2. A strike requires employees to choose between supporting union bosses' decision to strike against choosing to keep working to support their families; 3. If you chose to keep working to support your family, the union (acting as judge and jury) could fine and assess you; 4. The constitution authorizes the Teamsters to try, convict, and fine you for: leaving or trying to escape the union or 'crossing an authorized picket line' to support your families. [Citing the appropriate section of the Teamsters Constitution]."

At the bottom of the Spanish side of the document, but not the English,[61] is the following exhortation: "It's a risk of possible *terrible* consequences. Best vote no union and stay with a free and winning team." (Emphasis in original.)[62]

As noted, Highfill denies ever saying that the Company would close the plant or that individuals would be fired in the event the Union won the election. In fact, he testified that he told employees that it was against law to fire employees because of the Union.

I am of the view that Rivera-Loera's testimony is unreliable and that of the two versions presented, I must credit Highfill.

Rigoberto Flores: Flores' testimony regarding what Berrelleza supposedly said has previously been discussed in section R,3, specifically that he had admitted being suborned to say false things to the NLRB. The General Counsel alleged that Berrelleza had said that the "boss" would prefer to close the business rather than negotiate with the Union and it would therefore be "useless" to negotiate with Union. In addition to my accepting Berrelleza's version in the previous discussion, I observe that Flores omitted from his January 13, 1998 statement any reference to negotiations being useless or that the owner would prefer to close than negotiate with the Union.

Flores also testified that Berrelleza said that the Union liked to have long strikes so that the boss could hire other people. This reference was also omitted from that statement. Berrelleza credibly denied making the remark.

Finally, Flores says that Berrelleza, when answering questions from someone regarding whether the Respondent would call the Immigration and Naturalization Service, said that it would not be in the Company's interest to do so, but if they came the Company could do nothing about it. He says she went on to say that the Company had stopped the INS once, but couldn't do it again.

With respect to the INS, Flores' testimony provides little help here. First, it is unlikely that Berrelleza said anything about the INS; that was a topic which was left to Highfill or possibly Ybarra in later sessions. Second, saying that calling the INS would not be in the Company's interest is perfectly lawful and simply common sense. Third, saying that Berrelleza had claimed that the Company had stopped the INS once, but wouldn't do it again seems absurd. Berrelleza had no knowledge one way or another about Company's relationship with the INS. The employees had more knowledge about that relationship than she did. If she were to make any representations about the history between the Company and the INS, employees would easily recognize her ignorance and take it for a falsehood. It simply makes no sense for her to make any comment whatsoever about a history of which she had no knowledge. She certainly denies that she said anything regarding the Company's supposed power over the INS. At best she might make the common sense observation, as Flores said she did, that calling the INS would not be in anyone's best interest. Certainly she did not make any threat to call the INS.

Flores has offered no credible evidence that Berrelleza said anything unlawful.

Rafaela Romero: Romero is a day shift packer who testified about a meeting she attended in late December, apparently with Ybarra and Berrelleza. She said that the male consultant said, "[T]he union could not obligate the company to negotiate" and "[I]f the owners wanted to, they could stop the plant and they could also send the fruit elsewhere and stop us from working." Her testimony was very brief and she did not supply any context for the remarks. Her January 22, 1998 report to the Union (R. Exh. 5) (actually signed as a declaration), is inconsistent with that testimony. A Spanish document,[63] which Romero said she both read and had read to her, it was translated to English prior to the hearing by Board Attorney Miriam Delgado. The pertinent language, in its entirety, is:

> I was in a meeting when the consultant told me that the owner did not have to negotiate a salary increase with the Union, did not have to negotiate a medical/health plan, and the Union could not force the owner to give us a contract.
>
> The consultant did not say that the owner had the right to send his apples to another packer if he wanted to, and lay off the employees, and that the owner had the right to close his packaging operation if he wanted to.

The most obvious inconsistency is her statement that the consultant did not say that the owner had the right to send apples to another packer. The General Counsel has argued that, although Attorney Delgado's translation is correct, the witness

[61] According to Highfill, the identical English exhortation was cut off in the copying process due to the shorter length of the paper when mistakenly printed in landscape mode.

[62] Statements such as those contained in GC Exh. 102 are generally considered lawful and permissible under the free speech provision of the Act, Sec. 8(c). Cases so holding are *Coleman Co.,* 203 NLRB 1056 (1970), and *UARCO, Inc.,* 286 NLRB 55, 76–79 (1987). The General Counsel has not attacked this exhibit as unlawful.

[63] The document was taken by someone named George Minori, presumably from the Union.

missed a scrivener's error in the Spanish, and that the word "no" is really the word "nos," a Spanish word for "us." In that event the sentence would read, "the consultant told us that the owner had the right to send his apples to another packer."

While I am sympathetic to the problems of scrivener's errors, I do not think it likely that one occurred here. The witness testified that the drafter read it to her and that she read it herself. When counsel attempted to get her to look at it more carefully (even having the translator read it aloud to her again) so that she could explain the discrepancy between her testimony and the writing, she became defensive and would not cooperate. Her behavior caused me to remark, "We're getting into an argumentative situation now. The witness either doesn't understand, can't understand, or won't understand the difference between what's going on and what she said and what's in the paper." She couldn't bring herself to say that the written version was a mistake. Accordingly, I find that the account set forth in Respondent's Exhibit 5 is accurate and that her testimonial version is not. I further find that her behavior requires me to view her testimony with skepticism.

In addition, her testimony varies from Respondent's Exhibit 5 in other respects. Her initial testimony was "the union could not obligate the company to negotiate," suggesting that the consultant was saying the company could not be forced to negotiate at all. But in Respondent's Exhibit 5 she said the consultant asserted the owner did not "have to" negotiate specific items, e.g., "a salary increase," or a "medical/health plan" and that the Union could not force the owner to give the employees a contract.

The first observation to be made here is that Romero was able, in the written version, to place the consultant's comments in some context, while on the stand she did not. Second, the written report allows one to see that the consultant's comments are much more expansive than Romero was willing to say while on the stand, demonstrating that she is withholding what she knows.

Third, the nature of the consultant's comments can reasonably be seen as partial descriptions of perfectly lawful commentary. If the consultant was accurately describing the collective-bargaining process, he quite likely would have spoken about examples of bargaining subjects—salary, health plan—and spoken about how, even with good-faith bargaining in place, the parties might be unable to agree. Indeed, the last clause of the sentence ("the Union could not force the owner to give us a contract") is entirely accurate if no agreement is reached.

Ybarra testified that the three topics he discussed upon his arrival on December 29 were union dues, union initiation fees, and special assessments. He says that the subject of collective bargaining was principally handled by a video. He says the video was much more detailed than either he or Berrelleza could present in the time allotted. He does say that both he and Berrelleza said at various times that a collective-bargaining contract would mean that things would likely not stay the same—sometimes things do remain the same, while sometimes employees get more, and other times they get less. He asserts that neither he nor Berrelleza said anything beyond that.

Berrelleza recalls the meetings in late December somewhat differently, saying that Ybarra was the first speaker. He observed that he had been a Teamster himself and then proceeded to do a financial calculation related to dues in the event the Teamsters won election. She recalls Ybarra stressed good communication skills, advised that the two of them would be available to talk individually afterwards. At that point she says she spoke of her experience as a union member.

Both deny saying anything resembling what Romero describes.

Given Romero's shortcomings as a witness,[64] I am compelled to conclude that she did not provide credible evidence of any violation here.

Efrain (Payo) Velasco: Velasco is a day-shift box machine operator. His immediate supervisor is Christina Bautista. He testified through the interpreter, although on cross-examination it became clear that he is reasonably bilingual. When counsel asked him how much English he spoke he replied, "a little." A review of his prehearing statements subsequently revealed that he had said that he both reads and writes English, also suggesting that he speaks English. Indeed, he has taken classes in English. His explanation, that he preferred Spanish to English because he was concerned about "legal terminology" which he might not understand, does not sit well with me. He was there to recite facts, not discuss law—legal terminology should not have been a concern. If he was uncomfortable speaking English in a formal setting he could have said so. Instead, he gave an answer which can only have been intended to mislead me about his language skills.

The General Counsel called him to testify about the issues of futility, being forced to go on strike, wage freeze/lower wages, reprisals and immigration threats. He testified that he attended five meetings with the consultants and at two of them remarks were said concerning those subjects.

He said that on December 23, the third of the five meetings, he recalled, "Mr. Highfill telling us that no one could force the company nor the union to negotiate with us. Because he said that they were the owners and they could do whatever they wanted to. That they could freeze our wages and lower them also. Another thing he said was that if the union were to enter into the company, they would force us to go on strike even if we did not want to."

As with some other witnesses, there is no context in which these remarks were made. It presented as if it had been a memorized burst.

He also testified that he was absolutely certain that it had occurred on December 23. Yet the evidence shows that Highfill did not speak to the employees after December 15. Ordinarily, a lack of memory concerning a date would be of little importance, but this witness' insistence on the validity of that date caught my eye. ("Q. Now, you testified that you [ ]—attended an employee meeting on December the 23rd of 1997? A. Yes. Q. Are you absolutely certain about that date? A. Yes. Q.

[64] There is also evidence, which I do not find necessary to explore here, that Romero has a bias against Respondent due to her belief that Respondent has violated the Family Medical Leave Act with respect to an absence from work due to a family member's injury. She is a plaintiff in a Federal suit regarding her loss of pay; she was initially denied reinstatement but was back to work at the time of the hearing. At that time the suit was still unresolved.

