Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer *and* International Ladies' Garment Workers' Union, AFL–CIO *and* Local 99, International Ladies Garment Workers' Union, AFL–CIO. Cases 29–CA–14548, 29–CA–14619, 29–CA–14681, 29–CA–14735, 29–CA–14845, 29–CA–14853, 29–CA–14896, 29–CA–14983, 29–CA–15012, 29–CA–15119, 29–CA–15124, 29–CA–15137, 29–CA–15147, 29–CA–15323, 29–CA–15324, 29–CA–15325, 29–CA–15332, 29–CA–15393, 29–CA–15413, 29–CA–15447, and 29–CA–15685

March 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On November 1, 1991, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party Union each filed cross-exceptions and supporting briefs. Additionally, the General Counsel filed a brief in support of the judge's decision, and the Respondent filed an answering brief to the General Counsel's and the Union's cross-exceptions.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as set out in full below,[3] to modify the rem-

[1] The Respondent subsequently by letter filed a request that the Board reopen the record to receive additional evidence or, alternatively, to take judicial notice of a judgment of acquittal rendered by a state criminal court in a matter involving Peter Salm, Respondent's operations manager and the son of its owner. The General Counsel and the Union each submitted letters opposing the Respondent's request. We grant the request to the extent that we enter into the record the decision of the judge in *New York v. Peter Salm*, Docket No. 91K001662-1991, but we otherwise find the request lacking in merit because the Board is not bound by a state court judgment or the findings of fact on which the judgment is based. See generally *Nashville Corp.*, 94 NLRB 1567 (1961). Further, we note that the standards of proof for criminal cases arising in state courts are significantly more stringent than those applicable to administrative proceedings before the Board.

[2] The 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further asserts that the judge's credibility resolutions are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses.

In fn. 20 of his decision, the judge stated that the Respondent had sent ''second'' offers of reinstatement to some former strikers in response to ''the Union's unfair labor practices.'' It appears, however, that in this footnote the judge intended to refer to the unfair labor practice *charges* which the union had filed concerning the Respondent's failure to reinstate former strikers. We therefore correct this misstatement which does not affect our ultimate conclusions here.

Although we agree with the judge that nonstriking employee Sam Padgett acted as the Respondent's agent in this case and that he was an intimidating and menacing presence to returning strikers, we disavow any possible racial implications in the comments the judge made pertaining to Padgett.

[3] The judge failed to include in his decision a ''Conclusions of Law'' section that sets out the specific violations of Sec. 8(a)(1), (3), and (4) which he found in this case. In adopting the judge's substantive findings here, we shall provide below formal ''Conclusions of Law'' in order to correct this inadvertent omission.

Regarding the judge's finding that employee Giles Robinson's discharge on December 1, 1989, violated Sec. 8(a)(3) of the Act, we note that the Respondent has argued in its exceptions that Robinson was discharged because he ceased working that day when union representatives entered its facility. We reject this argument, however, because the credited evidence shows that the Respondent told Robinson at the time of his discharge that it was terminating him ''due to all this trouble [we] are having with the Union.'' We note that the Respondent failed to except to the judge's finding that the discharge of reinstated striker Francisco Moriera violated Sec. 8(a)(3) and (1).

The Respondent argues that under *Mississippi Steel Corp.*, 169 NLRB 647, 662–663 (1968), its duty to offer reinstatment extended only to the 132 of the 195 strikers listed on Appendix A who reported for work on August 13, 1990. The failure of some employees to appear on August 13 raised a valid question by the Respondent about the status of these employees based on the Union's telegraphic representation that the striking employees, without noted exceptions, would appear on August 13 ready to report for work. See *Champ Corp.*, 291 NLRB 803, 885 (1988), enfd. 933 F.2d 688 (9th Cir. 1990). However, where a request for reinstatement appears ambiguous, the employer bears the burden of requesting clarification. Here the Respondent failed to do so. As the Board stated in *Home Insulation Service*, 255 NLRB 311, 312 (1981):

> Where any such ambiguity remains unclarified due to the Respondent's decision to ignore the offers and not seek clarification, the Respondent may not be heard to complain if such uncertainty is resolved against its interest. *Haddon House Food Products, Inc.*, 242 NLRB 1057 fn. 6 (1979).

We agree with the judge that the Respondent did not make valid offers of reinstatement to *any* employees on August 13, including Gerda Benoit and Miracia Porsenna, because it unlawfully required them to complete an application for reinstatement and produce INS ''green cards.'' Thus, on August 13 the Respondent never made a valid offer of reinstatement, collective or otherwise, in response to the Union's unconditional offer on behalf of all strikers to return to work. As a result, the strikers who did not return to work that day, including Benoit and Porsenna, are still entitled to reinstatement. Since the Respondent's offers that day were invalid, we cannot appropriately inquire into Benoit's and Porsenna's reasons for refusing to work on August 13. As the Board stated in *Consolidated Freightways*, 290 NLRB 771 (1988), enfd. 892 F.2d 1052 (D.C. Cir. 1989):

> We will not allow a discriminatee's response to an offer invalid on its face to ''retroactively validate [an offer] which [was] deficient when made.'' . . . If, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken.

