

Vibra-Screw, Incorporated and International Ladies' Garment Workers' Union, AFL-CIO.
Cases 22-CA-16137, 22-CA-16203, 22-CA-16259, 22-CA-16267, 22-CA-16278, 22-CA-16285, 22-CA-16335, and 22-CA-16428

January 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On March 7, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Vibra-Screw, Inc., Totowa, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(e) and (f) and reletter the subsequent paragraphs.

“(e) On request, bargain with the International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

“(f) On request, restore the hours of work of the employees in the bargaining unit in effect prior to March 27, 1989, and rescind the unilateral wage increase granted in June 1989 to the employees in the bargaining unit.”

2. Substitute the attached notice for that of the administrative law judge.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²In our Order we provide that the Respondent shall rescind the unilateral wage increases granted to its unit employees in June 1989 if requested to do so by the Union. Nothing in our Order, however, should be construed as requiring the Respondent to rescind any wage increases that may have resulted from its unilateral changes in employee compensation, without a request from the Union. *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT create the impression among our employees that we have kept under surveillance their activities in support of the International Ladies' Garment Workers' Union.

WE WILL NOT place warnings in employee personnel files in order to discourage employees from supporting the Union.

WE WILL NOT discharge any of our employees because they supported the Union.

WE WILL NOT deprive employees of overtime work assignments in order to discourage them from joining or assisting the Union.

WE WILL NOT delay unduly in furnishing the Union with the names of all it has requested.

WE WILL NOT change the hours of work of our employees in the above-described unit without bargaining with the Union.

WE WILL NOT grant wage increases to our employees in the above-described unit without bargaining with the Union.

WE WILL NOT refuse to meet and bargain collectively with the Union because of the composition of the Union's bargaining committee.

WE WILL NOT transfer employees to positions outside the collective-bargaining unit described below, in order to discourage employees from continuing to support the Union or without bargaining collectively thereon with the Union as the exclusive representative of the employees in this unit:

All full-time and regular part-time production, maintenance, shipping and receiving employees, and electronic department employees employed by us at our Totowa, New Jersey facility but excluding all office clerical employees, test lab employees, salesmen, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees with respect to the rights guaranteed them under Section 7 of the Act.

WE WILL offer to Maurice Moncayo, Angel Bermudez, Hubert Boganegra, Brad Drol, Joseph Santo, and Obed Rodriguez immediate and full reinstatement to their former jobs in the unit described above or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and make them whole, with interest, for any loss

of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole, with interest, Maurice Moncayo and Joseph Santo for all wages and other benefits they lost by reason of our unlawful failure to assign them overtime work.

WE WILL make whole, with interest, Maurice Moncayo for all wages and benefits lost by reason of our having unlawfully transferred him out of the assembly department.

WE WILL remove from the files of the above-named employees all references to their unlawful discharges, transfers, and warnings and WE WILL notify them in writing that this has been done and that none of these matters will be used against them in any way.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, WE WILL, on request, embody the understanding in a signed agreement.

WE WILL, on request, restore the hours of work of the employees in the bargaining unit in effect prior to March 27, 1989, and WE WILL rescind the unilateral wage increase granted in June 1989 to the employees in the bargaining unit.

VIBRA-SCREW, INCORPORATED

Gary A. Carlson, Esq., for the General Counsel.
Richard H. Bauch, Esq. (DeMaria, Ellis & Hunt), of Newark, New Jersey, for the Respondent.
Joseph A. Finer, Esq. (Reitman, Parsonnet, Maisel & Duggan), of Newark, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The amended consolidated complaint issued on behalf of the Acting General Counsel of the National Labor Relations Board alleges that Vibra-Screw, Incorporated (Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The specific issues raised by the answer filed by Respondent are whether it:

(a) Deprived employees, Maurice Moncayo and Joseph Santo, on and since January 5, 1989, of overtime work assignments because they supported the International Ladies' Garment Workers' Union, AFL-CIO (the Union).

(b) Transferred Moncayo from its assembly department on February 13, 1989, to allegedly more onerous work in its test laboratory, in order to discourage its employees from supporting the Union and in violation of its duty to bargain with the Union.

(c) Created the impression on February 15, 1989, among employees that it kept their activities in support of the Union under surveillance.

(d) Failed to bargain collectively with the Union, after its certification on February 10, 1989, by not responding to its requests since February 21 for a list of the names of all unit employees and for related data.