How? A. Because I remember and that's the testimony that I gave. Q. Did you make a note of it on a calendar or some piece of paper that that was the actual date? A. No. I do not remember.") At one point he is attempting to impress me with the precision of his memory, only to be forced to say he did not remember whether he had even written it down.

The second meeting which he testified about was the last meeting. He says it occurred on January 5, 1998 (a date to which the General Counsel led him). He testified that consultant José [Ybarra] told employees that the Company could not call the INS and that it would not be the Company's fault if the INS came. He asserts that Ybarra harped on this issue 10 to 15 times during the the 15-minute discussion. Oddly, his version does not even amount to a threat to call the INS; it is instead, a reassurance that the Company would not do so.

On cross-examination, counsel suggested that what Highfill had really said was that the Union couldn't force the Company to agree to the Union's demands, but Velasco, replied that he didn't remember that. Indeed, he became somewhat defensive, his recollection seemed to recede and he went blank. And one point he mixed up the words "could" and "would" particularly when referencing the union forcing employees to go on strike. Finally he settled on "would force us."

Significantly, he admitted that the consultants generally used examples when making their points, admitting there was a major context in which to place their remarks. Despite that admission, at no point did Velasco ever even make an effort to describe a specific example. The consultants, of course, said they presented their examples in specific detail. Velasco's acknowledgment here demonstrates that he was not testifying about the words the consultants used, only the conclusions which he drew from them, conclusions which are unsupported by facts.

Although Velasco said the words which the General Counsel needed to make its case, I conclude that his testimony is not reliable, but is instead conclusory and deliberately designed to veil the truth. He knows the actual words the consultants used but declines to reveal them. He has simply not been forthcoming. He wants me to accept his conclusions at face value.

I conclude that Velasco's testimony is unreliable and an inadequate foundation upon which a finding that the Act has been violated can be based.

Antonio Salazar: As observed earlier, Salazar is a cold room employee working under Bautista's supervision. He is a recognized union activist. The General Counsel called him to testify about several allegations against the consultants, including statements that unionization would be a futility, that the Union would force the employees to strike, that reprisals would be taken in the event the employees chose union representation and that they made threats related to deportation.

Salazar testified that during the first meeting conducted by Highfill, during the first week in December, Highfill "started telling us that, really, the union had some very strict rules by which, on occasions, they would make it mandatory for us, the workers, to have stoppages or strikes. He asked if we were aware of that work stoppage that had occurred at that time in July and August of '97 at [United Parcel Service], and also the millions of dollars that had been lost. He also asked if we were aware of the accusations that were being held against Mr. Ron Carey, who is the president of the Teamsters. That's most of what I remember." Salazar also recalls Highfill discussing union dues.

He also recalls Carmona saying something similar regarding the Union obligating employees to strike and to participate in work stoppages.

On cross-examination Salazar admitted that with respect to the Union that the consultants "may have said" that the Union could discipline employees who didn't strike. He even admitted that Highfill never said that the Union would strike Respondent. He also agreed that in the January meetings neither Ybarra nor Berrelleza ever said that the Teamsters would strike Respondent.

At the second meeting, apparently December 15, Salazar said that Highfill presented a document describing a history of strikes. While testifying about this meeting, he was asked if Highfill said anything about wages and he replied: "He said that about those wages, if the union won, while they were making the contract, that our wages would be frozen." In addition, Salazar said that Highfill responded to a question by employee Alicia Mendoza who had asked if there was any truth to a rumor that the Company would call the INS. Salazar recalls Highfill responding, "No, the company will not bring them in. The one that might possibly bring them in would be the union."

As discussed previously Highfill did indeed bring a list of current strikes to the meeting and distributed it. Second, Highfill acknowledges that when describing the bargaining process he stated that wages would remain the same until a new agreement had been reached and that the company could not make changes during that period. Thus, Salazar's testimony about wages being frozen seems likely to be almost accurate, missing Highfill's distinction that during negotiations employers are not permitted to make unilateral changes in working conditions. In fact, Salazar agreed with counsel on the point:

> Q. Okay. He just—he just said that during the bargaining process there could not be changes made without negotiating?
>
> A. Exactly, yes.

With respect to the response Highfill gave to Mendoza, insofar as it relates to the Company's response it is entirely lawful. Insofar as the Union is concerned, Highfill clarified that as he stood before the group he realized that the question presented an opportunity to explain by example a circumstance under which the Union might actually benefit from an INS raid. Earlier that month there had been a well-publicized INS raid on an unrelated company, Brewster Heights Packing, which was nonunion. The immigration service had arrested and deported several undocumented aliens as a result of that raid.

He explained that under a union contract which had a union-security clause, new employees are usually obligated to pay an initiation fee to become union members. He pointed out to the employees that if Brewster Heights had been unionized, the only entity which would benefit from the raid would be the union because that employer would be obligated to replace the deported employees with new employees. Under a normal union contract, the replacements who chose to comply with the union-security clause would have to pay initiation fees. In that

sense, he said, the union would be the only beneficiary of an INS raid. Despite that he did not suggest that the Union had any real incentive to call the INS. Ybarra even said he did not think that the Union was "that mean."

I find Highfill's description to be more detailed and more accurate than that provided by Salazar and conclude that Salazar's testimony is simply incomplete. In that circumstance, I find that he has not fully described what Highfill said and that what Highfill actually did say was perfectly lawful.

Insofar as threatening reprisals is concerned, I found no place in the record where Salazar made such contention. There is an incident involving repartee between Salazar and Berrelleza concerning a consultant named Leticia Maravilla whom Highfill had discharged. It did not involve a threat by Respondent to take any reprisal against any employee for selecting the Union.

Considering the context in which the remarks Salazar described occurred, and considering that his recollection was incomplete, I am unable to find anything in his testimony which supports the allegations in the complaint.

Maria del Rosa (Rosio) Diaz: Diaz' union activity has previously been discussed. She was one of the leading employee organizers and later married professional organizer Andrew Barnes.

She testified that about 2 weeks before Christmas she attended a meeting in the lunchroom conducted by Highfill, Carmona and another person she did not know (probably Berrelleza). She says there were 10 to 15 employees in attendance. She says Highfill told them, "That the union would obligate us to go on strike. And that we would not matter to the—we would be of no importance to the boss, because he could replace us. And that we could lose our job." She was unable to remember anything more which occurred at that meeting.

As with other witnesses, this testimony is without any context and is very curtailed. She could remember nothing said by either Carmona or the third person. Yet we know that Berrelleza described her 1985 strawberry strike experience and that Carmona warned employees about certain organizing techniques used by professional organizers. As an organizer herself, she should have remembered what Carmona described. Similarly, Berrelleza's graphic description of the 1985 strike should have been recalled. Rather clearly, Diaz is providing information through a selective memory.

Again, one can perceive that Diaz is not describing the words which Highfill used, but is instead editing his remarks in a manner best suited for the Union's purpose. We know that his discussion of strikes occurred only after he explained the bargaining process and what might happen in the event that agreement could not be reached. Moreover, Highfill, as previously noted, did speak about the Union's constitution which gave it the right to discipline members who did not join an authorized strike. We also know that Highfill presented his list of ongoing strikes and spoke of the economic impact strikes have on employees. He testified: "[T]here was a discussion of strikes at some juncture and I don't exactly know when it was, I said that the law currently in the United States is that when there is a strike, a company can still lawfully replace economic strikers. And I defined that term for them. Told them what economic striker meant." He also denied saying that employees were useless because they could be replaced or fired.

I conclude that Diaz' testimony is too abrupt and pointed to be credible. She is obviously influenced by her strong belief in the union movement. She is unable to testify fully and completely and in an objective manner. She is not without bias. Highfill's testimony is much more credible. Accordingly, I conclude that Diaz' testimony does not support the complaint.

Marcelino Gonzalez: Gonzalez testified through the interpreter. He is illiterate in Spanish and, of course, understands very little English and speaks even less. I concluded, while observing him, that he doesn't understand much more than simplistic phraseology. Sophisticated argument, such as that engaged in by more educated persons, are simply too subtle for him. Nuance strains his understanding. In addition, his anger at being transferred from his previous cleanup job to working at the dumper was a significant factor in his approach to testimony. He believes that he was transferred from one job to the other because of his union activities. Of course, the complaint contains no such allegation. He nevertheless believes it to be true.

He is a strong union adherent. Even though he cannot read or write, he did successfully solicit a few signatures on authorization petitions on behalf of the Union. He is gregarious and talkative. He is mischievous as well, having taken part in Chuy Andrade's distribution of the procompany T-shirts after one of the video meetings.

He testified that he attended all of the preelection meetings conducted by the consultants, but he tends to conflate them. He actually described only three meetings, one with Highfill (whom he misnamed "Garfield"), one with Ybarra (apparently) and one with Plath (whom he actually knew).

At the first meeting he described, he said Highfill/Garfield told him that the Union would force the employees to strike. He gave an affidavit dated December 16, either only 1 day from the December 15 meeting or 2 weeks after the December 3 meeting, but did not mention this subject in that affidavit. The subject does appear in a second affidavit (R. Exh. 2), dated February 3, 1998, but in a decidedly different manner.

