

Information Control Corporation and Communications Workers of America, Local 9513, AFL-CIO. Case 31-CA-2347

April 21, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On October 6, 1971, Trial Examiner Martin S. Bennett issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, along with cross-exceptions, and a brief in support thereof.

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 Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings,¹ and conclusions² and to adopt his recommended Order,³ as herein modified.

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 Trial Examiner and hereby orders that Respondent, Information Control Corporation, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as so modified.

1. Add the following as paragraph 1(c) to the Trial Examiner's recommended Order:

¹ The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd 188 F 2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

² The record reveals that the Respondent's Industrial Relations Director, Graham, spoke with employee Evelyn Hernandez in his office on March 5, 1971, and asked her whether she was distributing union literature. He also asked her whether Darlene Kimbriel was distributing union literature. Shortly thereafter, Kimbriel was summoned to Graham's office and informed that Respondent had learned that she was distributing union literature. The Trial Examiner failed to make appropriate findings addressed to this unlawful conduct. In view of the foregoing and the entire record evidence, we find that the Respondent, by interrogating employees Hernandez and Kimbriel, interfered with the exercise of rights guaranteed to employees in Section 7 of the Act and, accordingly, violated Section 8(a)(1) thereof. *Engineered Steel Products, Inc.*, 188 NLRB No. 52. Additionally, we shall amend the Order and notice to take into account these additional violations which we have found.

³ Member Kennedy would not find an 8(a)(1) violation based upon Graham's statement to Hernandez and Kimbriel that they should restrict their union activity to their own time.

"(c) Interrogating employees concerning their union activities or the union activities of fellow employees."

2. Substitute the attached notice for the Trial Examiner's notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL offer Darlene Kimbriel immediate and full reinstatement to her former job, or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and WE WILL make her whole for any loss of wages suffered as a result of our discrimination against her.

WE WILL NOT discourage membership in, or activity in behalf of, Communications Workers of America, Local 9513, AFL-CIO, or any other labor organization of our employees, by discharging employees, or by discriminating in any manner in regard to hire or tenure of employment or any term or condition thereof.

WE WILL NOT promulgate or enforce discriminatory no-solicitation policies or rules, or in any manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate employees concerning their union activities or the union activities of other employees.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization, except to the extent such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

INFORMATION CONTROL CORPORATION
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7352.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Trial Examiner: This matter was heard at Los Angeles, California, on June 24 and 25, 1971. The complaint, issued April 14, later amended, and based on charges filed March 23 and April 13, 1971, by Communication Workers of America, Local 9513, AFL-CIO, herein the Union, alleges that Respondent, Information Control Corporation, has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent. Subsequent to the close of the hearing, the General Counsel moved for the correction of certain errors in the transcript and the motion is hereby granted. A motion by Respondent that the hearing be reopened is treated herein after.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I JURISDICTIONAL FINDINGS

Information Control Corporation at the time material herein was a corporation engaged at Los Angeles, California, in the manufacture of core memory systems for large computer manufacturers. It annually purchases and receives materials valued in excess of \$50,000 directly from suppliers located outside the State of California and sells and ships materials valued in excess of that sum directly to points outside that State. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Communication Workers of America, Local 9513, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A. Introduction: The Issues

The Union commenced organizational activities among the previously unorganized employees of Respondent early in March 1971. On March 19, employee Darlene Kimbriel,¹ who had initiated the union activities, was laid off. The General Counsel contends that this layoff resulted from her union activities and that a subsequent offer of reinstatement was not a full and unconditional offer, this being violative of Section 8(a)(3) of the Act. He also alleges that Respon-

dent engaged in unlawful interrogation, promulgated a discriminatory no-solicitation rule against union activities, promised a job promotion, and announced a pay raise, all for the purpose of interfering with and discouraging union activities within the meaning of Section 8(a)(1) of the Act.