(e) Placed warnings in employee Moncayo's file and later discharged him on February 28, 1989, in order to discourage employee support for the Union.

(f) Failed to bargain collectively by having unilaterally changed working hours of unit employees on March 27, 1989.

(g) Discharged Brad Drol, Angel Bermudez, Joseph Santo, Hubert Boganegra, and Obed Rodriguez in March and April 1989, in order to discourage employee support of the Union.

(h) Granted an across-the-board wage increase to unit employees on June 16, 1989, without having bargained collectively with the Union.

(i) Refused to bargain collectively with the Union on and since June 26, 1989, because the Union did not agree to its demand that certain named individuals be removed from the Union's negotiating committee.

The hearing was held before me in Newark, New Jersey, on 6 days in September 1989.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (General Counsel), the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The amended pleadings establish that Respondent, in its operations annually, meets the Board's nonretail jurisdictional standard and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent manufactures equipment used principally to move dry material, such as flour, from storage areas into process. Its plant is located in Totowa, New Jersey, where it has about 50 employees. They had been unrepresented. In November 1988, the Union began a drive to organize them. It demanded recognition on December 13, 1988, filed a petition for certification in Case 22-RC-10057 on December 16, 1988, and was certified in that case on February 10, 1989, as the representative of the following appropriate unit:

All full-time and regular part-time production, maintenance, shipping and receiving employees and electronic department employees employed by Respondent at its Totowa, New Jersey facility, but excluding all office clerical employees, test lab employees, salesmen, professional employees, guards and supervisors as defined by the Act.

All dates hereafter are for 1989, unless stated otherwise.

¹ General Counsel's posthearing motion to correct certain typographical transcription errors is granted.

B. *The Alleged Unfair Labor Practices*

1. Overtime work assignments—Moncayo and Santo

On January 4, the Union's director of organization, Luis Fonseca, met with some of Respondent's employees at a VFW hall. At this meeting, the employees chose Maurice Moncayo and Joseph Santo, who worked in the assembly department, to go with Fonseca to a conference scheduled to be held at the Board's Regional Office on January 6 in the then-pending representation case. On the following morning, Moncayo and Santo went around Respondent's plant to tell most of the unit employees what transpired at that meeting, including the fact that they had been selected to attend the representation case conference.

Later that morning, they were told by the supervisor of the assembly department, John Herman, that they would no longer be assigned overtime work. Herman also told them that their timecards showed that they were not working enough overtime. Moncayo testified that they had been working overtime every day and not less than the other employees worked. Santo estimated that he had actually worked more overtime than the other employees.

Moncayo and Santo have not been given overtime work since January 5.

Neither Moncayo nor Santo had ever been told previously to January that they were not working enough overtime.

Respondent's vice president, Richard Wahl, testified that towards the end of the fourth quarter of 1988, Production Manager Karl Goldschmidt informed him that Moncayo and Santo did not wish to work overtime. Wahl testified that he reviewed the overtime records and told Goldschmidt to inform Moncayo and Santo that they would no longer be assigned overtime, an order carried out by Herman on January 5. Wahl explained that Respondent needs to count on one employee to stay with a job, including overtime, until it is finished as that person will then be able to do the most efficient work.

Goldschmidt testified at the hearing before me, but did not refer to any conversation with Richard Wahl concerning any unwillingness on Moncayo's part or Santo's to work overtime. Herman did not testify. Nor did Respondent produce any overtime records which Wahl had referred to in his testimony.

The evidence establishes that Moncayo and Santo were key supporters of the Union and that they had, on the morning of January 5, gone about Respondent's plant to inform the unit employees of the latest developments from the Union's standpoint. The evidence also establishes that, almost immediately thereafter, they lost their overtime assignments. The reason given them by Herman for their loss is not supported by the evidence. Moncayo and Santo both testified that they had worked at least as much overtime as the other employees and Respondent offered none of the records that its president testified he used in making the decision that they would no longer be given overtime. Further, they never were told that there was any problem with their overtime work.