He also says that Ybarra, in the second meeting, said that the employees would be forced to strike. He does not explain why that would be so. He doesn't say whether the strike would occur because an agreement would not be reached, or that the Company would bargain in bad faith thereby causing a strike or that the Union would force a strike for reasons of its own. He simply does not explain. This, of course, coming from Ybarra, could not have been included in the December 16 affidavit, but does appear in Respondent's Exhibit 2. That exhibit, taken in English by a Board agent, demonstrates at least some confusion on Gonzalez' part. I quote the pertinent portion of the affidavit:

> These meeting [sic] were conducted by consultants. Sometimes Tommy Hanses was present. At the first meeting there was a white man name [sic] Highfill, and two women Maria Carmona and "Maravilla." They all said the union was bad. They talked to us about strikes that the union was going to force us to do.

> In the last company meeting another consultant, Jose, told us that we did not have to vote, but not voting was like a vote for the union.

As can be seen, this affidavit is vague. It does not describe any words which the consultants supposedly used. Furthermore, it does not describe José Ybarra as having said anything about strikes. It only describes in conclusionary terms strikes which the Union was going to force them to take, according to Highfill, not Ybarra.

Among other things, this is an example of Gonzalez' inability to discern nuance in what Highfill was really saying. Again, there is no question that the consultants cited the historical fact that Teamsters presidents have been convicted of corruption. That fact to Gonzalez' recollection became "the union was bad." There is also no doubt that Highfill described the bargaining process and described the few options left when no agreement is reached, including a strike. There is also no question that Berrelleza (misidentified as Maravilla) described her experience in the 1985 strawberry strike, and that Highfill spoke of the constitutional right of the Union to impose sanctions on members who declined to join authorized strikes. This is a far cry from Gonzalez' conclusionary claim that somehow the Teamsters would force employees to go on strike, or from the other possibility, that the Company would bargain in bad faith, thereby forcing a strike.

Moreover, some of Gonzalez' testimony is simply a garble. In further describing what Ybarra supposedly said about striking, he gave the following testimony which included a reference to some sort of unspecified reprisal:

> Q. (BY MS. DELGADO) As best as you can recall, who spoke during that meeting, that second meeting?
>
> A. Mr. Jose.
>
> Q. And as best as you can recall, what did he say?
>
> A. Well, he was talking to us as regards where the union was going to take us.
>
> Q. And do you recall what he said about that?
>
> A. That it was going to force us to strike.
>
> Q. Okay. And do you recall if you made any comment at that meeting?
>
> A. Yes.
>
> Q. And what do you recall?
>
> A. I answered why was the union going to force us to make strikes if that was not the truth.
>
> Q. And do you recall if any of the consultants that were present answered your question?
>
> A. Yes.
>
> . . . .
>
> Q. BY MS. DELGADO: Okay. Who answered the question?
>
> A. Mr. Jose.
>
> Q. And what was the answer that you got from him?
>
> A. He said that the company would take reprisals against us if they were to lose.

Quite obviously, Gonzalez was making it up as he went along. He was being asked about strikes, and described a question he supposedly asked Ybarra, "[W]hy would the union force us to strike?" To that, Ybarra supposedly replied, "[T]he company would take reprisals against us if they were to lose [the election]." This simply makes no sense. In essence he is saying that Ybarra said the Union would force a strike because the company would take reprisals if it lost the election. Why would Ybarra say something as nonsensical as this?

Accordingly, because he has told inconsistent stories, because he is unable to recall matters in any sort of sensible context, and because he seems to have a bias not only favoring the Union, but disfavoring the Company, I conclude that Marcelino Gonzalez' testimony is unreliable and does not support the allegations in the complaint.

Maria de Jesus (Chuy) Andrade: Chuy Andrade, like Rosio Diaz, was one of the principal employee organizers. She had been the victim of some 8(a)(1) conduct in October for talking about the Union while working and stood up to Bautista when Bautista questioned her filching some procompany T-shirts which were not intended for union leaders at the end of a preelection video. Her proclivities were well known to Respondent's supervision and managers, though probably not to the consultants. She attended the same meetings as activists Rosa Salas, Marcelino Gonzales, and Efrain Velasco. She, too, testified through the interpreter.

The General Counsel offered Andrade's testimony to support its contention that the consultants made statements constituting an unlawful threat of closure, that union representation would be a futility, that jobs would be lost, that the employer would send its fruit elsewhere, that employees would be forced to strike and that wages would be frozen or lowered.

Andrade testified about four meetings she attended conducted by the consultants. A review of her testimony shows that she is somewhat confused about the sequence of the meetings. Moreover, she believes Mayra Berrelleza attended all of the meetings, although the credible evidence shows that Berrelleza was not present during the early December meetings. She also claims that either Carmona or Berrelleza did most of the talking at these meetings. This, too, is contrary to the credible evidence, as Highfill and Berrelleza both spoke at length December 15 meeting and Ybarra was the major speaker at the meetings in the 10 days before the election.

She was taken through each of the four meetings she described. She testified that the group of employees who usually accompanied her to these meetings was the same, and that it included individuals who were the most active in the Union. She testified that during the first meeting, which she did not make an effort to date, Carmona said, among other things:

> {T]hat everything that the union was telling us was all lies, that they were all lies what they were saying, they were all false promises. She said to us that [neither] the union [n]or us, [. . .] no one was going to make the company pay us more money than what the company could pay us. She also told us that if we ask for a dollar raise, or 50 cents raise, that they would not pay that because neither us nor the union could pay us that if the company could not do that. She said that they were the owners, and neither the union nor us would make them pay us more. [Edited for clarity.]

Andrade interrupted Carmona: "I stood up, and I was very angry. I told her—I told her that we were old enough, we were

big enough, why didn't they let us organize ourselves? Why didn't they let us tell them what we wanted? I remember that she told me that I was a foolish child, that I didn't even know what I wanted." At the time she testified, Andrade was still angry over what she regarded as an insult. Carmona denies ever calling an employee either "foolish" or a "foolish child."

One thing is clear under Andrade's version, that Carmona had been attempting to explain that in the bargaining process an employer would not pay more than it could afford—an employer could not pay money it did not have. It is equally clear that Andrade regarded that remark as unacceptable, because she did not understand Carmona's description to be in the abstract.

Andrade continued, "I remember Maria Carmona saying that if the Union entered that the Company could take their fruit to other warehouses, and that we could be left without a job, and that neither us, the workers, nor the union could do anything because they were the owners and they were the ones that would decide." And then she testified, "I don't remember if it was Maria Carmona or if it was Mayra [Berrelleza], the one that told us. She told us that if the union were to enter that we were risking losing our jobs. She said 'You could lose your jobs,' and she said 'They will make sure that you will never find work in any other warehouse.' I asked her, 'Why? We are not criminals. We are in a free country. We can organize ourselves whenever we want to.'"

On cross-examination, she added that if the Union won, that the employees would be forced on strike and nothing could be done about that. She also said that Mayra told them that if there was a strike the Company had the right to operate the plant with other workers.

Keeping in mind that Carmona and Berrelleza had specific roles to play, much of Andrade's testimony here seems to be only partially accurate while at the same time a distortion of what was actually said. First, it seems entirely unlikely that Carmona said much of anything about the bargaining process. Highfill was the one responsible for the subject matter. Carmona said virtually nothing during the early December meeting and only described union organizing tactics at the December 15 meeting.

It is true, as has been previously noted, that Highfill did speak about what might happen in the event that collective bargaining failed to result in an agreement. In that event, he said, a strike might ensue. And, as previously noted, he was prepared with his list of ongoing strikes. Furthermore, Berrelleza detailed her 1985 strawberry strike experience. One of them also spoke of the United Parcel Service strike which was then in the news. Andrade concedes the consultants spoke of the Watsonville strawberry strike, but denies anyone mentioned the UPS labor dispute.

Her concession that Berrelleza dealt with her experience in Watsonville is also a concession that the consultants were sticking to their planned roles. Therefore, if Highfill and Berrelleza were performing their duties, why would Carmona not be performing hers? She was there simply to describe union organizing tactics which she characterized as deceptive. All three denied ever talking about sending fruit to other packers or that unionization equated with job loss. Indeed, a threat to send fruit to other sheds makes little sense in this community, where Respondent is one of the largest, if not the largest, apple packers. Furthermore, Respondent had only recently completed a large capital investment in equipment. It is also belied by Plath's discussion shortly before the election in which he described the Company's future, noting that more trees had been planted and that the Company's future was bright. For the consultants to say that Respondent would send its fruit to other packers simply because a union had organized it would not be seen as a believable deterrent.

I conclude, therefore, that Andrade's testimony is similar to what has been determined with other witnesses—that she has misunderstood or has distorted what was really being said. Her claim of job loss and blacklisting was simply an extrapolation she drew from Berrelleza's Watsonville experience, not an independent threat from Berrelleza.

With respect to the second meeting, Andrade says that the consultants who participated were Ybarra (Jose) and Berrelleza (Mayra). Again, she cannot put a date on it, but it must have been after Ybarra arrived on December 28. She describes what he had to say: "I recall that Mr. Jose said that if the union were to enter—if the union were to enter, that we were running the risk of losing our jobs—that we were running the risk of losing our jobs, they could even close the plant; and that just because we were participating in the union that we could be left without a job."