B. Sequence of Events

Darlene Kimbriel was hired in August 1969 as a key-punch trainee in the electronics data processing department of Respondent. The only other person in this department was her supervisor, Anderson. Prior to her hire, Kimbriel had completed in 3 months a training course as a keypunch operator which normally is 6 months in duration. Anderson left the employ of Respondent in August 1970. According to Kimbriel, he told her prior to his departure that Respondent might consider her as his replacement. Kimbriel promptly solicited the promotion from Anderson's superior, Koster, then financial vice president and controller, and was told that Industrial Relations Director Albert Graham desired a man for the position. One, Joe Brunet, was hired to replace Anderson as electronics data processing supervisor on August 24, 1970.

As a measure of Kimbriel's competency, I note that she quit her job with Respondent on August 28, 1970, and went to work elsewhere. Within a week or two, Brunet told Koster that he was dissatisfied with Kimbriel's replacement and urged her rehire. Koster telephoned Kimbriel and offered to rehire her at a substantial raise. She returned to work in September with a raise from \$100 to \$117.60 per week. This was a rehire as a tab operator at \$2.94 an hour, an increase from her previous rate of \$2.50. She testified, and I find, that Koster told her that Respondent felt she was capable of assisting Brunet and that she could handle the electronics data processing section in his absence.² Thereafter, from September 1970 through March 1971, Kimbriel spent 50 percent of her time keypunching and about 40 percent performing the job of tab operator, the latter including the wiring of control panels and boards.

Brunet testified, and I find, that he was planning to leave the employ of Respondent and, in February or March 1971, recommended Kimbriel to Koster for the job, basically a one-person operation which she was qualified to handle. Koster, in turn, recalled Brunet advising him of his impending resignation, did not recall whether Brunet said one person could run the department, and did not recall whether Brunet said Kimbriel could handle it. Brunet impressed me as having a more precise and specific recollection and he is credited herein.

C. The Union Campaign and Respondent's Response

Due to financial reverses during 1970, Respondent carried out a series of layoffs and, on August 10, there was a general pay cut of all employees except those in the accounting department. There is some variation in the testimony, but that of Graham and employee Evelyn Hernandez in essence is, and I find, that President Goldstick told an assemblage of employees at the time that Respondent hoped to restore the cut by the end of the fiscal year on April 1, 1971.³

Because of her belief that Respondent had reneged on its promise for a prompt restoration of the pay cut, Kimbriel contacted the Union on March 2, 1971. She met on March

² A keypunch operator punches holes in a series of IBM cards. A tab operator operates tabulation equipment and also wires control panels.

³ Hernandez opined he had promised restoration of some on January 1; Kimbriel believed that he had promised restoration of all by January 1

¹ Also spelled in the transcript as Kinbriel.

3 with Anthony Bixler, then chief steward, and received some cards and literature. On Thursday, March 4, Kimbriel brought cards to the office and solicited the signature of 15 employees; on the following day she contacted some 10 more. She left a card and literature on the morning of March 4 on the desk of Hernandez and later asked if she had read the material. Indeed, early that same morning, she brought literature to the office of Credit Manager Lorraine Dryke, according to the latter, but Dryke informed her that she was too busy to discuss the topic. Kimbriel arranged to have lunch that day with four or five female employees and did so; these included Hernandez and Dryke and she urged the support of all for the Union.

Graham testified that his secretary informed him after lunch on March 4 that Kimbriel was distributing union literature. He was similarly advised by an assembler on a date he variously placed as March 4 or 5, but which apparently was March 4. Graham also testified that he sent his secretary to look over Kimbriel's desk. In his affidavit to the General Counsel, he gave a different version, deposing that he personally went to the desk and observed a pamphlet bearing the name of the Union.⁴

Graham spoke with Hernandez on a date he placed as March 4. According to the latter, he asked if she was distributing union information and Hernandez replied that she knew nothing about this. He then cautioned her to restrict her activity to her own time because working time union activity could lead to her discharge.

