

Ace Beverage Co. and William W. Hoffer, Ray Furstenau, Epifanio Gonzalez, and Ron Drake.
Cases 21-CA-15142, 21-CA-15150, 21-CA-15162 and 21-CA-15163

December 16, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

On July 21, 1977, Administrative Law Judge Bernard J. Seff issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions, a motion to strike Respondent's brief,¹ and a brief supporting cross-exceptions and answering Respondent's exceptions; and William W. Hoffer filed an exception.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge, to modify the remedy so that interest is to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),⁴ and to adopt his recommended Order, as modified below.

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent violated Section 8(a)(1) and (3) of the Act by demoting employees Ron Drake and Epifanio Gonzalez.⁵

In addition, we find that Respondent violated Section 8(a)(1) of the Act by threatening Drake and Gonzalez on May 17, 1976, with demotion and possible discharge if they did not cross the picket line and work during an anticipated strike.

¹ The General Counsel filed a motion to strike Respondent's brief on the grounds that it did not comply with the Board's Rules and Regulations. Inasmuch as Respondent's brief substantially complies with our requirements, we deny the General Counsel's motion.

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

³ In affirming the Administrative Law Judge's findings and conclusions herein, we find it unnecessary to pass on his *arguendo* finding that, even if Respondent's president stated that in order to qualify for Respondent's profit-sharing plan, employees could not remain members of the Union, such a statement "would not seem to have the express purpose of impinging upon the employees' freedom of choice for or against unionization . . ."

⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁵ Member Penello agrees with the Administrative Law Judge's finding

Based on the credited testimony of Drake and Gonzalez, the Administrative Law Judge found that Supervisors Hull and Wells held separate meetings with Drake and Gonzalez in Hull's office on May 17, 1976. Hull asked each employee if he would cross the picket line and work in the event of a strike. Drake expressed reluctance, based in part on his fear that he might lose his union pension rights. He asked Hull what would happen if he refused to cross the picket line. Hull replied that he might or might not have a job with Respondent, but that he definitely would not remain a "route supervisor."

When Gonzalez was similarly asked if he would work during a strike, he said that he had been a member of the Teamsters for 30 years and that he would certainly not jeopardize his pension with the Union. Gonzalez testified that Hull then stated that, if Gonzalez did not work during the strike, he might or might not lose his job, but that he definitely would not be a "supervisor."

Although the foregoing threats of demotion and possible discharge were not alleged in the complaint as separate unfair labor practices, the incidents were fully litigated at the hearing and the Administrative Law Judge specifically credited the testimony of Drake and Gonzalez that Hull made the statements set forth above. Therefore, and because the statements occurred in the course of conduct which was alleged as unfair labor practices and were closely related to such conduct, the Board is not precluded from finding that said statements violated the Act. Accordingly, we find that Hull's May 17 statements to Drake and Gonzalez violated Section 8(a)(1) of the Act.⁶

In view of the nature of the discrimination for union activity which "goes to the very heart of the Act,"⁷ and the unfair labor practices here found, there exists the danger of the commission by Respondent of other unfair labor practices proscribed by the Act. Accordingly, we shall modify the recommended Order of the Administrative Law

that Drake and Gonzalez were statutory employees and not supervisors within the meaning of the Act. In adopting the Administrative Law Judge's finding that the demotions of Drake and Gonzalez were unlawful, Member Penello does so on the ground that Drake and Gonzalez would not have been demoted but for their membership in the Union. Thus, Drake credibly testified that, although Hull told him about the breweries' desire for younger men in the "route supervisor" positions, Hull also told him that "the main reason I was being demoted . . . was that I could no longer be in the union and be a supervisor." Similarly, Gonzalez credibly testified that although Hull said that there had been complaints about Gonzalez' work, Hull further stated, "the fact is, that you are a member of the union and that is . . . the main reason" for Gonzalez' demotion.

⁶ Although the Administrative Law Judge made no finding regarding these statements, his failure to do so appears to have been inadvertent inasmuch as par. 1(a) of his recommended Order requires that Respondent cease and desist from, *inter alia*, "Threatening to demote or discharge employees for refusing to work during the course of a strike . . ."

⁷ *N.L.R.B. v. Enwistle Mfg. Co.*, 120 F.2d 532, 532-536 (C.A. 4, 1941).

Judge to order that Respondent cease and desist from in any other manner infringing upon the rights guaranteed employees in Section 7 of the Act.⁸

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 2 and renumber subsequent Conclusions of Law accordingly:

"2. By threatening Ron Drake and Epifanio Gonzalez with demotion and possible loss of jobs because of their refusal to work during the course of a strike, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Ace Beverage Co., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as so modified.

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Threatening to demote or discharge employees for refusing to work during the course of a strike by Teamsters Local 896 of the Beer Drivers, Salesmen and Helpers International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

"(b) Demoting employees or discriminating in any manner against any of its employees in regard to their hire or tenure of employment, or any term or condition of employment, because of their union membership, sympathies, or activities.

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

2. Substitute the attached notice for that of the Administrative Law Judge.

⁸ *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 437 (1941).