In essence, the evidence offered by the General Counsel demonstrates that Moncayo and Santo were active union supporters, that they were deprived of a long-term benefit very shortly after having circulated through the plant on January 5 to discuss the Union with their coworkers and that the rea-

son given them for being deprived of overtime work appears baseless. Their open union activities on January 5, their being told later that same morning that they were being deprived, without any warning, of a material benefit and the baseless nature of the reason given for that loss are circumstances from which I infer that they were deprived of overtime because of their union activities. Respondent has argued that there is no direct proof that it knew of their union activities before it acted and has thus urged that it could not have been motivated thereby. It is well settled however that direct evidence is not essential to prove an unfair labor practice and that circumstantial evidence can give rise to a proper inference of an employer's prior knowledge of a discriminatee's protected activities. See *Abbey's Transportation Service*, 284 NLRB 696 (1987).

As General Counsel has thus met the burden of showing, prima facie, that Moncayo and Santo have been denied overtime in order to discourage employee support of the Union, the burden shifts to Respondent. See *Wright Line*, 251 NLRB 1083, 1089 (1980).

I further find that Respondent has failed to demonstrate that its deprivation of overtime to them would have resulted absent their activities in support of the Union. Accordingly, I conclude that Respondent has denied overtime work assignments to Moncayo and Santo since January 5, in order to discourage its employees from supporting the Union.

2. Moncayo's transfer to the laboratory

Moncayo injured his leg while at work on January 15 and was unable to work while undergoing treatment.

Moncayo served as the Union's observer at the election held in Case 22-RC-10057 on February 2. The Union won and, on Friday, February 10, a certification of representative was issued to it by the Board's Regional Office. On Monday, February 13, Moncayo returned to work in the assembly department after being cleared to do so by his workers' compensation doctor. Later that morning, Respondent's plant manager, Goldschmidt, told him that he was being transferred to the laboratory because additional employees were needed there.

Moncayo testified that, in the test lab, he was assigned to carry buckets weighing 35 to 45 pounds, up and down ladders and that the work was dirty. Lab employees wear paper masks and protective clothing in view of the dust generated when materials are tested. The work there is in contrast to the easier assembly department work where Moncayo read blueprints and performed related duties including manual work in assembling machinery.

On February 15, Moncayo was treated at the workers' compensation clinic, having aggravated his leg injuries in going up and down a ladder in the test lab. On February 21 and 27, he again went to the clinic with that problem.

Respondent did not notify the Union of its intent or decision to transfer Moncayo from the assembly department, to the test lab, where employees are excluded from the appropriate unit, described above.

Respondent's vice president, Richard Wahl, testified that he and Goldschmidt talked about Moncayo's being on leave because of the injuries he received at work January 15. Wahl related that they agreed that they had an obligation to bring him back to work, that Goldschmidt "seemed to be pretty staffed up in the assembly area," and that Goldschmidt told

him that there was an opening in the test lab because Respondent had lost two or three men from the lab.

Goldschmidt testified on other matters but did not refer to any discussion with Wahl pertaining to Moncayo's recall.

In analyzing the evidence above, I note at the outset that the terms of an employee's transfer clearly affect employment conditions and are a mandatory subject of bargaining and that an incumbent union has a statutory right to be consulted as to any change therein. *Kansas National Education Assn.*, 275 NLRB 638, 639 (1985); and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698 (1983). As the evidence is undisputed that Respondent never consulted with the certified Union as to Moncayo's transfer, Respondent impinged on that right and thereby failed in its obligation to bargain collectively with the Union thereon. The fact that Moncayo was the Union's election observer and had been discriminated against since January 5 as to overtime assignments as found above, the timing of his transfer relative to the issuance of the certification of representative, the suddenness of his transfer which occurred during the course of a workday, the arduous nature of the lab work particularly in view of the injuries Moncayo had suffered only weeks earlier and in comparison to the work he was accustomed to doing in the assembly department—and Respondent's almost willful failure to consult with the Union as to its transfer of a key union supporter to a nonunit job—all point forcefully to a strong inference that Moncayo was transferred to the test lab in order to discourage support of the Union among Respondent's employees. I thus find that General Counsel has made out a prima facie case of unlawful discrimination. I place virtually no weight on the uncorroborated, conclusory testimony given by Respondent's president in support of the reason it proffered. I find further then that Respondent has failed to demonstrate that it would have assigned Moncayo to the test lab, absent his support for the Union, and thus conclude that Respondent effected that transfer in order to discourage support among its employees for its certified representative.