As will appear, Respondent placed a personnel advertisement in the *Los Angeles Times* at 3:30 p.m., on March 5. Kimbriel was interviewed by Graham at 4 p.m., that day. Thus, it seems more likely that Hernandez was interrogated on March 5, as she testified, at 3:30 p.m., but this is not deemed to be a significant distinction herein.

Graham also claimed that Hernandez came to his office, as is customary in connection with her work, but admitted that he initiated the discussion. He also admitted that he asked Hernandez if she was aware of any union activity and she replied in the negative. He next asked if Kimbriel was distributing literature and she replied similarly. He did not deny the warning concerning union activities on company time. I credit the testimony of Hernandez herein and further find that Graham made inquiries concerning union activity in the plant and more particularly concerning that of Kimbriel.

D. The Advertisement

Relevant to an appreciation of Respondent's motivation herein is the timing in the placement of a personnel advertisement in the Sunday *Los Angeles Times* of March 7. Larry Tyson is in the advertising sales department of that newspaper. About 1 week before the critical conversation herein, according to his uncontroverted and credited testimony, Tyson made an initial solicitation to Graham for an advertisement and none was forthcoming.

On Thursday, March 4, he telephoned Graham for a second time, either shortly before or after noon, and solicited an ad for the March 7 *Times*. Graham responded that

⁴ Respondent, in an effort to offset this and other contradictions in Graham's affidavit, stressed the alleged aggressiveness of the Board Field Examiner who took the affidavit, in effect urging that he thereby wore down Graham. Bearing in mind that Graham is one with considerable industrial relations experience extending beyond his employment with Respondent, I am not impressed by the contention. Stated otherwise, he is viewed differently than an inarticulate rank-and-file employee who might be subjected to the alleged aggressiveness. And, as will appear later, the contradictions are not trivial.

he expected to place an advertisement for the sale of some equipment and asked that Tyson call back. Graham mentioned only the one ad in this talk. Tyson telephoned again at 9 a.m., on Friday, March 5, and was asked to come to the office. He spoke with either Graham or the latter's secretary on this occasion and again reference was made only to the advertisement for the machinery.

Tyson appeared at the office between 3 and 3:30 p.m., on March 5,⁵ and met with Graham. At this time, Graham gave him two advertisements. One was the ad previously discussed about the sale of machinery. A second to be placed in the same issue was for a position in Respondent's electronic data processing department and, as Respondent contends, it was seeking one person to replace both Brunet and Kimbriel. The ad reads as follows:

DATA PROCESSING WORKING SUPERVISOR

We have an immediate opening for an individual with at least five years exper. on an IBM 402. Must be able to wire own boards and will also be required to key-punch at least four hours per day. Our company is located near the LA Int'l Airport. We have excel. working cond. and are offering a starting salary of \$10,500 per year. Apply in confidence to: Box H-085 L.A. Times.

This advertisement was run only once in the *Times* of March 7. I find, on a preponderance of the credible evidence, that Graham ordered the ad that afternoon and then spoke with Hernandez, as set forth above.

E. The Talk With Kimbriel

Almost directly after Graham's talk with Hernandez, on March 5, Kimbriel was summoned to Graham's office. She testified that Graham told her he had learned she was distributing union literature. She denied this, but stressed the need for a union to protect the employees, adverting to an alleged promise of pay raises.⁶

Graham told her he had never discharged anyone without good cause but that she would be subject to dismissal if she distributed union literature during working time. Graham next told her that he would like her to stick around and run the data processing department and she responded that she was capable of doing so.

Graham admitted cautioning her about union activities on working time and said that this could be a problem. As for her advancement, he testified that he asked if she could operate all of the equipment. She replied that she had learned much under Anderson but that Brunet was a poor instructor who communicated poorly.

Graham denied offering her a promotion. He was asked why he had discussed her competency inasmuch as Respondent had allegedly decided previously on her replacement and replied that he wanted to use her experience as a basis for evaluation applicants for employment, manifestly from those responding to the advertisement he had just placed. This view is difficult to accept in view of Kimbriel's alleged deficiencies. I credit Kimbriel herein, but in any event, on both versions, it is clear that they discussed her capabilities, something highly irreconcilable with an alleged outstanding decision to terminate her.