APPENDIX

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

After a hearing at which all sides had the opportunity to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

The Act gives all employees these rights:

- To form, join, or help unions
- To choose a union to represent you in bargaining with us
- To act together for your common interest or protection
- To refuse to participate in any or all these things.

WE WILL NOT threaten to demote or discharge employees for refusing to work during the course of a strike by Teamsters Local 896 of the Beer Drivers, Salesmen and Helpers International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT demote employees or discriminate in any manner against any of our employees in regard to their hire or tenure of employment, or any term or condition of employment, because of their union membership, sympathies, or activities.

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

WE WILL offer Epifanio Gonzalez and Ron Drake immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay they may have suffered because we demoted them, with interest.

ACE BEVERAGE CO.

DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Administrative Law Judge: This case came to hearing before me in Los Angeles, California, on April 26 and 27, 1977.¹ Hoffer filed the charge in Case 21-CA-15142 on October 20; and on October 26 Furstenau filed the charge in Case 21-CA-15150, Gonzalez filed the

¹ All dates are in 1976 unless otherwise specified.

charge in Case 21-CA-15162, and Drake filed the charge in Case 21-CA-15163. The cases were consolidated for hearing and incorporated in the instant complaint which was issued December 21, 1976. The complaint alleges in substance that Ace Beverage Co. (herein called Respondent Ace or Company) demoted two employees allegedly because of union or concerted activities and promised benefits to the employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. By its answer, Respondent admitted certain allegations, but denied the commission of any unfair labor practices and alleges affirmatively that the two demoted employees were supervisors and therefore beyond the protection of the Act.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.

Upon the entire record in the case, and from my observation of the demeanor of the witnesses, and having duly considered the briefs filed by the parties, I make the following:

FINDINGS OF FACT²

The complaint alleges and the answer admits facts which establish these jurisdictional elements. I find these facts to be as pleaded in Respondent's answer.³

Ace Beverage Co. is in the business of distributing beer at wholesale to retailers.

A. Background

1. John Anderson is the sole owner of Ace. He also owns and operates Metro Distributing Company, which is a facility located across the street from Respondent. Metro underwent a protracted strike by then Local 203 in the course of which considerable violence took place. For example, two of Metro's trucks were firebombed, truck tires were slashed, and a warehouse was damaged.

2. The Company and Union were functioning under a contract with Local 203, which expired by its terms on June 1.

3. A strike commenced at Ace on October 6 and ended on December 6.

4. Don Wells was the company sales manager and Robert Hull was the vice president and general manager. Both of these men are clearly supervisors within the meaning of Section 2(11) of the Act. Hull is answerable to Anderson, but he is in charge of the day-to-day operations since Anderson is not at the facility on a daily basis. Wells is under the supervision of Hull.

5. Ron Drake was described as a route supervisor having five route salesmen on his team. Epifanio (Eppie) Gonzalez was described as a route supervisor having six salesmen on his team. Both of these men were demoted on or about September 14. These demotions are the basis for the General Counsel's 8(a)(3) allegation (complaint allegation 6(a)).

² No issue of commerce or labor organization is presented.

³ Respondent in its answer denied that Local 203 of the Beer Drivers, Salesmen and Helpers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is labor organization. The reason for this denial is because the Union, Local 203, was merged into Teamsters Local 896 on December 1.

B. Issues

1. Whether Drake and Gonzalez were supervisors within the meaning of the Act at the time they held the positions of sales supervisors.

2. Whether Respondent violated Section 8(a)(1) and (3) of the Act by demoting Drake and Gonzalez from their positions as sales supervisors to the positions of route salesmen.

3. Whether Respondent violated Section 8(a)(1) of the Act by promising benefits to employees in order to encourage them to withdraw their support from Beer Drivers, Salesmen and Helpers, Local 203, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union.

C. Certain Principles Should Be Noted

The Board's determination is based on the existence of authority rather than on assertions that supervisory authority has been conferred on a particular person.⁴ The routine direction of the type customarily exercised by experienced employees over those less skilled does not confer supervisory status within the meaning of the Act.⁵ Further, the responsibility for making work assignments in a routine fashion does not make one a supervisor nor does the assumption of some supervisory authority for a temporary period create supervisory status.⁶

All of the above principles are set forth in *Beth Israel Medical Center* reported at 229 NLRB 295 (1977).

D. The Facts and Discussion

On June 1, 1976, the collective-bargaining agreement between Respondent and the Union expired. Around this date a strike began at Metro. Respondent's employees continued to work without a contract until October 6, 1976, when they went on strike. The strike ended on December 6, 1976, when a strike agreement and a new contract were agreed upon by most of the beer distributors in the Los Angeles area.

Pursuant to the terms of the strike settlement agreement if a decertification petition was pending involving a salesmen unit of a certain employer, the salesmen of the employer would return to work if the Union won the decertification election but if the Union lost the election the employer was not required to reinstate any striking salesmen (Resp. Exh. 8). Such a decertification petition was filed by Respondent's employees and an election took place on January 6, 1977. The ballots in that election were impounded pending the outcome of an appeal of the dismissal of 8(a)(5) charges against Respondent and most of the other beer distributors involved in the December 6 strike settlement agreement.⁷

⁴ *West Penn Power Co. v. N.L.R.B.*, 337 F.2d 993, 996 (C.A. 3, 1964).