Continued

edy, and to adopt the recommended Order as modified below.

1. The judge found that the conduct of employees Joseph Aris and Jean Sigay Pierre in forming a ''human chain'' to prevent strike replacements from reaching the bus they were attempting to board was so serious that it would have entitled the Respondent, in other circumstances, to deny reinstatement. Based on the evidence that Peter Salm, the son of the Respondent's owner and the manager of the assembly line where most of the unit employees worked, himself engaged in violent conduct and condoned the verbal and physical abuse of returning strikers by nonstriking employees, the judge concluded that the Respondent violated Section 8(a)(3) of the Act by denying reinstatement to these strikers. Thus, the judge found that, in light of the evidence that more violent acts of misconduct by nonstrikers went unpunished, the Respondent's denial of reinstatement to Aris and Pierre was not made in good faith and constituted disparate treatment.

In adopting the judge, we note that the Board stated in *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988):

> Although an employer does not violate the Act by refusing to reinstate strikers who have engaged in serious misconduct, it is not free to apply a double standard. It may not knowingly tolerate behavior by nonstrikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny strikers reinstatement to jobs.

Applying this analysis here, we agree with the judge's conclusion that the Respondent violated the Act by discharging these two employees. We rely particularly on the Respondent's failure to discipline employee Sam Padgett who, inter alia, physically assaulted two returning female strikers, causing injuries that resulted in the employees' hospitalization. Although the judge found, and we agree, that in other instances Padgett acted on Peter Salm's direction and as the Respondent's agent in abusing returning strikers, it appears that Padgett may have acted on his own when he assaulted the two former strikers. We stress that one of these attacks occurred outside the Respondent's facility as Padgett and his victim were waiting for public transportation at a bus stop. Nevertheless, we find that the Respondent had knowledge of Padgett's violent conduct because one incident occurred as the former striker was attempting to work and the other, described above, resulted in the police arresting Padgett while he was working at the Respondent's facility. Because the Respondent failed to discipline Padgett for this misconduct, we conclude that the Respondent accorded Aris and Pierre disparate treatment in violation of Section 8(a)(3) by failing to reinstate them based on their noninjurious pushing and shoving while engaged in protected concerted activities.[4]

2. Both the General Counsel and the Union have excepted to the judge's failure to find that nine identified employees were unfair labor practice strikers who are entitled to offers of reinstatement and backpay. The record shows that six of these individuals—Jean Lacombe, Marie Leconte, Emilio Meredith, Jose Angel Ortiz, Freda Osias, and Marie L. Pierre—signed in and

In these circumstances, we find it unnecessary to pass on the judge's analysis of the Board's holding in *Esterline Electronics Corp.*, 290 NLRB 834 (1988), including his discussion of the Board's ''requirement of good faith dealing'' imposed on employers and individual discriminatees. See *Orit Corp.*, 294 NLRB 695 fn. 3, 699 (1989).

We agree with the judge that former strikers had legitimate reasons for declining facially valid offers of reinstatement that the Respondent sent to them on September 11, 19, and 24, 1990. As the judge found, the record clearly discloses that these unrecalled former strikers, who continued to gather regularly outside the Respondent's facility, knew from conversations with employees whom the Respondent previously had recalled, that the Respondent was physically and verbally abusing the returning strikers. Thus, employee Gertha Denaud testified that she did not return to work because employees Louis Antoine Dormeville and Antoinette Romain had told her that ''when they came back to work, the people there insulted them, fought with them and hit them.'' Employee Gertha Denaud testified that she also declined reinstatement ''because I was afraid.'' Denaud said that ''there are people who came back and they were threatened. There was Antoinette [Romain] who came back and they threw clothing at her, she fell and it was an ambulance that took her away.''

Further, the Respondent sent these September recall letters to the former strikers via a form of mail service that required their signatures for delivery. Although many of the employees were unable to pick up their letters at the post office for several days after the postal service had attempted delivery, the Respondent in virtually every case denied reinstatement to former strikers who reported for work later than the reporting time the Respondent had specified in the letters they received, even if only by a few hours. Employees Rose St. Juste, Maximo Lacayo, and Luis Ramos Frederick all testified that in late August they told former strikers awaiting reinstatement that the Respondent had refused to hire them when they reported for work past the return date specified in the Respondent's letter. Employee Frederick further testified that he had heard from other employees that they had not been able to work because they appeared at the Respondent's facility after the designated reporting date. Employee Marie Mondestin testified that she did not report after she picked up her letter several hours past the designated reporting date because she had heard from other employees that the Respondent did not allow returning employees to report late. For these reasons, we agree with the judge that the Respondent's September offers of reinstatement were insufficient to toll backpay for employees who had received them but did not attempt to report for work because their designated reporting date had passed or because they feared harassment on the job.