3. LiVecchi's conversation with Bermudez

The Union had scheduled a meeting for February 15 at the VFW hall in Totowa, New Jersey, but Fonseca changed the location to the Union's headquarters in Passaic, New Jersey. The employees decided that afternoon to set up a car caravan to go as a group to Passaic. One of these employees, Angel Bermudez, was driving his car as part of that caravan but lost it when he was held back at a traffic light. He was unable then to find his way to the Union's office and went home instead.

The following morning, according to Bermudez, his supervisor, Joseph LiVecchi, Respondent's parts department manager, asked him how did it feel to be abandoned by the Union. Bermudez testified that he had no idea how LiVecchi knew that he had gotten lost the previous evening.

LiVecchi testified that he had one conversation in particular with Bermudez about the Union. He related that he did not know how the conversation began but that Bermudez seemed unhappy and told him that he was annoyed at the union members because they deliberately lost him while he was following them to a meeting.

I am more persuaded by Bermudez' account and credit it. LiVecchi's remarks to him obviously suggested that he was being kept informed as to even tangential matters at meetings

of employees held by the Union and Respondent thereby unlawfully created the impression that it kept union meetings under surveillance. See *Great Dane Trailers*, 293 NLRB 384, 385 fn. 8 (1989).

4. The Union's requests for information

On February 21, the Union wrote Respondent for a list of the names of the employees in the unit for which it was certified, for their job classifications, rates of pay and other related data. When it received no reply, it reiterated the request on April 10 and 12 and May 17 and 23. Respondent furnished that requested data in early July.

The Union, as the statutory representative of the unit employees, is presumptively entitled to the requested data because the information it sought is clearly necessary and relevant for it in the performance of its representational duties. *Jakel Motors*, 292 NLRB No. 58 (Jan. 18, 1989), not reported in bound volumes. Respondent's delay for over 4 months in supplying the requested material is unlawful. *Globe Business Furniture*, 290 NLRB 841 (1988).

5. Moncayo's discharge and the warnings in his personnel file

As found above, Moncayo was unlawfully deprived of overtime assignments on and since January 5 and was unlawfully assigned more onerous duties when he was transferred to a nonunit job in the test lab upon his return on February 15 from a work-related injury. Also as noted above, Moncayo, since his return, has made regular visits to the workers' compensation clinic for treatment of recurrences of that injury, which was aggravated by the more onerous work he was performing in the test lab.

Moncayo testified that each time he had an appointment at the workers' compensation clinic he gave his supervisor, Kevin Galuska, prior notice and showed him the clinic appointment card to assure Galuska that he was scheduled to see a doctor there. While at the clinic on February 27, the examining doctor told him that he was not to work until he saw a Dr. Cohen. An appointment was scheduled for him the next day at 3 p.m. Moncayo then returned to Respondent's plant and advised Galuska of that development.

On February 28, while Moncayo was attending to his appointment with Dr. Cohen, Respondent's president arranged to have a mailgram sent to Moncayo reading:

This is to advise that your employment with this firm is terminated as of 2-27-89. After repeated warnings you again left your work station and the plant and did not advise your supervisor of your return or intentions. As of 9 o'clock a.m. this morning you have still not contacted your supervisor.

Moncayo reported for work on March 1 and was told by Galuska that he was terminated for not having called in. Moncayo reminded Galuska that he had showed him that he had had a doctor's appointment on February 28. Galuska asked him for additional verification. Moncayo gave him a note from Dr. Cohen and asked Galuska to make a photocopy of it. Galuska told him that Respondent's vice president wanted to meet with Moncayo. Galuska then left to make a copy of Dr. Cohen's note. He returned and gave Moncayo a copy of it. Moncayo asked him for the original and was

told by Galuska that Respondent's president had it. Galuska then told him that Respondent's vice president no longer wished to see him and that he was fired.

Respondent's vice president, Richard Wahl, placed two notes in Moncayo's personnel file. One, dated February 16, stated that Wahl, had spoken to Galuska about one of Moncayo's absences and that Moncayo had "apparently lied" about the reason he gave for that absence. The second, dated February 21, related that Wahl had spoken again to Galuska about "subject's absence" (referring to Moncayo) and that Galuska "was not told."

Moncayo was never shown either of those notes nor told of them; he learned of their existence during the course of the hearing before me.