⁵ *Southeastern Cast Stone, Incorporated*, 185 NLRB 688, 691-692 (1970), and cases cited therein.

⁶ *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970).

⁷ Official notice is taken of the Board's proceedings in Case 21-RD-1405.

E. *The Employment Status of Drake and Gonzalez*

Before September 14, 1976, Respondent's sales staff consisted of 11 route salesmen, Sales Supervisors Drake and Gonzalez, Draft Manager Mary Buchanan, Sales Manager Don Wells, and General Manager Bob Hull.

Each route salesman was assigned a definite area which was his responsibility to take care of. His duties consisted of calling on all the accounts in the assigned area of that route that had any liquor, beer, or wine licenses. He inventoried stock, asked for new orders, rotated beer, stocked shelves, and asked for permission to install floor displays and new package products. Drake worked for 5 years as a route salesman from 1964 to 1969 and he was the supervisor from 1969 until September 13, 1976. Thus, Drake was a route supervisor for approximately 7 years. Drake's group consisted of five salesmen and Gonzalez had six. Before 1975, when Gonzalez was named supervisor, Drake had been the only sales supervisor for all 11 route salesmen.

One of the primary duties of the route supervisor was to back up as a substitute for route salesmen who were on vacation or sick leave. The sales supervisor also worked with the men in the field attempting to improve the sales in his area, particularly with respect to major accounts. In helping maintain proper relations with these key accounts, the sales supervisor would call on these accounts, with or without route salesmen, and attempt to sell new packages, set up floor displays, rotate the beer, and place advertising signs. Additionally, the sales supervisors instructed the route salesmen in the proper bookkeeping procedures, pricing procedures, the correct way to rotate beer, and the establishment of a schedule of calls on a route. In the performance of these duties, the supervisor was expected to ride with the route salesmen on his route about once every 3 months.

The sales supervisors also had the responsibility of collecting money which represented customer's checks which had not been honored by the bank. However, he did not have any authority to determine the amount of money that a customer would have to pay to satisfy his debt. Route salesmen earned \$1,019 a month. Sales supervisors earned \$1,060. In 1974 and 1975 Drake received a \$200 bonus for the year. The salary for a route salesman was determined by the union contract. Such salesmen were reimbursed every 2 months or so for parking, telephone calls, and matters of that nature. As sales supervisors, Drake and Gonzalez received \$75 every 2 weeks with which they were expected to take care of trade spending.⁸ Route salesmen used a company car while performing their duties. The sales supervisors had the use of a company car 7 days a week.

Both Drake and Gonzalez testified that as sales supervisors they did not have the authority to hire, fire, transfer employees from one route to another, assign an employee to a route, promote, grant time off, or to schedule vacations. Furthermore, both Drake and Gonzalez testified that they had never been told that they had the authority to hire, fire, promote, or discipline employees and, in fact, had

never recommended any such action. Occasionally, they were asked to express an opinion as to whether a particular employee should be hired. Similarly, Drake recalled that on a number of instances he had been asked to express an opinion on an employee's termination. In every case, Drake testified that the final decision was made by Hull and his own evaluation and observations of the employee in question. Both Gonzalez and Drake testified that they had never recommended that an employee be disciplined and instead of giving verbal reprimands had merely informed employees of their errors. Even in the event of an emergency neither Gonzalez nor Drake had the authority to give an employee permission to leave work. The authority to grant time off was exercised by Hull.

Vacations were determined by seniority. Both sales supervisors had a vacation list and they would rule out the weeks when the employees were not allowed to go on vacation because of company policy. For example, if a holiday occurred during the week that an employee wanted a vacation, he was not permitted to take a vacation at that time. Apparently, holidays are important periods during which there is greater demand for beer. In the event of a holiday, Drake would just run a line through those weeks which vacations could not be taken.

With respect to the authority to discipline employees, Drake's testimony was corroborated by employees (Hoffer, Telles, and O'Shell). These employees corroborated the fact that even when they were given corrections, both Hoffer and Telles testified, they did not feel compelled to follow such corrections. The record shows that Drake never recommended that an employee should be disciplined and instead of giving verbal reprimands he had simply informed employees of their errors.

Gonzalez testified that he did not have the authority to recommend that employees be hired, fired, or promoted, but he had on occasion, and when requested, expressed an opinion. With respect to recommending terminations, Gonzalez testified that he had never recommended anyone be fired and that the only time that he had been involved in the decision to terminate an employee was the time Respondent hired Andrew Hernandez. According to Gonzalez, whom I credit, Hull had instructed Gonzalez that Hernandez was to be fired after Gonzalez rode with him, and Gonzalez was instructed to report that Hernandez was not performing his job properly. Gonzalez refused to do what Hull requested because he found that Hernandez had not made any mistakes during the day that he rode with him. In fact, Gonzalez reported that Hernandez did a satisfactory job and with further experience would make a good salesperson. There is no evidence in the record that Gonzalez had ever disciplined an employee or recommended such action.