It may be noted at this point that the General Counsel

⁵ The parties stipulated that he appeared at approximately 3 p.m.

⁶ It appears that Graham had informed employees of the material control department on the previous day that he would endeavor to place with other employees those dissatisfied because they had not received a raise.

stresses the fact that at approximately 11 a.m., on March 5, Respondent announced that the pay cuts would be restored as of April 1. However, I deem it significant that all rank-and-file employees had previously been restored to their pay levels in the previous January and that this restoration as of April 1 applied only to some 27 of the complement of approximately 100; namely, executives, supervisory and managerial employees, none of them rank and file. Hence, I do not rely on this in the conclusions that follow.

F. The Discharge of Kimbriel

As set forth, Respondent placed an advertisement in the *Los Angeles Times* of March 7 for a data processing supervisor. One, Emily Flickinger, was among those who responded thereto; she was interviewed, hired and reported for work on Monday, March 22, after a briefing session on March 20. Respondent contends that she was more qualified than Kimbriel, and the record does demonstrate that she is well qualified for the post. Flickinger alone has handled the electronics data processing department since then, except at month's end and at peak periods when temporary help is brought in.

On Friday, March 19, Carl Koster, then vice president of finance, summoned Kimbriel to Graham's office. As Kimbriel testified, Graham told her that she was being laid off. She asked for the reason and Graham replied that the department was to be condensed to one person in order to save money. Kimbriel asked if Brunet was being laid off; Graham replied in the negative and added that Brunet would run the department. Kimbriel pointed out that Brunet could not perform the keypunching operation.

Brunet was not consulted in Kimbriel's termination. Respondent contends that it had intended to terminate Brunet as part of this consolidation move. However, it is undisputed that, late in February or early in March, Brunet had informed Koster of his intention to return to a former employer. According to Respondent, March 19 had been selected for the termination of Brunet as well, but he left work early that day and was not terminated until March 22.

G. Conclusions as to the Discharge of Kimbriel

There is much in the record concerning the pros and cons of Kimbriel's discharge, all of which has been considered. I believe that the following factors are sufficient to demonstrate that the evidence preponderates in favor of the General Counsel herein:

(1) Kimbriel had been in Respondent's employ for over 18 months at the time of her layoff. When she initially quit after 1 year, Respondent sought her out at her new place of employment and persuaded her to return with a raise in pay; she thereafter worked for Respondent for approximately 6 months until her termination. She was obviously regarded highly by Respondent at the time, and this reflects on its decision not to try her at the new consolidated post.

(2) Brunet, who had urged Koster to rehire Kimbriel, testified that he recommended her for his post when he told Koster in February or early March that he would return to his former employer. Indeed, he pointed out that this should be a one-person operation. Koster agreed, stating that Respondent had considered the consolidation of the department.⁷

⁷ Koster's testimony leaves much to be desired. He testified that Brunet told him Kimbriel could not run the department by herself. He also conceded that Brunet could have recommended her as qualified to handle a one-person department, although he doubted it; he further conceded that he gave a lot

(3) Kimbriel's union activities were prominent. She spoke to approximately 25 of less than 100 employees on March 4 and 5 and advocated union membership. Respondent promptly heard of this, questioned Kimbriel and Hernandez, cautioned them against union solicitation on company time, and warned Kimbriel of the possibility of discharge if she violated the "rule."

(4) I find that Respondent decided on March 5 to terminate Kimbriel. Its position is that by memo dated February 24, Graham recommended to President Goldstick, among other measures, that Respondent combine the functions of keypunch operator (Kimbriel) and data processing supervisor (Brunet), and save over \$6,000 per year. As Brunet could not keypunch, and Kimbriel lacked experience in wiring boards on one piece of equipment, an outsider was to be hired.