Richard Wahl testified that the February 16 memorandum in Moncayo's file was "a note to warn Moncayo that he had been absent without excuse" and that that February 21 memorandum had been prepared in order "to warn him once again about an absence that was not excused." Wahl testified that he never spoke to Moncayo about those notes or the contents thereof. Galuska did not testify before me.

There is simply no factual basis to sustain the reason proffered by Respondent for discharging Moncayo. The insertion in his personnel file of "warnings" never conveyed to him further points up the pretextual nature of the reason Respondent has given for discharging him. In sum, General Counsel has presented an un rebutted clear prima facie showing that Moncayo's discharge on February 28 was the culmination of a series of acts against him which were motivated by Respondent's desire to discourage support for the Union. Those discriminatory acts included the insertion in Moncayo's personnel file of the February 16 and 21 memoranda prepared by Richard Wahl. See *Chopp & Co.*, 295 NLRB 1058, 1063 (1989).

6. Change in working hours

On March 21, Respondent posted a notice to unit employees, stating that "[e]ffective Monday, March 27, 1989, work hours are 8:00 a.m. to 4:15 p.m." The employees had been working a 7 a.m. to 4:15 p.m. shift until March 27. The change impacted on employees who complained about the traffic problems they faced coming into work at 8 a.m.

By unilaterally, without notice to or consultation with the Union, changing the work hours of the unit employees effective March 27, Respondent has failed and refused to bargain collectively with the Union. See *San Antonio Portland Cement Co.*, 277 NLRB 309, 315-316 (1985).

7. Discharge of Angel Bermudez

Bermudez began working for Respondent on November 2, 1988, as a spare parts clerk. As noted above, his supervisor, Joseph LiVecchi, noted that Bermudez had lost his way, on the previous evening, to a union meeting. Bermudez has attended other union meetings and had since February 28, worn a cap and a button while at work, which bore the legend, "The Union for me. I.L.G.W.U."

Bermudez testified that LiVecchi and also Plant Manager Goldschmidt had told him, prior to the election in the representation case discussed above, that he was a good worker. On March 31, LiVecchi told him that "they're going to let [him] go" because he was "not hustling enough." Bermudez

continued to work until he was summoned about 3 p.m. to Goldschmidt's office. There, Goldschmidt told him that he was going to have to let him go. Bermudez protested that he always did his work, to which Goldschmidt replied that he did not make the decision to discharge him and that it was made "upstairs," referring to the "owners' office." Goldschmidt told him to leave the plant then and that he would be paid for the full day. Bermudez then left. Bermudez testified that he never had been warned about "not hustling enough."

LiVecchi, the parts department manager, testified that Bermudez seemed to be a willing worker when he started his employment and that LiVecchi has a habit of complimenting employees as a form of encouragement. He related that Bermudez progressed slowly, that he never could perform on his own, and that "maybe four or five times" he spoke to Bermudez to get him "to hustle up." LiVecchi further testified that Bermudez was late 90 percent of the time in shipping parts out and that LiVecchi had to go out and, in effect, do the work that Bermudez had failed to do.

LiVecchi also testified that he communicated to Production Manager Goldschmidt his recommendation that Bermudez be discharged, but that he never informed Bermudez that he had done so.

Goldschmidt testified as to other matters but not as to Bermudez' discharge.

Respondent has noted in its brief that at no time did Goldschmidt or LiVecchi discuss Bermudez' discharge with either Respondent's president, Eugene Wahl, or its vice president, Richard Wahl.

I credit Bermudez' testimony, including his uncontroverted account that Goldschmidt told him on the day he was discharged that he did not make that decision to discharge him. If Goldschmidt had not discussed that matter with the Wahls as Respondent asserts and if he had received only a recommendation to discharge from LiVecchi, as LiVecchi related, I am at a loss, based on the accounts proffered by Respondent, as to who in management made the decision to discharge Bermudez. The testimony which is more probably true is that given by Bermudez. That testimony establishes that he openly and actively supported the Union, that LiVecchi had directly coerced him in referring to his getting lost enroute to a union meeting, and particularly that the reason given him for his discharge was obviously a pretext. On that last point, I note that the credited evidence is that Bermudez was told by both LiVecchi and Goldschmidt that he was a good worker, that he had never been told otherwise, that he was discharged during an ordinary workday by a plant manager who told him that he did not make the decision and that, from Respondent's evidence, apparently no one ever did.