Included in the regular duties of the sales supervisor was the requirement that he ride with each of the route salesmen in his group at least once a quarter if his workload made this possible.

During cross-examination, Gonzalez was asked if he had ever made any recommendations with respect to other salesmen besides Hernandez. He testified that he did with

⁸ Trade spending was defined by Drake as the spending of money used to purchase beer for customers.

respect to one truckdriver, Ray Caldera. Three months later, Caldera was hired as a route salesman, but this was done without consultation with Gonzalez and without his knowledge. When Gonzalez was riding with a salesman and found that he was not doing something properly, he talked to the salesman in an attempt to correct him, but he was really only trying to show him an easier way to do the job. He did not regard this as a reprimand.

Gonzalez also delivered beer to retailers during 1975, but this work was eliminated in 1976. He also called on different wholesalers where he picked up a truckload of beer. In addition, Gonzalez called on high-volume accounts and key accounts, he spent considerable time doing this work because the books were reviewed by the brewery and making the calls throughout the city was time consuming. Gonzalez testified that he occasionally had complaints from customers, but if they were serious they were turned over to the sales manager and he would make final disposition of such complaints. The record also shows that no evidence was presented that Gonzalez had ever disciplined an employee or recommended such action.

Part of the regular duties of the sales supervisor was to ride with each of the route salesmen in his group at least once a quarter if his workload permitted him to do so. By riding with the route salesmen, the supervisor was able to learn the route and the new customers he would have to deal with when he substituted for the regular salesmen.

At the end of the day, after riding with the route salesmen, the supervisors were required to fill out a report. These reports bore the title "Hamm's Wholesaler Personnel Ratings." The forms contained 20 categories to be rated on a scale of one to four, four being excellent. The categories included: Whether the route salesman is known by name by retailers; whether the route salesman checked his stock and his replacement in the refrigerator; whether the salesman rotated his stock; and whether the salesman kept his floor displays and other advertising material in good condition. According to Drake and Gonzalez, these reports provided a guideline to the performance of the salesmen to determine what mistakes they were making and if they required additional training. The completed forms were turned in to the sales manager, who placed them in his own files, but did not discuss the substance of the forms with either supervisor.

It is clear from the testimony of Drake and Gonzalez that the evaluations were used to judge the quality of the services being rendered to the customer rather than as a basis for making decisions on the employment status of each salesman.

In a single instance, which occurred in January 1976, both Gonzalez and Drake were asked to fill out a new form for each salesman. Wells developed this form and said it was to be a 6-month evaluation but he did not use the form a second time. On each form, the supervisors were asked to make general comments on the salesman's progress, his good points and areas where he needed improvement, and if the salesman was performing the tasks best suited to his ability or if he should be discharged. The forms were turned in to Wells who again placed them in his office files but not in the employees' personnel files and were never heard of again.

It should be noted that when Drake was first offered a job as route supervisor he was told by Larry Davenport (who was the previous general manager and is no longer with the Company) that he had a choice as to whether or not he could stay in the Union, that it was immaterial to the Company. Drake elected to stay in the Union. This situation took place 7 years before he was demoted.

On one occasion, when Hull and Wells were both away from the facility attending a sales seminar, they left written instructions as to what was to be done in their absence. Also, during the time that Hull and Wells were away from the office there was a representative from management in the facility. This person was Judith Brady, the office manager. Brady is assistant to Anderson, who is the president and owner of the business. She was in charge of the office and plant when no one else of the top management hierarchy was present.

F. *The Demotion of Drake and Gonzalez*

Hull and Wells held separate meetings with Drake and Gonzalez in Hull's office on May 17. Hull asked each man if he would cross the picket line and work in the event of a strike. Drake replied by saying that he had been a union man for 17 years and he did not want to jeopardize his pension. Wells made a remark about the fact that he understood that the new laws on pensions allowed a union member to freeze his pension rights. Drake asked what would happen if he decided not to cross the picket line. Hull replied that, in that event, Drake might or might not have a job with Respondent, but he definitely would not remain a supervisor.

When Gonzalez was asked the same question, he stated that he had been a member of the Teamsters Union for 30 years and that he would certainly not jeopardize his pension with the Union. Again, Wells made mention of the fact that under the new laws the union members could freeze their pensions. Gonzalez testified that Hull then stated that if he did not work during the strike he might or might not lose his job with the Respondent but that he definitely would not be a supervisor. Both Hull and Wells deny this testimony as given by Drake and Gonzalez.

Both Drake and Gonzalez gave their testimony in a thoughtful, careful manner and impressed me by their demeanor as being reliable witnesses. I credit their testimony. I do not credit the denials of Hull and Wells.

In this connection it should be noted that at the time of their demotion they were not discharged but were demoted from their supervisory positions. This seems to confirm the accuracy of the testimony of Drake and Gonzalez because, while they were not discharged, they were kept in the Company's employment on a reduced status. These facts also demonstrate that the denials by Hull and Wells are refuted by the facts as they developed in the unfolding of the events which took place.