She says that Berrelleza told them: "if the union were to enter, that we could be replaced by other workers. She said that we could be replaced, and that the company could close down whenever they wanted to, and that we would lose our job. She also said that if the union were to enter, that they could make it mandatory for us to go on strike or have a work stoppage, and she said that we would have to do that. And I told her that, no, that if we didn't want to do that, that we wouldn't have to do what we didn't want to do."

On cross-examination, she added that Berrelleza said that in the event of a strike, and the Company could not get replacements, the Company might have to send its fruit out to other packers. At other points, she said that Mayra either "could" or "will" take its fruit to other warehouses. Later, Berrelleza says that Mayra told them that in the event of a strike, the company "might" send the fruit out. Frankly, her inconsistent testimony here does not leave me with much confidence in her accuracy.

She also said, whether it was in the second or third meeting, that Berrelleza spoke in more detail about her Watsonville experience:

> (WITNESS ANDRADE) . . . Mayra said that if the union entered, that the same thing would happen to us, what happened to her mother in Watsonville, California.
>
> Q. Okay. Besides the Watsonville, California story, do you recall if Mayra said anything else regarding the union coming into the plant?
>
> A. Yes. She said that if the union were to enter, that we would be fired.
>
> Q. What was—do you recall what she said about Watsonville, the story about Watsonville, California?
>
> A. Yes.
>
> Q. And what was that?

> A. She said that the same thing that had happened to her mother would happen to us, that if the union were to enter, that they were going to fire us just like she had been fired, simply for being involved in a strike; just because of being involved in that strike, that her mother had been fired from her job, and that the same thing would happen to us, that they would fire us, and that we would be replaced, and that they would make sure that we would not be hired in any other packing shed.

This testimony invokes a startling embellishment. For the first time we see a claim that Berrelleza's mother was involved in the 1985 the Watsonville strawberry strike. Furthermore, according to Andrade, the mother had been fired and had been blacklisted.

Berrelleza testified that she never said any such thing and furthermore said that her mother was never involved in the Watsonville strike. I certainly have no reason to discredit Berrelleza on the point. It is possible, but entirely unlikely, that she would need to invent a fictitious mother who suffered extensively during the Watsonville strike. Yet her own experience was quite sufficient for the purpose. Accordingly, I conclude that Andrade's testimony is more than simple embellishment; it is an untruth.

Andrade also asserts that during the third meeting that Berrelleza said that if the Union got in, it would be "useless" because the Company would never negotiate with it. In addition, the Company would lower or freeze the wages, that the Union would require the employees to go on strike and that the employees would be replaced, the Company would close and the employees would lose their jobs.

Oddly, on cross-examination she recalls that Berrelleza said that in the event of a strike, if the Company couldn't find employees to do the work, it might have to close. She also remembers Berrelleza saying that if the Union won the election and they began to negotiate, that the workers could end up with less than what they have now, the same, or more. In almost the same breath she asserted that Berrelleza said, "[I]f the union were to win, that they (Respondent) could freeze our salaries, even lower them."

Again, Andrade's testimony leaves me without confidence. She is inconsistent, she is incomplete, and she is inventive. Her testimony pales when compared to that of Berrelleza and Ybarra. I cannot rely upon it and it cannot be used to support the allegations in the complaint.

3. Commentary and conclusions

As can be seen in the foregoing, each of the witnesses proffered by the General Counsel in support of the allegations concerning the consultants has been discredited. In nearly all of the cases, they were internally inconsistent, told multiple stories either on the stand or in their prehearing statements, were embellishing and/or telling falsehoods. I find it curious that each of these individuals is a Spanish-speaking member of the activist group. None of the English-speaking activists, such as Pam Smith, or nonactivists (whether Spanish- or English-speaking) ever heard anything like that reported by this group. If Respondent were actually saying such things to its employees as part of a common plan, surely such things would have been said to English-speaking employees. Yet there is no evidence whatsoever to that effect.

Furthermore, all the witnesses called by the General Counsel to support this portion of the complaint said that they had spoken to no one (other than the lawyers) about what they testified to. I find that denial disingenuous. This organizing campaign was a momentous event in their lives. It would have been a common topic of conversation. Statements such as those which were described would have spread like wildfire throughout the plant. Yet these employees would have me believe that they said nothing about them to other employees.

These two factors, when connected to all the inconsistencies in their stories, lead me to the conclusion that these individuals have either chosen or been led to a path of deliberate falsehood. I am not certain whether these employees, like Flores, were suborned or whether their zeal led them astray. Individuals with strong feelings such as those held here are often known to believe that the end justifies the means. I think these individuals fell prey to that type of thinking.

This is not to say that Highfill and his staff did not play hardball here. In utilizing truthful, but unpleasant examples, Highfill's group was able to convey a very strong negative image of union representation. Nonetheless, that message was protected by Section 8(c) of the Act.

Section 8(c), of course, does not protect coercion. Yet, at no place can I find in the record any credible evidence supporting the types of coercion that are commonly seen in speeches of this nature and which would be beyond the bounds of Section 8(c). The employees' claims that the consultants said wages would be frozen or that strikes were inevitable are simply fragments of what was actually said. In fact these fragments almost certainly are deliberate. Such evidence does not rise to the level where it could be said the remarks may reasonably be construed to be saying that the existing system of wage increases would be stopped either if the Union won the election or to await a first contract. Compare *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Similarly, such evidence does not lead one to the conclusion that the consultants were saying strikes were the inevitable result of voting for the Union or that a contract could not be reached without a strike. Compare *Vestal Nursing Center*, 328 NLRB 87 (1999). Employee evidence of these and other remarks, such as the threats to close, to process the apples elsewhere or to call the INS is simply untrustworthy.

The Board and the courts have said that Section 8(a)(1) and 8(c), when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969); *General Electric Co.*, 332 NLRB 919 (2000); *Advanced Mining Group,* 260 NLRB 486 (1982); *Coleman Co.*, 203 NLRB 1056 (1970); and *TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981). None of these factors was proven here. The consultants' speeches were protected by Section 8(c).

As a result, I conclude that the General Counsel has failed to prove that Respondent violated the Act as alleged in paragraph 11 of the complaint, except for that portion relating to Bautista which has been discussed in another section.

IV. OBJECTIONS TO THE OUTCOME OF THE ELECTION

As previously noted, the parties entered into a Stipulated Election Agreement which was approved by the Regional Director on November 26, 1997. Pursuant to that agreement a representation election was conducted on January 8, 1998, in the following unit:

> All regular hourly production and maintenance employees (including apple and pear employees), warehouse, shipping, repair yard, and refrigeration employees; excluding all salaried employees, office clerical employees, all other employees, and guards and supervisors as defined in the Act.

The tally showed that of approximately 300 eligible voters, 121 votes were cast for representation by the Union, 161 were cast against representation and there were 8 challenged ballots and 1 void ballot. The challenges were insufficient to affect the outcome of the election and the final tally showed that the Union lost the election by 40 votes.

On January 15, 1998, the Union filed 23 objections to conduct affecting the results of the election. The Regional Director investigated the objections and on June 12, 1998, issued his report and recommendation on objections in which he dismissed Objections 4, 13, and 15. He consolidated the remaining objections with the complaint so that the matters could be heard together. On June 23, 1999, I dismissed Objection 22 on the record.

A large number of the objections simply track the complaint and have been dealt with in the unfair labor practice section of this decision. Those are Objections 1, 2, 3, 5, 7, 8, 16, 18, 19, and 20. The merits of these objections will not be discussed further here. Where necessary, any remedy required will be included in the remedy and Order portion of this decision.

There are two objections, Objections 14 and 17 which could have been alleged as unfair labor practices, but were not. Objection 14 alleges that Respondent solicited grievances, implicitly promising to remedy them, in order to encourage employees not to support the Union. There is no evidence supporting this objection and the Union's brief does not refer to it. Accordingly, Objection 14 will be dismissed. Similarly, Objection 17 alleges that the Employer engaged in, or gave the impression of engaging in, surveillance of workers engaged in concerted, protected activity in nonproduction areas in nonworktimes. In support of this objection the Union points to an incident occurring on May 30, 1997. This was the subject matter of paragraph 7(a) of the complaint which I dismissed on the record on June 30, 1999. Aside from its obvious failure of proof, I observe that the incident occurred about 6 months before the petition was filed. Accordingly, it did not occur during the preelection critical period. See the Board's rule as set forth in *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961). That case requires objectionable conduct to have occurred between the filing of the petition and the election; therefore, this matter will not be pursued further.

That leaves for resolution Objections 6, 10, 11, 12, 21, and 23. They will be dealt with seriatim.

Objection 6. This objection alleges that Respondent offered prizes, such as color televisions to workers in order to gauge antiunion sentiment and to induce workers to express antiunion statements orally and in writing. The evidence in support of this allegation deals with a preelection raffle. At volume 3, page 384 of the transcript, the parties entered into the stipulation set forth in the footnote.[65] Based on my understanding of the law and taking into account the stipulation, on June 23, 1999, I orally dismissed the unfair labor practice allegation dealing with the raffle, paragraph 12 of the complaint, but permitted this objection to stand. Since that time the Board has revisited the entire field of preelection raffles. In *Atlantic Limousine, Inc.,* 331 NLRB 1025 (2000), the Board set forth a new rule regarding preelection raffles, saying that it would be applied "to all pending cases in whatever stage." (Id. at 1030.) The new rule is aimed at preserving the "laboratory conditions" which the Board seeks to preserve during the preelection period. Specifically, the rule says that preelection raffles will be deemed sufficient to overturn a Board election "if (1) eligibility to participate in the raffle or win prizes is in any way tied to

[65] The stipulation:

1) Respondent, as part of its election campaign, held a contest.