General Counsel has established a prima facie case that Bermudez was discharged because of his open support of the Union and Respondent has failed to rebut it by showing that he would have been discharged, absent his union activities. I thus find that Respondent discharged him in order to discourage support for the Union among its employees.

8. Discharge of Hubert Boganegra and Brad Drol

Boganegra began working for Respondent in August 1974 and has worked in the sheet metal department since then and until his discharge. In November 1988, he made the first

contact with the Union on behalf of the employees involved in this case.

Drol began working for Respondent in September 1987 and has worked for it as a heliarc welder. He was chosen by his coworkers to be a member of the Union's negotiating committee.

Boganegra and Drol attended a negotiating session held on March 29 between the Union and Respondent. Another session was scheduled for April 12. That session was postponed at Respondent's request. During lunch that day, Boganegra and Drol, along with other employees discussed Respondent's discharge of Bermudez, the change in the working hours and the cancellation of the negotiating session that had been scheduled for that day. These employees decided that they would not work overtime that day, as a form of protest. Overtime assignments are voluntary.

Drol's supervisor, Harry Cagnina, asked him later that day if he was going to stay, referring to working overtime. Drol told him he was not because too many people would be aggravated if he did. Cagnina replied that he understood.

Cagnina also asked Boganegra to work overtime on April 12. Boganegra declined, saying that his wife had an appointment with her doctor.

On Friday, April 14, Production Manager Goldschmidt handed Drol and Boganegra identical memorandums signed by Respondent's president, reading:

Because of your refusal to work overtime due to the postponement of the last bargaining session between the company and the ILGWU, as communicated to your supervisor Harry Cagnina on Wed. April 12, you are hereby notified that your employment is terminated effective immediately.

In *Jasta Mfg. Co.*, 246 NLRB 48 (1979), the Board held that it was unlawful for the employer there to discharge four of its employees because they declined voluntary overtime assignments in an attempt to secure certain terms and conditions of employment they sought. The Board held there that those four employees did not lose the protection of the Act by their actions. In the instant case, Boganegra and Drol were clearly engaged in protected activities in similarly declining to work voluntary overtime. Respondent, by discharging them for having engaged in such activity, had sought to discourage the unit employees from supporting the Union.

9. Discharges of Joseph Santo and Obed Rodriguez

Santo worked for Respondent for about 16-1/2 years, and was assigned to the assembly department for about 10 years before his discharge on April 19. As found above, Respondent had discontinued assigning him overtime in January because of his support for the Union. After the Union was certified, Santo was selected by the unit employees to be on the Union's negotiating team. On April 17, Santo was handed a memorandum by General Manager Mike Gulywasz. The memorandum was signed by Respondent's vice president and it read:

You were observed Friday in areas of the shop and engaging in activities unrelated to your work. You are again warned that this is not permitted and if continued will result in your dismissal.

From now on, you are to request permission of your supervisor, John Herman, or in his absence Mike Gulywasz when wanting to leave your work area for any reason.

If you are found outside of your work area for any reason without permission, you will be dismissed.

Santo testified that he had never been previously warned about being engaged in activities unrelated to his work while in areas of the shop.

As to the other alleged discriminatee whose status is discussed in this subsection, Obed Rodriguez, the testimony is that he was hired by Respondent in August 1988 as an assembler. He actively supported the Union and was selected as a member of the Union's negotiating committee upon its certification.

On April 19, Santo and Rodriguez were in the assembly department when Respondent's president, Eugene Wahl, approached them and told them that they were fired and that they had "five minutes to get the hell out of here." They then left the premises.

Respondent adduced no evidence to support the assertion in the memorandum handed Santo on April 17 that it had given him previous warnings.

General Counsel has made out a prima facie case that Santo and Rodriguez were discharged on April 19 because of their support for the Union. The unlawful hostility shown Santo by Respondent in January is a factor pointing toward that finding, their serving on the union negotiating committee, and the *animus* thereto displayed by Respondent as to other employees as discussed above is another such factor. The precipitate outburst by Respondent's president, without precedent, to two employees on the work floor further indicates that Respondent's president harbored a deep resentment against employees who openly supported the Union.

Respondent contends that Santo and Rodriguez were discharged because they were standing around, wasting time, doing nothing, for an appreciable period on April 19. Santo and Rodriguez testified that they were going over blueprints used in their work. I credit their accounts.