On September 1, Gonzalez again met with Hull and Wells in Hull's office at which time Hull announced to Gonzalez that, effective September 14, Gonzalez would be demoted back to the position of route salesman. According to Gonzalez, Hull stated that there had been some complaints from salesmen about Gonzalez, but the main

reason he was demoted was because a supervisor could not be a union member.

On September 7, Drake was called into Hull's office where he met with both Hull and Wells. He was told that effective September 14 he was being demoted to a route salesman. Drake protested, pointing out that he had been with the Respondent almost 13 years and he did not think it was fair that he should be demoted at this time. According to Drake, Hull replied that Respondent was making changes and the main reason for the demotion was that a supervisor could not be in the Union. As a second reason Hull stated that both Olympia and Anheuser-Busch had recommended that younger men be hired to take over these jobs.

G. The Independent 8(a)(1) Conduct of Respondent

A meeting of all employees took place in the salesroom at Ace on August 2, 1976, at which Anderson spoke to the employees. This was a day when the Olympia Brewery hosted a baseball game and dinner for the sales employees. Anderson talked for 20 to 30 minutes in the course of which he discussed three main topics. First, he gave a summary of the negotiations he had had with the Union. Anderson told the employees that he had met with the union leaders and thought the parties had worked out an agreement but the Union later reneged on their agreement. Second, Anderson discussed the fact that there had been a lot of violent instances which had taken place at the facility of the Metro Company, which is also owned by Anderson and is located across the street from the Ace operation. There had been a strike for approximately 60 days at Metro during the course of which two warehouses had been firebombed, one warehouse had been leveled, four of the company's trucks had been firebombed, and every day tires on company trucks had been slashed. Anderson urged all the employees not to participate in any violence but to maintain a low profile. The third topic discussed concerned the Company's profit-sharing plan. Anderson testified that the plan's purpose was to equalize employees who were not covered by any other plan.

In answer to a question put to him by his counsel, whether Anderson had discussed decertification of the Union, Anderson replied that the question might have been raised about decertification from the floor. He stated there were a number of companies that had been decertified. He did, however, deny that he had alluded to or recommended decertification by any of his employees. Anderson also denied that he had mentioned during the course of his talk that Ron Drake and Eppie Gonzalez had withdrawn from the Union. He said he believed they were still members of the Union. In his testimony, Anderson also stated that he did not suggest that any employees withdraw from the Union.

Anderson testified that he paid particular attention to the requests of Anheuser-Busch and Olympia Brewing Company because these were the two major suppliers of beer to his Company. He said that the two companies made a semiannual review and appraisal of the job being done by Ace as a distributor. In a semiannual review that took place in December 1975, Ace had received a poor rating from the Olympia Brewing Company and one of the items demand-

ed by Olympia of Ace was that the Company should revise and overhaul their sales management personnel who were not doing a good job. As a consequence of the pressure against Ace by Olympia, the Company agreed to shift their present sales manager and the two sales supervisors.

Vic Anderson is the Olympia representative who has specific jurisdiction over Ace Beverage. About 6 or 7 months after the December negative evaluation, both Olympia and Anheuser-Busch gave Anderson a demand that the recommendation which they had made be put into effect by a definite date and they insisted on tying Ace down to a specific commitment. At this point Anderson said he approved the demotion of Drake and Gonzalez. Hull had the obligation to make the changes described above but only with the approval of Anderson. Anderson stated that his approval had nothing to do with the union membership of Drake or Gonzalez.

Respondent offered Danny Telles as one of its witnesses. Telles has held the position as sales supervisor for about 7 months. He replaced Gonzalez. Prior to the time he became a sales supervisor he was a salesman for Ace for a period of 4 years.

During the time Telles was a salesman his supervisor was Drake. With respect to the mistakes that he made, Drake would tell him what was wrong and tell him how to correct it. He was not required to obey these directions unless he thought they were correct.

With respect to evaluation reports, Telles said that the purpose of the reports was to find that the job being done by the salesmen was adequate or if they needed more training.

With respect to being granted time off from the job, Telles testified that when he asked Drake permission to take a day off Drake would say that it really was not up to him. He would have to ask Bob Hull.

Adverting to the talk given by Anderson on August 2, both Hull and Wells testified that in this talk no mention of decertification was made by Anderson. In his direct testimony, Anderson was asked by his attorney if he had discussed decertification of the Union. Anderson replied that the question might have been raised. There were a number of companies that had been decertified. He denied that he had recommended decertification by any of his employees. It is significant to note the conflict in testimony between Hull and Wells and the testimony of Anderson.

The Company points to certain duties and actions of Drake and Gonzalez to establish their supervisory status. However, an examination of Gonzalez' and Drake's work duties clearly reveal that they did not possess any such authority.

Both Drake and Gonzalez testified that while they had no authority to hire employees they had, on occasion, expressed an opinion about the hiring of certain people. Respondent produced no evidence that it relied on the opinions of Drake and Gonzalez without conducting its own independent investigation.