2) Beginning in early December 1997, Respondent posted in the warehouse lunchroom generally two questions and answers per week. [ ] General Counsel's Exhibit 41 is a true and correct copy of the completed posting, except that question and answer number 4 was not posted or used in the contest, and the fax transmission information did not appear on the posting.

3) As to the instructions and questions, the contest form was uniform. [ ] General Counsel's Exhibit 42 is a true and correct copy of a completed contest form.

4) Respondent divided the raffle participants into three groups, herein "raffle groups." These groups consisted of the following employees: One raffle group was comprised of day shift apple line employees, a second raffle group consisted of night shift apple line employees, and a third raffle group consisted of shipping/pear line/warehouse/repair yard and refrigeration employees.

5) Contest forms for each raffle group were sequentially numbered, based upon the number of employees in each raffle group. The same number on each contest form appears on the bottom, right-hand corner and at the top. These numbers were created by respondent solely for the contest. The colors of the contest form numbers for each raffle group were different. The colors used were red, black, and most likely, blue.

6) After completing the questionnaire, General Counsel Exhibit 42, each employee who participated tore off the bottom, right-hand corner of the questionnaire.

7) Completion of the questionnaire, General Counsel Exhibit 42, was necessary to be eligible for the raffle drawing.

8) Prior to Respondent grading the questionnaires, completed questionnaires were placed into a particular box designated for the employee's particular raffle group.

9) Respondent graded the contest forms based upon the questions and answers appearing in General Counsel Exhibit 41.

10) Employees, to be eligible for contest prizes, had to answer all the questions correctly, based on General Counsel Exhibit 41. The prizes and their after-tax cost for each group were: first prize, $430.39, a t.v. with integrated VCR; second prize, $182.90, a barbecue; and third prize, $139.86, a VCR. The raffle drawings for each of the raffle groups were separately conducted by respondent on January 2, 1998.

11) Prizes were awarded to the winning participants in each raffle group.

voting in the election or being at the election site on election day or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. The term 'conducting a raffle' includes the following: (1) announcing a raffle; (2) distributing raffle tickets; (3) identifying the raffle winners; and (4) awarding the raffle prizes."

In examining the stipulation, I observe that the announcement of this raffle occurred during the first week of December 1997, a month or more before the election. Furthermore, I observe that the drawing itself was held on January 2, 1999, 6 days before the election. Accordingly, I am unable to conclude that this raffle ran afoul of the *Atlantic Limousine* rule.

Furthermore, I am not persuaded that this raffle sought to induce employees to reveal their union sympathies and desires. It was instead designed as a debating tool to induce employees to vote against the Union. It set forth questions and answers for a true-false quiz to be given as a condition for becoming eligible for the drawing. The employees were divided into three groups for three separate drawings. One group was the day shift, one group was the night shift, and one group included all of the shipping/pear line/warehouse/repair yard and refrigeration employees. The quiz for each group was separately colored and each quiz was numbered at the top and the bottom. The employee, to be eligible for the drawing, first filled out the quiz and tore off the bottom containing the number as proof that the number drawn belonged to him or her. Second, all forms were graded consistent with the answers as posted on the lunchroom wall. They are found in General Counsel's Exhibit 41 and in revised format are set forth in the footnote below.[66] Those quizzes which answered all questions correctly were placed in a box for the drawing.

Since all of the quizzes in the drawing were correct and since there were three winners for each group, those who held matching numbers, no one except the winners was identifiable. Indeed, even the identities of persons without perfect answers could not be known. Furthermore, although the prizes (combination television/VCR, barbecue, VCR) ranged in value from $432 to $140, they are not directly aimed at the purchase of votes. They are instead, designed to focus the employees' attention on the issues which a representation election participant usually debates.

Accordingly, I find this raffle to be protected by Section 8(c), the free speech section of the Act. This objection will be overruled.

Objections 10, 11, 12, and 21. These objections all relate to conduct occurring during the period the polls were open on January 8, 1998. They tend to run together and the witnesses are generally the same. Objection 10 asserts that the Employer serveilled or gave the impression of surveilling voters as they voted or as they waited in line or walked to the polls. Objection 11 asserts that the employer engaged in electioneering in the polls and in the line of waiting voters immediately outside the polling place. Objection 12 alleges that the Employer directed employees to vote even if they may not have wished to do so or barred some employees from voting. Objection 21, connected to Objection 12, contends that that the Employer coordinated the release of employees to vote contrary to an agreed-upon plan of release and that the breach of the agreement interfered with the laboratory conditions required by the Board.

Pursuant to the Stipulated Election Agreement, election was held between the hours of 2 and 6 p.m. on January 8, 1998. About half an hour before the election was to begin Board Agent Rudy Hurtado conducted a preelection conference. Although the Petitioner-Union asserts in its objections of that an agreement was reached relating to the release of employees from their tasks to go to the polls, the evidence does not so show. Instead, according to the Union's principal witness,[67] Andrew Barnes, who served as a translator for some of the Spanish-speaking people at the meeting, but who was not one of the active participants, the only thing he could really recall was that the observers were to release the employees in groups

[66] GC Exh. 41 as follows:

1. Q. Union members never stop paying for their jobs. A. True, because the union requires employees to pay dues as long as they work under a contract.

2. Q. If the union negotiates a contract that does not include a raise for the employees, the union will not make the employees pay dues. A. False, because the union requires its members to pay dues in every company where it has a contract.

3. Q. It is against the law for union agents to make promises to workers that they know they cannot keep. A. False, unfortunately, union agents can legally promise anything they think will convince people to vote for them.

4. [Not utilized during this election]

5. Q. The union gives workers more pay and better benefits. A. False, the union does not pay one cent worth of wages and benefits. The employer is the only one who pays for these changes.

6. Q. Union 'initiation fees' can be well over $100 and anyone who fails to pay them when the union says may have to lose their jobs. A. True, if the union gets a contract it can require every new employee to pay a fee or be fired.

7. Q. It is possible for those making minimum wage ($5.15 per hr.) to lose money by belonging to a union. A. True, if the employer and the union sign a contract that offers minimum wage, dues later required by the union will cause to (sic) employees to actually make less than they did without the union.

8. Q. The union enforce the employer to pay more than he is willing to pay. A. False, because the law does not require any employer to pay more than he is willing to pay.

9. Q. A union can strike an employer to force him to pay more. A. True, but when a strike happens, those who take part in it may be permanently replaced—no matter how long they may have worked for the employer.

10. Q. If a person breaks any of the union's rules or refuses to pay any of their fines, assessments or dues, they can be fined or even fired. A. True, and the best way to avoid the possibility of such terrible things from ever happening is to keep the union out of this company.

[67] The principals for the Union at that meeting were Attorney Robert Gibbs and John August, the International Union's coordinator of organization. Although August served as a witness for the General Counsel regarding the August 12 demonstration, he was not asked regarding whether or not any prerelease agreement was reached on January 8, 1998.

and that the supervisors would not be involved in the release process. He recalled that "large groups" were not to go all at once. Rather obviously, this meant that Respondent was intending to continue to run its fruit processing activities as best could while employees were engaged in the voting process.

Because the election period was deliberately timed to overlap the shift change, and because of the length of the polling period, each party chose two employees as their election observers. The Union chose Maria Gonzalez and Ruth Anton. The employer chose Francisco Juarez and Sandra Ayala.[68] Gonzalez and Anton were employed on the night shift, while Juarez and Ayala worked the day shift. Gonzalez and Ayala were designated to be one pair while Juarez and Anton became the other. When one pair was out releasing workers, the other remained at the polling place with the Board agent to assist him in checking off the names of voters as they presented themselves. It was also their duty to challenge any person who appeared to vote whose name was not on the list of voters. The Maria Gonzales/Sandra Ayala pair did the initial release of voters. They switched duties with the Francisco Juarez/Ruth Anton pair at 3:30 p.m., about halfway through the election period.

One of the instructions, which the Board agent gave to the observers, limited what they could say to employees as they were being released. Essentially he told the observers to tell the employees that if they were ready to vote, then it was time for them to go and vote and that they should follow the two observers to the polling place. They were to say nothing more and were asked to make no gestures as well. For a portion of that time, Gonzalez carried a handwritten cardboard sign with a similar message, per the Board agent's instructions.

The polling place itself was the lunchroom in the center of the main warehouse building. It has a self-closing door that opens to the aisleway between the lunchroom wall and the bagging area. When the Board agent placed heavy paper over the door window, the room became entirely private. No one could see inside the lunchroom unless they opened the door.

Before the election began, the managers and supervisors wore their procompany T-shirts. However, when the election approached, all of them, including Tommy Hanses, either removed the shirts or covered them with an outer garment. Except for Bagging Supervisor Martin Zepeda, there were no supervisors anywhere near the lunchroom during the election. Zepeda's normal duties required him to be in his area, which as noted, is located across the aisleway from the lunchroom door. However, no evidence has been offered that any manager or supervisor, including Zepeda, spoke to any employee as they approached the lunchroom to vote. Indeed, there is no evidence that anyone whatsoever spoke to employees as they approached the polling place with the observers or once they were inside the lunchroom. Accordingly, there is no proof that any electioneering occurring during the polling period. In the absence of any evidence supporting Objection 11, it must be overruled.