Wahl testified that he had observed Santo and Rodriguez standing idle for a half hour just before he discharged them. I am not persuaded by that testimony that Respondent would have, absent their union activities, discharged them. Wahl had also testified that he viewed his company as an extension of his family and its employees as family members. Wahl did not strike me as the type of person who would impose discipline on someone close to him without first making a full inquiry and without consulting others who might assist in his making a full and fair evaluation. Yet, he did none of these things with respect to Santo and Rodriguez. He never even asked their immediate supervisor to look into the matters or for a recommendation. The evidence is insufficient for me to find that Respondent would have, absent their union activities, summarily discharged Santo and Rodriguez on April 19. Accordingly, I find that it discharged them to discourage its employees from continuing to support the Union.

10. The wage increase

On May 1, Respondent notified its shop employees that it was "planning to implement [its] Spring COLA increase, as scheduled, by the end of May." On June 1, it notified them

that the “COLA increase will be effective with this week’s pay and will be reflected in next week’s pay check.”

The pleadings before me disclose that, on June 26, Respondent granted a 4-percent wage increase to the unit employees. The Union was never notified nor consulted about that increase.

The testimony offered by Respondent to show that it customarily granted a COLA increase each spring also discloses that the amount of the increase is based on “kind of an average” of various indices it selects. I infer from that testimony that ultimately the amount of the increase is not based on wholly objective factors but on subjective evaluations by the Wahls.

The Board has held that where the amounts of annual wage increases involve elements of discretion, an employer must offer the union the opportunity to bargain thereon and may not continue to unilaterally exercise its discretion with respect to such increases once an exclusive collective-bargaining representative has been selected. *Advertiser’s Mfg. Co.*, 280 NLRB 1185, 1195–1196 (1986). Respondent’s unilateral action in the instant case is particularly egregious as it was on the one hand sending notices to its employees to indicate that the raise was imminent while it was also, as found above, withholding from the Union the information sought and needed by the Union to bargain responsibly as to wages and other terms and conditions of employment of the employees in the unit it represents.

11. The composition of the Union’s negotiating committee

On June 29, the Union was scheduled to hold a negotiating session with Respondent. Its negotiating committee, which included four employees found above to have been unlawfully discharged (Drol, Boganegra, Santo, and Rodriguez), came to Respondent’s plant that day. Respondent advised the Union’s attorney who was also present that it would not meet as long as those four individuals were present.

Respondent, by refusing to negotiate with the Union because four discharged employees were on its committee, has failed to bargain collectively with the Union. See *Colfor, Inc.*, 282 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having:
 - (a) Created the impression among its employees that it has kept under surveillance their activities in support of the Union.
 - (b) Committed the acts described in subparagraphs 4 and 5 below.
4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having:
 - (a) Placed warnings in employee personnel files in order to discourage employees from supporting the Union.
 - (b) Discharged employees because they supported the Union.

(c) Deprived employees Maurice Moncayo and Joseph Santo of overtime work assignments in order to discourage employees from joining or assisting the Union.

(d) Transferred Maurice Moncayo to its test laboratory in order to discourage employees from continuing to support the Union.

5. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act by having:

(a) Transferred an employee out of the collective-bargaining unit described below without bargaining collectively thereon with the Union as the exclusive representative of the employees in this unit:

All full-time and regular part-time production, maintenance, shipping and receiving employees, and electronic department employees employed by Respondent at its Totowa, New Jersey facility but excluding all office clerical employees, test lab employees, salesmen, professional employees, guards and supervisors as defined in the Act.

(b) Delayed unduly in furnishing the Union with the names of all unit employees and related data.

(c) Unilaterally changed the hours of work of the employees in the above-described unit.

(d) Unilaterally granted across-the-board wage increases to its employees in the above-described unit.

(e) Refused to meet and bargain collectively with the Union because it objected to the composition of the Union’s bargaining committee.

6. Respondent has not engaged in any unfair labor practice alleged in the amended complaint and not found here.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully deprived its employees Maurice Moncayo and Joseph Santo of overtime work assignments, I shall recommend that they be made whole for all wages and other benefits they lost thereby, with interest thereon, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent unlawfully placed warnings in Maurice Moncayo’s file, I shall recommend that it be ordered to remove those warnings, and to notify Moncayo in writing that it has done so and that it will not use those warnings against him in any way.