Hull's testimony on Drake's recommendations to hire employees was vague and uncertain. He testified that, as nearly as he could recall, Drake had made such recommendations but he could not recall the name of any person whom Drake had actually recommended for hire. He did

testify that he believed that Drake had recommended someone nicknamed Beta. Thus, it can be seen that the Company presented no evidence that could be accepted as proof of the fact that Drake made effective recommendations with respect to the hiring of employees.

With respect to Gonzalez, Hull testified that Gonzalez made only two recommendations concerning the hiring of employees and in each case the person recommended was not hired. From this evidence, it cannot be said that Gonzalez had the authority to effectively recommend the hiring of employees.

With respect to termination of employees, Drake testified that on two or three occasions he expressed an opinion on the possible termination of an employee. In each case, however, the final decision was made by Hull after conducting his own independent investigation. The first employee, Mike Lozano, manifested a tendency to make many errors until he was brought into the office and told to improve his work. Hull discussed this situation with Drake and it was finally concluded that Lozano should be put on probation and told that he had to improve or he would be terminated. Hull testified that he thought Drake had agreed with his idea of the probationary period, but the decision was made by Hull.

Similarly, Hull testified that a second employee, Al Gee, had also made a number of mistakes and Respondent had received a number of customer complaints concerning Gee. Hull testified that he thought Drake had recommended that he, Hull, talk to Gee about his mistakes and tell him that he either had to improve or he would be terminated. Drake had given Gee a low score in the evaluation sheet with respect to his appearance and Hull spoke to Drake about that score. Drake expressed his opinion that Gee was very well liked and deserved an opportunity to improve rather than be discharged. In any event, the opinion to give Gee another chance was a decision made by Hull.

There was also some discussion with respect to Hernandez which has been discussed *supra*. In this instance, both Drake and Gonzalez had ridden the route with Hernandez and suggested that Hull give Hernandez proper supervision and thereafter Hernandez became a good salesman. It is important to point out that with respect to Drake's involvement in possible recommendations concerning discharge the instances described above are the only incidents in his 7 years as supervisor when Drake had even been questioned about a salesman's performance.

The General Counsel argues that from the above-related facts it is clear that Drake and Gonzalez did not have the authority to effectively recommend the termination of employees. In each instance the Respondent conducted its own investigation and made its own evaluation on the merits of the employee's continued employment.

It is also clear that neither Drake nor Gonzalez had the authority to discipline employees. Hull testified that Drake and Gonzalez had the authority to verbally reprimand salesmen and that he had often heard them do so in the sales department. Hull, however, did not cite any specific incidents when he had observed either Drake or Gonzalez reprimanding a salesman. In contradiction to this testimo-

ny, Respondent's witness O'Shell⁹ testified that Drake did not verbally reprimand him when Drake was his supervisor. Telles testified that while Drake would occasionally correct his work, he did not feel compelled to do what Drake told him to do unless he felt that Drake was right. Hoffer testified to the same effect. This establishes rather clearly that with respect to Telles and Hoffer that Drake was not regarded as a supervisor by fellow employees. Both Drake and Gonzalez testified that they did not reprimand employees, but merely showed them their mistakes and a better way of doing their work, which was verified by the employees who had worked with them. Consequently, there is no evidence that Drake and Gonzalez did have the authority to verbally reprimand employees.

Similarly, the credible evidence indicates that Drake and Gonzalez were not supervisors. The evidence clearly reveals that they did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assist, reward, or discipline other employees, or to effectively recommend such actions.

Despite the fact that both Drake and Gonzalez expressed opinions on the hiring and termination of employees, they only did so when requested to express an opinion. The evidence reveals that these opinions were not effective recommendations. This is so because even when recommendations were made they were not acted upon without independent investigation by either Wells or Hull. The General Counsel cites the case of *Wilson Wholesale Meat Company*, 209 NLRB 222 (1974), affd. 516 F.2d 1244 (C.A.D.C., 1975).

Furthermore, Respondent has presented no evidence that the recommendations made on the evaluation forms had any effect on the terms and conditions of employment of the route salesmen. In this connection, the General Counsel cites the case of *Leisure Hills Centers, Inc.*, 203 NLRB 326 (1973). In that case, licensed practical nurses filled out evaluation forms on the aides assigned to them which included recommendations for continued employment and wage increases. These nurses were found not to be supervisors within the meaning of the Act because no action on their recommendations and evaluations were made without an independent investigation by higher supervision. In the instant cases, it is clear that Hull independently investigated the merits of any decision affecting the salesmen and the evaluations played an insignificant role in those decisions. The General Counsel adverts to the *Caravan Supply Company, Inc.*, 203 NLRB 583, 587 (1973). In this case, the supervisor of a lunchroom filled out written evaluation forms on employees at the end of the summer when the summer help was being terminated. Based on these evaluations he rated employees on such things as how well they got along with others, how well they did their work, and recommended action concerning the rehiring of the employees. These forms were placed in the employees' personnel files and were used by management in determining whether or not the employees would be rehired for the following summer. Here again the supervisor was found not to be a supervisor within the meaning of the Act, because his recommendations were not effective

⁹ O'Shell was one of Respondent's route salesmen until September 14, when he replaced Buchanan as draft manager.

without an independent investigation and evaluation by higher supervision. Therefore, as the evidence reveals that the evaluations filled out by Drake and Gonzalez were seldom used for any purpose and subject to independent investigation and evaluation by higher supervision, they are not supervisors within the meaning of the Act.