Zepeda is, however, the focus of Objection 10, alleging that the Employer either surveilled or created the impression of surveillance of employees during the polling.

According to observer Maria Gonzalez, on numerous occasions during the election, estimated between 8 to 10 times, she observed Zepeda at the drinking fountain not far from the lunchroom door. She testified that the fountain is only 5 or 6 feet from the door. She is not corroborated by her partner Ayala. Ayala says that she did not observe any supervisor by the fountain. Moreover, she says the fountain is some 10 to 15 meters (some 30 to 45 feet) from the lunchroom door, next to the restrooms. At that time it was the only fountain in the building.

The Union observes that Zepeda did not testify and argues that because he did not deny or explain what he was doing, Gonzalez' version should be credited. Of course, it does not take into account Ayala's testimony. I recognize that there is some difference between Gonzalez and Ayala regarding the distance between the door and water fountain, but on balance I am not persuaded that Zepeda was doing anything improper. First, it seems unlikely, absent some special need, that anyone would visit the water fountain as frequently as described by Gonzalez. Yet Gonzalez did not seem to be one who would exaggerate. Still, I note Ayala's failure to observe such an oddity. Surely Gonzalez would have said something to Ayala upon the fourth or fifth observation. Apparently she did not. Accordingly, if she observed Zepeda at the water fountain, I believe it was only once or twice, not the 8 to 10 times she says. I also note that there is no evidence that Zepeda had any papers with him to suggest that he was recording what he saw or that the employees on their way to the polls even noticed him. His behavior seems to have been entirely unremarkable.

In that circumstance, I cannot conclude that Zepeda was doing anything out of the ordinary. He worked in that general area, the water fountain was handy, was next to the restroom and he was in a location where one would expect to see nearly everyone on the floor at one time or another.

I am therefore unable to find any facts warranting sustaining this objection. Accordingly, I shall recommend that Objection 10 be overruled.

Insofar as Objections 12 and 21 are concerned, the Union points to three situations that are said to support the contentions. One involved Mel Sager at the packing lines, another involved Rumsey Abdulla, the shipping department foreman who was at the cold room and the third seems to have involved Allan Munn, the shipping foreman at the bin lot, although the witnesses did not know his name.

Although, as I have found, no specific release agreement had been reached, there was a general consensus regarding how employees should be notified that it was their turn to go to the polls. One of those factors was for the observers to begin at the beginning of the processing operation and follow it to the end. However, Gonzalez and Ayala seemed not to understand this preference, at least as they started out. They began with the pear packers and then proceeded to the apple sorting lines. While the initial choice of the pear packers was appropriate, it

[68] She stated her name as "Sandra Aiala-Reies," spelling it as shown here. I initially thought her to say "Ayala-Reyes," but she corrected me. However, company records, including the *Excelsior* list, show her as "Sandra Ayala." The parties have accepted that spelling and I shall follow that convention here.

was there that the observers could not make themselves understood and very few employees followed them. As a result the Board agent asked Gonzalez to hold up the cardboard sign and to speak as best they could to the employees thereafter.

However, the apple line employees were chosen somewhat out of the expected order. That line usually begins with the dumper, with the bag line being a last station. When they arrived at the bag line, according to Sager, too many people left at once causing a department wide problem. As a result he spoke to them an asked that they take one line at a time, allowing for orderly shutdown and resumption. They agreed to follow that procedure and, before telling the employees on a specific line that it was their turn to vote, would advise Sager which line they were about to release. Gonzalez says that Sager told them which of the employees to release.

I think part of the problem here was the Board agent's limitation on the words which the observers were permitted to use. While they may have been able to use common sense in releasing the employees line by line, they had been told they could say nothing other than "it is your turn to vote." Because they said nothing else, too many people at a time left, leaving stations unmanned but with the lines continuing to run. It was for that reason that Sager interceded. In fact, according to Ayala, Sager "asked if it was okay" to proceed by having a whole line stop and that both she and Gonzalez concurred. Once the observers agreed to a line-by-line stoppage, the problem was resolved. There is no evidence that Sager spoke to any voter or released any voter himself. In fact, Gonzalez' testimony that he selected some specific employees would appear to be a misstatement. What Sager was no doubt doing was trying to minimize the confusion. If he referred to anyone by name, it was to choose individuals from a specific line, so that other lines could continue to run, while still permitting the observers to perform their assigned function. Had he not stepped in, there was the distinct possibility all the bag employees would have left at once or that the departures would be so uncontrolled that operating lines would have been undermanned risking spillage and/or inability to maintain bag-size integrity. There is no evidence that he interfered with anyone's right to vote. Indeed, neither Gonzalez nor Ayala think they missed anyone in the bagging area.

Later, when Gonzalez and Ayala arrived at the shipping department, located in a building across the street, the second situation arose. Gonzalez says that Ayala asked her to wait a moment while she went upstairs to speak to Abdulla in the office. A moment later, she says, Abdulla came down and told the employees to vote. He called people off the forklift and from the cold room and then led them outside so they could walk to the warehouse to vote. Ayala's version is somewhat different. She observes that the entrance to the shipping department is somewhat dangerous, with fast-moving forklifts exiting the main door which is covered with hanging plastics strips that inhibit visibility. She wanted to make certain the forklifts would be stopped for safety reasons when the employees walked through that doorway. She testified:

> Q. (BY MR. CROLEY) And what was the reason for initiating contact with Mr. Abdulla?
>
> A. Because there was up above a person that was to vote also, and I know that the forklifts, they run fast around there. I—before going up there, I told [asked] Maria if it was okay if we told Rumsey so that he could look or watch so that we would not have any problem with the forklifts. I only went up above and I said, "Rumsey, I need your people."
>
> Then we came down, and he came down with us, and we told the three people that were there. And there's a large door. And Rumsey walked up and said not to go by there, because we went through there. Then we went through there and inside we told the other two people that were inside the cold room. Then we left.

Thus, there is a testimonial variance between Gonzalez and Ayala regarding the role Abdulla played in releasing these employees. However, I'm of the view that the variance is essentially meaningless. Rather clearly, when Abdulla came down from his office, he immediately got on a forklift, exiting through the door in question and appears to have protected it while the employees departed with the observers. He does appear to have said something to the effect of "Okay, guys" but that remark is too vague to be of significance. He may simply have been saying to the observers that the course was safe. Whatever else might be set of this situation, it is clear that Abdulla did not walk around the department telling employees that they could leave to vote. That was left to the observers.

The third situation occurred at the bin lot, also located some distance from the main warehouse. When Gonzalez and Ayala arrived at the bin lot, there is again some testimonial variance. Gonzalez says that when they arrived, employees, perhaps six or seven, said they were on their break. She says that he observers asked them if they were ready to vote, but they replied they were not because they were on their break. She says Ayala asked for a supervisor, went and found one, and that he returned and ordered them to go vote. Ayala says that about the same time the employees declined to leave because they were on their break, a man drove up on a forklift and the observers told him that it was time to vote. At that point the man said something in English which neither Ayala nor Gonzalez could understand. At that point the two observers decided to move on, but two or three of bin lot employees followed them and another went his car and drove to the warehouse.

Both Gonzalez and Ayala believe that the individual who spoke to the employees was the foreman, but they do not know his name. The foreman for that area was Allan Munn. He did not testify.

Again, I do not find testimonial difference to be significant. I do not think that Gonzalez is entirely correct when she says that Ayala left to find a supervisor. No doubt the foreman was nearby. When Ayala announced to him, perhaps be leaving him to be an employee, that it was time to vote, he undoubtedly knew that the employees were taking a break. For him to make some not understood comment to them, is not proof that he was releasing them himself. He might have been releasing them, but he might equally have been admonishing them about putting their break ahead of their right to vote. Clearly he did not

tell them to vote, because not all of them followed the observers. Some chose not to go.

I conclude that the Union has failed to prove its Objections 12 and 21. Accordingly, they are overruled.

Objection 23. This objection asserts that the Employer failed to provide correct addresses for the employees whose names appeared on the *Excelsior* list.[69] It also alleges that the employer failed to include the names of all the eligible voters on the list. With respect to the latter issue, the Charging Party appears to have abandoned that concern. No evidence was offered and no argument has been made in support of that contention.

However, evidence was adduced to demonstrate that 28.4 percent of the addresses on the list were incorrect. Furthermore, the parties inquired into correspondence between the Union's attorney, the Board's Regional Office, and Respondent's attorney. They introduced by stipulation Charging Party's Exhibit 2, extracts from the Regional Office's representation case file in Case 19–RC–13536. The first is a December 2, 1997 cover letter from Respondent's attorney, Daniel Croley, to the Regional Director transmitting the *Excelsior* list. It was followed by facsimile from the Union's attorney, Robert Gibbs, dated December 16, 1997. In that transmission, Gibbs submitted material supporting a protest that the *Excelsior* list was defective in several ways, including a contention that it listed individuals who were unknown and advising that when the Union visited the addresses for those individuals, no one by that name could be found.

In response, the election specialist assigned to the case, Charlene Egbert, faxed Croley a request to deal with the problems, noting that the addresses for 12-named persons seemed to be incorrect.