Having found that Moncayo has been discriminatorily transferred to the test laboratory, I shall recommend that Respondent be ordered to offer him full and immediate reinstatement to his former position of employment in its assembly department or, if it no longer exists, to a substantially equivalent position within the scope of the collective-bargaining unit represented by the Union.

Having found that Respondent discriminatorily discharged employees Maurice Moncayo, Angel Bermudez, Hubert Boganegra, Brad Drol, Joseph Santo, and Obed Rodriguez, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former positions of employment or, if these no longer exist, to substantially

equivalent positions, and pay them backpay as computed in *New Horizons*, supra, from the respective dates of their discharges until they are properly offered reinstatement.

As there are employees in the unit involved who communicate principally, if not solely in Spanish, I further recommend that the notice to employees, appended here, also be translated and posted in Spanish, after being signed by a duly authorized agent of Respondent.

As requested by General Counsel, I recommend also that the entire certification year begin anew on Respondent's commencement of good-faith bargaining. *Glomac Plastics, Inc.*, 234 NLRB 1309 fn. 4 (1978).

The General Counsel has further requested that Respondent be directed to "cease and desist from in any other manner restraining and coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act" and has stated that his request is made "because Respondent has engaged in so many flagrant unfair labor practices."

The Board has, in two cases in recent years, expressly commented on the scope of its cease-and-desist orders. In *Horizon Foods*, 280 NLRB 1174 (1986), it rejected a recommendation for a narrow cease-and-desist order based on its findings that the conduct in that case was egregious enough to warrant the issuance of a broad cease-and-desist order. In *Chopp & Co.*, 295 NLRB 1058 (1989), the Board concluded, contrary to the recommendation of the administrative law judge, that a narrow cease-and-desist order is appropriate as, in its view, the record there did not establish that the employer there has a "proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." The conduct I have found unlawful in the instant case appears to be more analogous to that found in *Chopp & Co.*, supra, than to that in *Horizon Foods*, supra. Accordingly, I shall not recommend the broad cease-and-desist order sought by General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Vibra-Screw, Incorporated, Totowa, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that it has kept under surveillance their activities in support of International Ladies' Garment Workers' Union, AFL-CIO (the Union).

(b) Placing warnings in employee personnel files in order to discourage employees from supporting the Union.

(c) Discharging employees because they supported the Union.

(d) Depriving its employees of overtime work assignments in order to discourage its employees from joining or assisting the Union.

(e) Transferring employees to positions outside the collective-bargaining unit described below, in order to discourage employees from continuing to support the Union or without

bargaining collectively thereon with the Union as the exclusive representative of the employees in this unit:

All full-time and regular part-time production, maintenance, shipping and receiving employees, and electronic department employees employed by Respondent at its Totowa, New Jersey facility but excluding all office clerical employees, test lab employees, salesmen, professional employees, guards and supervisors as defined in the Act.

(f) Delaying unduly in furnishing the Union with the names of all unit employees and the related data it has requested.

(g) Changing the hours of work of the employees in the above-described unit without bargaining with the Union.

(h) Granting wage increases to its employees in the above-described unit without bargaining with the Union.

(i) Refusing to meet and bargain collectively with the Union because it objected to the composition of the Union's bargaining committee.

(j) In any like or related manner interfering with, restraining, or coercing its employees with respect to the rights guaranteed them under Section 7 of the Act.

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

(a) Offer to Maurice Moncayo, Angel Bermudez, Hubert Boganegra, Brad Drol, Joseph Santo, and Obed Rodriguez immediate and full reinstatement to their former jobs in the unit described above or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Make whole, with interest, Maurice Moncayo and Joseph Santo for all wages and other benefits they lost by reason of the unlawful failure to assign them overtime work.

(c) Make whole, with interest, Maurice Moncayo for all wages and benefits lost by reason of having unlawfully transferred him out of the assembly department.

(d) Remove from the files of the above-named employees all references to their discharges, transfers, or warnings found herein to have been unlawfully motivated and notify them that this has been done and that none of those matters will be used against them in any way.

(e) Preserve and, on 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 Order.

(f) Post³ at its Totowa, New Jersey facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on re-

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³As noted above, the notices are to be posted in English and in Spanish.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Allegations of unfair labor practices in the amended complaint, which were not found above to have merit, are dismissed.