It should be noted that both Drake and Gonzalez had as their primary responsibility the duty to call upon retailers and perform the identical duties that were performed by the salesmen on the routes. Both Drake and Gonzalez spent much of their time substituting for the route salesmen and engaged in sales activities at key accounts, they were compensated on a slightly higher basis than the salesmen, and they were under Wells' immediate control as were the salesmen.

H. *The Talk of August 2*

Anderson testified with respect to the subject of decertification, "I certainly did, in no way, allude to or recommend decertification by any of our people . . . I am a lawyer by background, and I recognize the danger of even bringing such items as that up so I certainly didn't recommend — there may have been a question raised about it, but I certainly didn't volunteer it." Respondent's counsel asked Anderson, "At that meeting did you in any way suggest to any of the employees that they withdraw from the union?" Anderson replied, "None whatsoever." Anderson impressed me as a persuasive witness. I credit his testimony. The General Counsel did not cross-examine Anderson.

The General Counsel argues that Anderson's talk of August 2, 1976, included a discussion of the Company's profit-sharing plan and by so doing offered a benefit to the employees if they would relinquish their membership in the Union. However, I have found that Anderson did not suggest that Respondent's employees should get out of the Union. Furthermore, Anderson did not state the profit-sharing plan was better or worse than the union plan. Therefore, it did not represent a promise of benefit. He also did not persuade the employees to take any such action.

Respondent, in its brief, calls attention to the fact that Hernandez, who was called as a witness for the General Counsel, corroborated the testimony of Anderson and "specifically testified that Anderson stated that it was not his intention to persuade the employees one way or the other, that the employees should consider all factors." Respondent further states in its brief that in order to support the General Counsel's contention two elements are necessary: "1 — That Anderson promised the employees increased benefits, and 2 — The promise of these benefits was conditioned upon withdrawing support from the Union. Neither of these elements is present here." I agree. I find that Anderson's talk did not constitute preponderant evidence of independent 8(a)(1) activity and I therefore recommend that this allegation in the complaint be dismissed.

The route salesmen spent almost all their working time without any supervision, out in the field and visiting

customers. Drake and Gonzalez rode with the salesmen, once every 3 months, and on those occasions they assisted the salesmen in performing their duties. At the same time, they acquainted themselves with the customers and with the routes of the salesmen but did not direct the work of the salesmen nor exercise any authority over them. It is clear that Drake and Gonzalez performed the same duties as other salesmen and were regular employees who neither thought of themselves, nor were they thought of by the other salesmen, as possessing supervisory authority.

The Board has consistently held that persons who merely transmit and execute directions from management and engage in routine functions are not supervisors within the meaning of the Act.¹⁰ Even with respect to the Gee incident, where Drake wrote on his evaluation that his dress was not in accordance with the requirements of the Company, the Board held that isolated instances of supervisory authority are insufficient upon which to base a finding that an individual is a statutory supervisor.¹¹

I. *Concluding Findings and Analysis*

Based on the evidence in the record, detailed *supra*, neither Drake nor Gonzalez was a supervisor. For example, neither man had the authority to discipline employees. When they pointed out shortcomings in the jobs being performed by route salesmen, they were simply acting as more experienced employees who were assisting less experienced men. Furthermore, contrary to a statement which appears in Respondent's brief that "fellow employees of Drake and Gonzalez regarded them as someone whose requests or instructions were to be obeyed," the testimony in the record is otherwise. Employees Hoffer, Telles, and Hernandez all testified without refutation that, when they were corrected, they would not have to comply with such corrections unless they felt the instructions were right and they were wrong. It is difficult to imagine a clearer manifestation of the nonsupervisory status of Drake and Gonzalez than to have employees credibly testify that they did not have to obey instructions of their alleged supervisors.

Respondent states in its brief that the sole reason why Drake and Gonzalez were demoted was due to pressure from Olympia to take such action. There is no doubt in my mind that Olympia did bring pressure on Ace and, by so doing, this played a part in the Respondent's decision to demote the two men. However, even if it is found that the demotions were in part due to a request from Olympia, it is equally clear to me that the circumstances of their demotions prove that the union membership of Drake and Gonzalez was at least, in part, a reason for the demotions and therefore the demotions were unlawful.

Respondent also makes a point of the fact that, according to it, "Drake and Gonzalez attended sales management meetings at which the salesmen were not present. These meetings involved new promotions. At these meetings quotas were recommended by Drake and Gonzalez for the salesmen in their groups and their recommendations were followed. These quotas were used in determining

¹⁰ See, for example, *Florida Steel Corporation*, 220 NLRB 225, 229 (1975); *Riverside Industries, Inc.*, 208 NLRB 311, 312 (1974); *Lawson-United Feldspar and Mineral Co.*, 189 NLRB 350, 354 (1971).