On December 18, Gibbs faxed Harold Weier, a Regional Office supervisor in charge of representation cases, advising that 87 of the 306 addresses (28.43 percent) on the *Excelsior* list were incorrect. He also said the Union, by its own efforts, had found addresses for all but 28 and that 2 of the 28 were individuals whose employment status was not known. Gibbs submitted a photocopy of the list, supplemented by handwritten notations regarding individuals whose addresses were defective. The evidence shows that this information was entered by one of the Union's principal organizers, Andrew Barnes.

Also in the file is a telephone message slip in which Egbert, responding to Croley's initial call of December 19, notes that Croley "will verify who has quit and who hasn't and [get] the new addresses if the union will verify that everyone else on the list is eligible."[70] Another entry on the slip asserts that one of the disputed individuals is not a supervisor. It seems likely here that Croley and Egbert were speaking only of issues raised by her December 16 facsimile to him.

Despite that telephone call, which occurred on December 19 or shortly thereafter, there is no evidence that the substance of Gibbs' December 18 complaint regarding the 28-percent inaccuracy rate was transmitted to Croley or acted upon by him. Indeed, Croley did not respond to Egbert's December 16 transmittal until January 5, 1998 (with a copy to Gibbs).

Respondent's controller, Bryan Mains, and its payroll clerk Patricia Thomas testified that Respondent attempts to maintain the correct addresses for each of its employees and has a rule that employees are supposed to notify the office of address changes, but that the rule is often ignored. Because Respondent does not utilize the employees' addresses for any purpose, there is no incentive for the employees to assist the Company in keeping accurate records. Paychecks and annual W-2 forms are hand delivered. The only persons to whom W-2 forms are mailed are those who are no longer employed.

I conclude from that testimony that Respondent knew the probability of incorrect addresses was extremely high. I also observe that Croley, in dealing with the 12 bad addresses contained in the December 16 facsimile, as well as the other issues raised there, did not treat the matter with any sense of priority. He explained that for the most part he was away from his office for the Christmas season and somehow the need to deal with the issues slipped past him. He seems to also have been hindered by the time it took Respondent to obtain current addresses of the 12. Even so, it is not clear that he could have been able to address Gibbs' December 18 concern with the 28.4-percent inaccuracy rate—the Regional Office does not appear to have advised him about it. At that point, 16 days had passed from the due date of the list and a corrected list could never have given the Union the benefit of having in its possession a proper list for the 5 weeks that the stipulated election agreement contemplated.

Moreover, he treated the matter with some disdain. Why did he tell the election specialist that he would get the addresses only on the condition that the Union agree that all of the other names on the list were eligible voters? The election specialist is part of the Regional Office support (clerical) staff, not the professional staff. Her authority is most circumscribed and she would not be able to participate in the type of negotiation which Croley proposed. Her duties are directed to the election mechanics, and not to anything substantive.[71] So why approach her? In any event, the substantive discussion was over, having been finalized by the stipulated election agreement. Respondent's duty (and therefore Croley's duty) was to comply with that agreement to make the election process work—among other things, to supply an *Excelsior* list which complied with the Board's requirements. It was certainly not to draw a subordinate Board employee into some kind of needless dialog.

Under *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994), the Board has held that the *Excelsior* rule is not intended to test employer good faith or "level the playing field" between petitioners and employers, but is to achieve

[69] *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). That decision requires that within 7 days [after approval of an election agreement or direction of an election], an employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. [156 NLRB at 1240.]

[70] When Croley testified, he did not deny the remark.

[71] The professional staff member who processed the representation case was Field Examiner Cathleen Shelton.

important statutory goals by ensuring that all employees may be fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights. See also *Mod Interiors, Inc.*, 324 NLRB 164 (1997). Accordingly, the Board requires that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters. The Board has recently revisited this kind of issue in *Woodman's Food Market*, 332 NLRB 503 (2000). It observed there that previous cases often inquired regarding whether or not an employer's errors could be overlooked because despite them, the employer was "in substantial compliance" with its requirements. In *Woodman's* the Board noted that the *Excelsior* requirements were not to be mechanically applied, citing *Telonic Instruments*, 173 NLRB 588, 589 (1968). Nonetheless, the Board observed it had also recognized that the potential harm from omissions is sufficiently great to warrant an approach that encourages a conscientious effort by employers to comply with the *Excelsior* requirements. *Thrifty Auto Parts,* 295 NLRB 1118 (1989). It went on to say, "The Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee's name suffers an obvious and pronounced disadvantage in communicating with that person by any means. *Women in Crisis Counseling,* 312 NLRB 589 (1993). See also *Thrifty Auto Parts,* supra. Thus, the omission of names from the eligibility list clearly frustrates the policies underlying the *Excelsior* rule since the union may be denied the opportunity prior to the election to inform these voters of its position on the issues raised before the election."

It decided in *Woodman's* that the previous rule concerning percentages alone did not take into account other factors of equal or greater importance. One of those factors was the closeness of the election and whether the number of omissions would be sufficient to affect the outcome of the election. It decided to overrule those cases which relied solely on percentages saying:

> [T]the Board's *Excelsior* policy was designed to enhance the availability of information and arguments both for and against union representation to employees so that they might render a more informed judgment at the ballot box. Thus, the proper focus in determining whether an employer has complied with the requirements of the *Excelsior* rule should be on "the degree of prejudice to these channels of communication, and not the degree of employer fault." *Avon Products,* 262 NLRB 46, 48 (1982). Obviously, the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union's ability to communicate with a determinative number of voters. To ignore this circumstance, therefore, is not only inconsistent with the rule's purpose but makes little sense. Accordingly, we overrule our prior cases to the extent they have done so and hold that whether the omissions involve a determinative number of names must be considered in determining whether to set aside the election. [Footnote omitted, supra at 504.]

Another factor to be considered is the Employer's explanation for its noncompliance. Of course, in circumstances where the noncompliance is determined to be in bad faith, its explanation will be rejected.

Here, unlike *Woodman's*, supra, the case does not involve the omission of the names themselves, but the inclusion of incorrect addresses. Considering that the primary purpose of the *Excelsior* rule is to make certain that all of the eligible employees are accessible to the Union in order to ensure that the statutory goal of fully informing the employees about the arguments concerning representation is fulfilled, it appears to me that that goal has been frustrated by the lack of access. Obviously addresses are an important component of communication. Here, over 28 percent of the employees' addresses were wrong. It is nearly self-evident that such a high level of inaccessibility would have a negative impact on the ability of voting unit employees to obtain information to be fully informed about the arguments in favor of representation. Indeed, the outcome of the election may well have been affected. The Union lost the election by 40 votes. Here, there were 87 incorrect addresses. Obviously that number could have affected the outcome. However, the Union concedes that it had managed to get addresses for 61 of those 87. Even so, it did not have that number for the entire preelection period. But as the Board has said, in circumstances where the union was able to get information on its own, "a union's ability to communicate with employees by means other than the eligibility list does not influence the determination of whether the employer has substantially complied with its *Excelsior* duty. *Thrifty Auto Parts*, [supra]." Therefore, it is inappropriate to concern myself with the possible success the union may have had with those 61.

But, even if I held that the Union had properly reached those 61, that would still leave the remaining 26 for whom no addresses were ever found. Hypothetically, if 21 of those 26 had voted for no representation, but with proper access would all have voted for the Union, the tally would change to show that 142 votes would have been cast in favor of union representation and 140 against. I recognize that the hypothetical is only barely possible on a mathematical basis, but it proves the point that it is critical for the Union to have face-to-face access. Obviously, the election outcome may well have depended upon proper addresses. Without it, face-to-face access to every member of the voting unit was not possible. In point of fact, however, it is clear that the Union did not have access to all 61 for the entire 5 weeks to conduct the campaign.

Finally, while I do not believe Croley's approach to correcting *Excelsior* list errors was in bad faith, I think it is fair to conclude that he did not give the task the professional attention that it deserved. He was not conscientious as impelled by *Thrifty Auto Parts*, supra. He did not correct the first errors which were brought to his attention until 3 days before the election, even though he had been notified of them almost 3 weeks earlier. He may well have been handicapped by the holiday season or by the time the Company took to find out the new addresses, but neither of these serves as a valid excuse.

The only proper approach here was to have ascertained the correct addresses in the beginning. Respondent knew, and Croley no doubt did too, that the database of addresses was not up-to-date. Efforts should have been made to obtain the correct addresses immediately upon the signing of the Stipulated Elec-

tion Agreement. He should have impressed upon Respondent the need for accurate addresses. In fact, based upon his attempt to distract election specialist Egbert around December 19, one might easily conclude that he knew there was a problem. Why else ask for an agreement which would put the error-filled list beyond review?

Accordingly, I conclude that Objection 23 has merit. Respondent should have provided an *Excelsior* list with correct addresses. If there were nothing else in this case, the election must be overturned on this basis alone and a new election ordered. Objection 23 is therefore sustained.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondent having discriminatorily discharged Ana Guzman, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Similarly, as Respondent discriminatorily demoted Pamela Smith, it must make her whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, supra. Furthermore, it shall be required to remove from the affected employees' personnel files any reference to their illegal treatment, whether discharge, demotion or lesser discipline. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

A Bargaining Order is not Appropriate

As noted in the beginning of this decision, the General Counsel and the Charging Party seek a remedial order requiring Respondent to recognize and bargain with the Union because in their view Respondent has committed such egregious unfair labor practices that ordinary remedies would be insufficient to allow for the conduct of a fair second election.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court set forth the rules under which bargaining orders should be issued. It established three categories, or levels, of unfair labor practices to consider in determining whether a bargaining order is an appropriate remedy. The first category is that of an employer having committed "outrageous" and "pervasive" unfair labor practices which have rendered the holding of a new, untainted election impossible. The second category is "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In that circumstance a bargaining order could also be appropriate. The third category is where the unfair labor practices are so minor that "because of their minimal impact on the election machinery, [they] will not sustain a bargaining order." Id. at 613–615.