Consistent therewith, Koster submitted such a job requisition to Graham on the afternoon of March 4 prior to the time he, Koster, was informed by Graham of union activities. I find that the timing of this job requisition does not stand up. In the first place, it is dated March 5. Graham, whose testimony is elsewhere rejected, contended that the date was in error and should have been March 4. The basis for this error is not adequately explained, the testimony is not credited, and I find that the requisition was submitted after Respondent learned of the union activities of Kimbriel.

(5) There is a major conflict between Graham's position herein and that he submitted to a Board agent in his sworn affidavit on April 7, 1971. He there deposed as follows as to his talk with Kimbriel on March 5:

... aware of the possibility of combining the two jobs in the EDP section, and in view of Kimbriel's stated concern over her financial situation I thought to myself maybe we could solve 2 problems—her family financial situation and save ourselves the expense of recruiting for a new position, combining all duties of EDP into one job.

On this premise, Graham was considering Kimbriel for the newly consolidated position. I do not deem this to be reconcilable with a job requisition for an outsider received on the previous day and the newspaper advertisement for a replacement.⁸ I find that the affidavit, in very large measure, undercuts the position of Respondent herein and substantially renders Graham's testimony unacceptable.

(6) In a February 24 memorandum to the president of Respondent, Graham did not recommend that these two positions be combined. He recommended, rather, that the keypunch operator divide her time by also functioning as a payroll clerk, thereby eliminating one fulltime payroll clerk; Kimbriel had, on occasion, performed some of these duties in that department. Stated otherwise, as of February 24, Respondent envisaged a blending of the duties in two departments, this contrary to its position herein.

(7) As found, Graham in essence testified that he questioned Kimbriel on March 5 concerning the handling of the electronics data processing department. He was then asked why he had discussed Kimbriel's capabilities on March 5 when a decision allegedly had already been made to terminate her. He claimed that he was going through her background as a gauge whereby he could appraise other

of thought to trying Kimbriel at the post.

⁸ Graham attempted to water down the affidavit by testifying that he had difficulty reading the writing of the Board agent, that it was incorrect, and that he really did not swear to its truth. But he admitted that he looked at it while it was read, that it reflected his thoughts, and that he initialed various corrections. I find that the affidavit accurately reflects what Graham told the agent on April 7.

applicants. If Kimbriel was deficient in the operation of certain equipment, as Respondent contends, this would hardly be a gauge to be meaningfully used.

(8) Hernandez, as payroll clerk, heard of the layoff of Kimbriel on March 19 from Koster when he directed the preparation of Kimbriel's check. She testified, and I find, that she asked Koster if it was because of the Union. Koster replied that it was not, adding that the decision was not of his doing; he also told her that Brunet would take over on March 22.

Hernandez further testified that Koster stated that this was something he had no control over and that the matter was out of his hands. Koster recalled the occasion but did not recall Hernandez asking why Kimbriel was laid off and whether Brunet would be retained. He thought it possible that she asked these questions but did not consider it probable. As elsewhere, he was rather vague in this area and Hernandez has been credited herein. This is not compatible with a job requisition emanating from him on March 5.

(9) Respondent has stressed its dire financial picture, yet, rather than give Kimbriel, at her lower salary, an opportunity to attempt the job, it was willing to pay as high as \$10,500 per annum to recruit a replacement, although it did hire Flickinger at a lesser sum.

(10) I am not unaware of the testimony of Credit Manager Lorraine Dryke, allegedly friendly with Kimbriel. Dryke testified as to two conversations with Kimbriel in January or February. Dryke needed some reports on accounts receivable from the tabulating room. Brunet being absent, Dryke requested them of Kimbriel who replied that she could not comply because Brunet had rewired and changed the boards and she did not know how to operate them.

Dryke also testified that on March 1 she discussed with Vice President George Schreiber, who did not testify herein, proposed changes in the electronic data processing department. This took place within a day or two of Schreiber's hire on March 1.⁹ Schreiber told her that he would transfer accounting and data processing into a one-group operation and that two persons would be laid off. He also told her that she would be retained rather than a man in purchasing.