¹¹ *Golden West Broadcasters—KTLA*, 215 NLRB 760, 761 (1974); *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057, 1058 (1971); *Commercial Fleet Wash, Inc.*, 190 NLRB 326 (1971).

incentive pay for the salesmen." I find no support in the record for this contention of the Respondent. Hull testified that a "quota is a figure that is put on a sales route, that has probably been predetermined by the previous year's sales and the amount that you want to increase over that figure." This testimony negates the above contention of the Respondent.

I have credited the testimony of Drake and Gonzalez that, at the meeting of May 17, Hull told each man separately that if they did not agree to work in the event of a strike they might not have a job with Respondent but, in any event, they would not continue to be supervisors. I have also found that neither Drake nor Gonzalez was a supervisor within the meaning of Section 2(11) of the Act. They therefore were entitled to the protection of the Act. All nonsupervisory employees in the bargaining unit have a legal right to honor a strike if one is called by their Union. Thus, their demotion was in derogation of their right to strike and was therefore a violation of Section 8(a)(3) and (1) of the Act. I so find.

With respect to the credibility of Drake and Gonzalez, I have credited their testimony. It seems highly unlikely that either man would deliberately fabricate false testimony on what was said to them by Hull and Wells. Furthermore, Hull was vague and unconvincing in his version of the remarks he made in his separate talks with Drake and Gonzalez on May 17. His testimony contains a fairly large number of "I don't recall" statements. When he spoke about complaints made by retailers concerning Drake, he said that there were too many for him to remember a single retailer who made such a complaint. Furthermore, he testified that neither Drake nor Gonzalez mentioned anything about his Union or about the union pensions which he did not want to jeopardize by coming to work during a strike. However, Wells was present with Hull when these meetings took place and he admitted in his testimony that both Drake and Gonzalez spoke about not wanting to lose their union pensions and to each of them he expressed the opinion that he thought the new pension laws allowed union members to freeze their pension rights. This is in direct contradiction to the testimony of Hull. I was also not impressed with the demeanor of Hull and Wells as contrasted with the favorable demeanor of Drake and Gonzalez. Overall, I credit Drake and Gonzalez over Hull and Wells. In sum, my findings of fact are based upon the composite of the testimony of both the General Counsel's and Respondent's witnesses. In resolving credibility I have relied on the demeanor of the witnesses on the stand, their ability to recollect events, their straightforwardness in responding to questions, and their contradictory statements. I also conclude that the natural and probable course of events from the beginning of the alleged unfair labor practice was more logically presented by the General Counsel's witnesses than those of Respondent.

Although the matter is not free from doubt, a number of witnesses testified that Anderson, in his talk of August 2, allegedly said that in order to qualify for participation in Respondent's profit-sharing plan employees could not do so and remain members of the Union. Assuming *arguendo* that such a statement was made, it would not seem to have the express purpose of impinging upon the employees'

freedom of choice for or against unionization as claimed by the General Counsel relying on the language of the Supreme Court in *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). They were offered their freedom of choice. They either could maintain their membership in the Union and continue to be covered by the union pension plan or they could elect to be covered by Respondent's profit-sharing plan. There was no threat of loss of benefits made by Anderson dependent on retention of or withdrawal from the Union. Additionally, there was no suggestion that employees who elected to participate in the profit-sharing plan would receive greater benefits than were available under the union pension plan.

In sum I find that the talk given by Anderson was not violative of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Ace Beverage Co., is an employer within the meaning of Section 2(6) and (7) of the Act.
2. By demoting Ron Drake and Epifanio Gonzalez, because of their refusal to work during the course of a strike, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
4. The Respondent has not otherwise violated the Act.

THE REMEDY

The recommended Order will contain the conventional provisions in cases involving findings of unlawful demotion, in violation of Section 8(a)(1) and (3) of the Act. This will require the Respondent to cease and desist from the unfair labor practice found, to offer reinstatement with backpay to Ron Drake and Epifanio Gonzalez and to post a notice to that effect. In accordance with the usual requirements, reinstatement shall be to the former positions occupied by Drake and Gonzalez or to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. Drake and Gonzalez shall be made whole for any loss of earnings they may have suffered by reason of the discrimination against them, by payment to them of a sum of money equal to that which they normally would have earned from the day of the initial discrimination, September 15, 1976, to the date they are offered reinstatement by Respondent, less net earnings if any, during such period to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). There shall be no backpay for the period from October 6, 1976, to December 6, 1976, during which time the above-described discriminatees were engaged in a lawful strike.

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

ORDER¹³

The Respondent, Ace Beverage Co., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to demote or discharge employees for refusing to work during the course of a strike by Beer Drivers, Salesmen and Helpers, Local 896, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminating in any manner against any of its employees in regard to their hire or tenure of employment, or any term or condition of employment, because of their union membership, sympathies, or activities.

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

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

(a) Offer Epifanio Gonzalez and Ron Drake immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for such loss of pay they may have suffered as a result of the Respondent's

¹³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

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

(c) Post at its premises in Los Angeles, California, copies of the attached notice marked "Appendix."¹⁴ Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

¹⁴ In the event that the Board's 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."