The Board has declined to apply any mechanical or per se rules in determining whether to issue a bargaining order. It has recognized that fact patterns are so variable and infinite that such an approach would not be realistic. Instead, each case needs to be fully examined for the nature and extent of the misconduct. There are however, some guidelines. Certain types of unfair labor practices are said to be "hallmark," and carry more weight favoring the issuance of a bargaining order. Hallmark violations generally are aimed at the loss of employment or at unfair labor practices difficult to remedy, and which would linger into a new election period. Discharges obviously fall in the first group as do threats of discharge, plant closing, and threats to close. The second group encompasses the grant of a wide variety of benefits.[72]

At the very least, the General Counsel's argument assumes that all of the allegations in the complaint have been sustained. Based on the foregoing, however, that is not the case. I have rejected, on a failure of credible proof, all the allegations relating to the consultants, as well as a number of other 8(a)(1) accusations, some of which had no legal merit. The 8(a)(3) refusal to rehire allegation also failed for lack of proof. I did sustain the single unlawful discharge allegation and the unlawful demotion, also finding that Respondent misapplied its no-solicitation rule and committed some garden variety 8(a)(1) conduct. Moreover, while the 8(a)(3) discharge and demotion are serious matters, I must note that they occurred in a voting unit of 300 plus employees operating in two shifts and spread around buildings which are found in portions of 4-city blocks.

Much of the 8(a)(1) conduct occurred well before the election petition was filed on November 20. Moreover, it does not qualify as a massive response to the employees' organizing activities. The first unfair labor practice was committed by First-Line Supervisor Christina Bautista on July 1 during her repartee with two cold room employees. No other unfair labor practices were committed until a month later in August. Again, it was Bautista on August 1 making remarks about what might happen to employees who wore pro-union T-shirts. Both of these may be characterized as conduct by first line supervisor who either did not know better, or who held strong opinions of her own which she could not control. (In fact, it was Bautista who committed the only unfair labor practices which occurred during the preelection critical period—compelling a few employees to wear procompany T-shirts.)

On August 6, Foreman Eric Hanses was the first mid-level manager to take any steps which might be characterized as a negative response. He reacted to Mata's brazenness in parking his car adorned with union placards in front of the headquarters office. Later that night, he treated Guzman more harshly than he treated Mendes when he issued her a stronger warning for the identical offense in an apple spillage. Yet even this unfair labor practice could not have undermined the election process concerning an election which did not occur until 6 months later.

The next unfair labor practice was 5 weeks after that, on September 10 (almost a month after the demand for recognition demonstration), when Tommy Hanses, on Rick Plath's instruc-

[72] Examples of such cases are cited by Judge Cracraft in *Yoshi's Japanese Restaurant*, 330 NLRB 1339, 1346 fn. 20 (2000).

tions, misapplied the no-solicitation rule to Pam Smith. This resulted in her demotion and the deprivation of her parts-runner duties. It was this unfair labor practice which first involved upper-level management. Even so, as hire and tenure violations go, it was on the less weighty end of the scale. It is nonetheless, the first unfair labor practice which I have considered in determining whether or not a bargaining order is appropriate. The preceding violations are simply too remote from the election and are not so pervasive as to impede it.

The next violation was a second misapplication of the no-solicitation rule to three packers on October 23, followed on November 12 by the unlawful discharge of Guzman. The last violation was the aforementioned incident in which Bautista in late December ordered two or three of her supervisees to wear procompany T-Shirts.

All of these post-August 12 incidents can be remedied by traditional means. In my opinion neither the facts nor Board precedent warrants the issuance of a bargaining order to the fact pattern described here. See *Pyramid Management Group*, 318 NLRB 607, 609 (1995). In some respects that case was more likely to warrant a bargaining order than this one. Its 8(a)(1) unfair labor practices were more numerous and severe, including creating the impression that union representation would be futile and threatening not to bargain with the Union if it won the election. In addition, the respondent there, in a much smaller voting unit (69) suspended 2 employees and discharged 2 others in violation Section 8(a)(3). Despite that the Board declined to issue a bargaining order as part of the remedy. It observed that none of the 8(a)(1) violations were "hallmark" and that the 8(a)(3) violations did not directly affect a significant portion of the 69-member voting unit nor were they combined with widespread hallmark violations.

Similarly, none of the 8(a)(1) violations here is of the "hallmark" variety. And the demotion of Smith and the discharge of Guzman, while coercive and "hallmark" do not directly affect a significant portion of this 300-plus member voting unit. They can certainly be remedied by the time a new election is conducted. See also *Yoshi's Japanese Restaurant*, supra; *Phillips Industries*, 295 NLRB 717 (1989).

Majority Status

It is true, that the General Counsel has demonstrated that the Union has submitted proof, through signatures on representation petitions, demonstrating that it had obtained majority status, appearing to maintain that standing until the election. Such status is required as a condition of a bargaining order. *Gourmet Foods*, 270 NLRB 578 (1984). The vast majority of the signatures, however, were solicited between March and May, 7 to 9 months before the election. Indeed, the General Counsel relies on only 13 signatures which were obtained after May. Eight employees signed during August and September and one signed in October. Rather clearly, a large number were obtained before the debate began in earnest in August. One may properly ask whether the election outcome might have been different had the Union filed its petition in May or June instead of waiting until late November as it steadfastly followed its policy of seeking voluntary recognition. Even though there were a few pre-August 12 unfair labor practices which might have had an impact, did that delay contribute to the cooling of the employees' ardor?

Because the Union demanded recognition on August 12, and because the unfair labor practices which preceded that date were committed only by First-Line Supervisor Christina Bautista and Night-Shift Foreman Eric Hanses, and not by any higher-level managers, August 12 would be the appropriate date to determine majority status, were a bargaining order necessary. Because a bargaining order will not be recommended, I shall not deal with the majority issue in great detail.

Nevertheless, payroll records show that on August 12, Respondent had 307 employees in the voting unit. At that time it had acquired the signatures of 179 of those employees. In determining that number, I authenticated the signatures of all but 24. I determined that those 24 should be litigated. Even so, assuming that none of those litigable signatures were valid, the Union still enjoyed majority status, 155 signatures (half being 154). However, upon any reasonable view of the evidence, none of those 24 could be rejected. There were four of those 24 who were called by Respondent and who testified that they did not sign the petitions even though handwritten entries were made in their names.[73] For a variety of reasons I have rejected their testimony as not credible. But, in the final analysis, a decision not to count their signatures would not affect the Union's majority.

Respondent also attacked the petitions themselves as being ambiguous and misleading. While I have considered the argument, I must reject it on the merits. However, in view of my conclusion that a bargaining order is unnecessary, I choose not discuss the matter further. The same can be said for Respondent's efforts to demonstrate that the signatures were improperly solicited. On the merits, it simply failed to show that any signature solicitor made representations intended to cancel the plain meaning of the language authorizing the Union to be the employee's collective bargaining representative. In the circumstances here, a lengthy discussion of the issue would serve no purpose.

Accordingly, I conclude that on August 12 the Union did enjoy majority status based upon the petition signatures.

Remedy Regarding Case 19–RC–13536

In view of the fact that unremedied unfair labor practices were extant at the time the petition was filed and because another unfair labor practice was also committed during the preelection critical period, the Board should set aside the election of January 8, 1998, and order a new election to be conducted upon the completion of a remedial period during which an appropriate notice to employees will be posted.

Based on the foregoing findings of fact, legal analyses, and the record as a whole I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[73] These were: Bertha Alvarez, Anjelica Juarez, Maria Valencia, and Gloria Antuñez.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. On July 1, 1997, acting through Christina Bautista, Respondent violated Section 8(a)(1) by telling employees they could not engage in union activity on company property, by threatening employees with loss of their jobs if they sought union representation, and by interrogating employees about their union sympathies.

4. On August 1, 1997, acting through Bautista, Respondent violated Section 8(a)(1) by interfering with employees' free exercise of their Section 7 rights when she told employees that those who wore apparel with a prounion message were "cutting their own throats" or were "putting their own heads in a noose."

5. On August 6, 1997, acting through Eric Hanses, Respondent violated Section 8(a)(3) and (1) when it issued employee Indalecio Mata because he parked a car with union placards in front of the headquarters building.

6. On August 6, 1997, acting through Eric Hanses, Respondent violated Section 8(a)(3) and (1) when it issued employee an enhanced a warning to its employee Ana Guzman because of her union activity.

7. On September 10, 1997, acting through Tommy Hanses, Respondent violated Section 8(a)(3) and (1) when it issued employee Pamela Smith a warning and demoted her because she was talking about the Union while at work.

8. On November 12, 1997, Respondent discharged its employee Ana Guzman because of her union activity.

9. In late December 1997, acting through Bautista, Respondent violated Section 8(a)(1) by interfering with employees' free exercise of their Section 7 rights when she ordered employees to wear apparel with a procompany message.

10. The General Counsel has not proven any other allegation in the complaint.

[Recommended Order omitted from publication.]