Around March 2, he also told her that Brunet and Kimbriel would be laid off. Being a friend of Kimbriel's, Dryke asked her why she did not apply for Brunet's position because she knew that Kimbriel had aspired to the job prior to his hire. Kimbriel allegedly admitted that she could no longer do the work because Brunet had changed the boards and had not put down the instructions.

Initially, this is a far cry from Kimbriel pleading inability to do the work, and the record is silent as to Dryke relating this to anyone at the time. Moreover, Respondent was on notice of Brunet's departure. Kimbriel also flatly denied any conversation of this nature with Dryke. To the contrary, she testified that Dryke had asked her to work this type of run and that she often did. Here, as elsewhere, I credit Kimbriel, and I deem this insufficient to offset the findings adverse to Respondent heretofore made. Particular reliance is placed herein on the fact that the genesis of the *Times* advertisement was no earlier than the afternoon of March 5.

While there is evidence that Respondent had previously considered this consolidation in its electronic data processing department, the evidence preponderates that, but for her union activities, Kimbriel would have been considered for the new post. And with Brunet's resignation, at the very least Respondent accelerated the program and hired an outsider. Stated otherwise, I find that, but for her union

activities, Kimbriel would have been given a chance at the job, even if it might have entailed her learning some new functions. I find, on a preponderance of the evidence, that Respondent terminated Darlene Kimbriel on March 19, 1971, because of her union activities, thereby discriminating with respect to her employment within the meaning of Section 8(a)(3) of the Act, and thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, within the meaning of Section 8(a)(1) thereof.

H. Interference, Restraint, and Coercion

As for the two talks with Hernandez and Kimbriel on March 5, it is to be noted that Respondent did not have a formal "no solicitation" rule; as Graham testified, there was no such rule because Respondent believed in treating its employees as mature adults. But the record discloses that solicitations and collections for birthdays, retirements, and parties were passed around during working hours and that baseball and check pools were conducted similarly. These solicitations were made, as Hernandez testified, to supervisors including Graham, without reprimand or disciplinary action.

To sum up, Respondent did not institute any rule. It, rather, selected two employees, one of them the leader of the union campaign, and placed on them alone restrictions on union activities during working hours and in no way restricted other activities during working hours. Nor is there any evidence that there had been union activities by these two during working hours which in any way interfered with production or discipline. The inference is therefore warranted that this restriction was imposed for discriminatory reasons. For a rationale in this area recently expressed by the Board, see *Heritage House of Connecticut, Inc. d/b/a Alliance Medical Inn-New Haven*, 192 NLRB No. 158. I find that the promulgation of this policy to two employees was motivated solely by a purpose to interfere with their rights to self-organization and was therefore violative of Section 8(a)(1) of the Act. See *Welsh Company of the South, Inc.*, 190 NLRB No. 42.¹⁰

I see little to support the General Counsel as to the offer of the alleged pay raise to Kimbriel and base no findings adverse to Respondent thereon. Viewed similarly is the allegation as to the offer of a job promotion and, in any event, the Order that follows will encompass such conduct.

I. The Alleged Offer of Reinstatement

Respondent contends that it offered Kimbriel full and unconditional reinstatement and that its backpay liability and its obligation to reinstate her are tolled. Kimbriel was laid off, as noted, on March 22, 1971. On April 28, 1971, Graham sent her a wire stating, "If interested in reemployment as a payroll clerk, please contact the undersigned by Friday, 5:30 p.m., April 30, 1971." According to Graham, Kimbriel telephoned him at approximately 3:30 p.m. on April 29. She asked about the wire and Graham asked if she was interested in returning to the payroll. Kimbriel questioned him about her backpay and Graham responded that this was a separate issue. Salary was not discussed¹¹ and Kimbriel asked about chances for advancement. Graham replied that he could make no promises but that the oppor-

¹⁰ This is not to be deemed as preventing Respondent from promulgating a nondiscriminatory rule restricting nonwork activities during working time for nondiscriminatory reasons such as maintenance of production, preventing disruption of production or avoiding littering of the premises.

¹¹ Kimbriel assumed that the salary would be the same as her last salary

⁹ It would seem that his advent on the scene resulted in the major demotion of Koster to accounting manager

tunity was there. According to Kimbriel, she asked and was told that there was no opportunity for advancement.

Graham stated that he wanted her response by 10 a.m. on April 30. Kimbriel replied that she would clear with the Labor Board and ascertain whether "it is all right." Kimbriel did not contact Graham again.

As I understand Board law, Respondent is under an obligation to unconditionally offer a discriminatee employment at the same, or substantially equivalent, position. Respondent did nothing of the sort. It rather invited Kimbriel to apply for reinstatement. And I deem it immaterial whether or not there was opportunity for advancement. The simple answer is that Respondent did not make an unconditional offer to reinstate Kimbriel to her job. In a sense, Respondent toyed with Kimbriel. One may well theorize that the invitation to her to apply to return was accompanied by the silent thought that she might not apply for her job.

Respondent misconceives the situation it was in. It had discriminated against an employee within the meaning of Section 8(a)(3) of the Act. It is well established that it had the burden to unconditionally restore her to her job or an equivalent one. It did nothing of the sort. Respondent, rather, invited her to apply for work and then engaged in an exercise in semantics as to whether there was an opportunity for advancement in the job.

All this begs the basic issue. Respondent simply did not do what the law requires. Totally aside from the fact that 48 hours may not be enough time in which the employee can meaningfully accept, reject, or evaluate such an offer, I find that Respondent never unconditionally proffered to Kimbriel the same or substantially equivalent employment.

Respondent has, since the close of the hearing, moved to reopen the record to ascertain whether or not Kimbriel was counseled by the Union prior to her contact of Respondent in response to the latter's wire. As I view it, it is immaterial whether or not she was so counseled and the motion is hereby denied. Stated otherwise, the relevant criterion is whether Respondent made a specific and unconditional offer of reinstatement, and I have found that it did not. See *Rea Trucking Company, Inc.*, 176 NLRB 520, and *Leading Sales Co., Inc.*, 155 NLRB 755.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Information Control Corporation is an employer within the meaning of Section 2(2) of the Act.
2. Communication Workers of America, Local 9513, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By laying off Darlene Kimbriel for engaging in union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By the foregoing, and by promulgating and enforcing a discriminatory no-solicitation policy, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not otherwise engaged in unfair labor practices.

THE REMEDY

Having found that Respondent has engaged in unfair

labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent has violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off Darlene Kimbriel. I shall, therefore, recommend that Respondent offer her immediate and full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. See *The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 NLRB 827.

I shall further recommend that Respondent make her whole for any loss of earnings she may have suffered as a result of her layoff by payment of a sum of money equal to that she normally would have earned from said date to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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:

ORDER ¹²

Respondent, Information Control Corporation, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Discouraging membership in, or activity in behalf of Communication Workers of America, Local 9513, AFL-CIO, or any other labor organization of its employees, by discriminating in regard to hire or tenure of employment, or any term or condition thereof.
 - (b) Promulgating or enforcing no-solicitation rules or policies for the purpose of interfering with the rights of employees, or in any manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the National Labor Relations Act, except to the extent such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.
2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:
 - (a) Offer Darlene Kimbriel immediate and full reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges, and make her whole for any loss of pay suffered by reason of the discrimination against her in the manner provided above in the section entitled "The Remedy."
 - (b) Preserve and, upon request, make available to the board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this recommended Order.
 - (c) Rescind the policy it promulgated on March 5, 1971,

¹² 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.

that employees are permitted to solicit for a union only during nonwork time.

(d) Post at its plant at Los Angeles, California, copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent, shall be

¹³ In the event 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board "

posted by it immediately upon receipt thereof and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.¹⁴

¹⁴ In the event this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."