[4] Additionally, we adopt the judge's findings that employees Caesar Amador, Jean L. Bonny, Bardinal Brice, Roberto Morales, Juana Peralta, and Yolande Heurtelou did not engage in any strike misconduct that would preclude their reinstatement following the strike under *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1983), enfd. mem. 765 F.2d 148 (9th Cir. 1985). Because the judge found that Brice did not, as the Respondent contended, spit on the Respondent's security guard, John Tubior, during the strike, we find it unnecessary to pass on the judge's further finding that such misconduct, even if it had occurred, would not have justified Brice's discharge.

received strike benefits from the Union on at least one occasion during the strike. Based on this evidence demonstrating their participation in the strike, we find that these employees made common cause with the strikers and they, therefore, should enjoy the rights of unfair labor practice strikers.[5] Accordingly, we conclude that the Respondent further violated Section 8(a)(3) and (1) of the Act by failing to offer these employees reinstatement following the Union's unconditional offer to return to work. We shall require the Respondent to reinstate these six employees with appropriate backpay.[6]

With respect to the remaining three individuals, Verrance Joseph, Jean Malvoisin, and Marie Annette Time, the evidence shows only that they were employees of the Respondent who ceased working when the strike began. Although the Board has held that an employee is not required to picket in order to show that the employee supported the strike,[7] we find in this particular case, where the Respondent employed a transient work force in a relatively large unit, that additional evidence is necessary to support a finding that they, like their fellow employees above, joined the Union's strike. We note that, in the absence of any affirmative showing that these employees made common cause with the strike or even sought to return to work upon its conclusion, it is plausible that these employees coincidentally terminated their employment with the Respondent at the time the strike began. Thus, on these particular facts, because we decline to speculate whether these employees joined the strike, we do not provide any remedy for Joseph, Malvoisin, and Time.[8]

3. In adopting the judge's recommendation that Peter Salm be required to read the Board's notice to assembled groups of employees, we note that in fashioning remedies the Board is authorized by Section 10(c) of the Act ''to take such affirmative action . . . as will effectuate the policies of the Act.'' Furthermore, the Supreme Court has long recognized that the Board's power in the area of prescribing effective remedies is ''a broad discretionary one, subject to limited review.''[9]

Applying these concepts in *Conair Corp. v. NLRB*, 721 F.2d 1355, 1386–1387 (D.C. Cir. 1983), the court affirmed the Board's order requiring the Employer's president to read the notice ''[i]n order to dispel the atmosphere of intimidation created in large part by the president's own statements and actions . . . .'' That court later found in *Food & Commercial Workers v. NLRB*, 852 F.2d 1344–1349 (D.C. Cir. 1988), that the Board had not abused its discretion by ordering a similar remedy where the Employer's president ''was involved in a large number of the violations for which the company was cited.''

We conclude that the remedies that the Board ordered by the employers' presidents in those cases are even more suitable for Peter Salm as he was clearly the principal actor in the Respondent's outrageous conduct. As the judge pointed out, it was Peter Salm who swiftly responded to the advent of the Union by interrogating employees, threatening them with discharge, creating the impression of surveillance, promising and terminating employees' benefits, and offering bribes and protection to employees if they refrained from union activity. Then, after employee Giles Robinson had introduced him to the Union's representatives who demanded recognition, Peter Salm immediately discharged Robinson ''due to all this trouble that we [are] having with the Union . . . .'' Salm later discharged employee James Charles who, like Robinson, was among five or six employees on the Union's organizing committee.

During the strike that followed, Salm denigrated both the strikers and, in their presence, the Union's representatives, by the gross and disgusting, racially and sexually demeaning comments he made to them. Further, Salm directed an employee to back the Respondent's truck into a car driven by a union representative, causing property damage and, on another occasion, threw a rock that struck and injured a female representative of the Union. After the strike ended, Salm delayed and impeded the return of the unfair labor practice strikers to their former jobs. Additionally, Salm harassed strikers whom the Respondent did recall and also directed employee Samual Padgett, the Respondent's agent, and other nonstriking employees to abuse returning strikers. Further, Salm personally discharged most of the 12 returning strikers whom the Respondent terminated following the strike. We also emphasize that during the course of the hearing in the instant proceeding, Salm discharged employee Maximo Martinez in violation of Section 8(a)(4) for giving testimony adverse to the Respondent's interest.

We recognize that the instant proceeding arises in the Second Circuit where the court has been reluctant to require that company officials personally read the Board's notice to unit employees.[10] Instead, in cases

[5] *White Oak Coal Co.*, 295 NLRB 567, 571 (1989).

[6] We note that the judge, after finding in the remedy section of his decision that employee Marie L. Pierre was not a striker, included her name in Appendix A among those employees who are to receive offers of reinstatement and backpay. Based on our finding above that she was an unfair labor practice striker, we shall include Pierre's name in the revised Appendix A.

[7] Id. at fn. 4.

[8] We shall delete Time's name from Appendix A which the judge had inadvertently included there.

[9] See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[10] *NLRB v. S. E. Nichols, Inc.*, 862 F.2d 952, 962–963 (1988), enfg. as modified 284 NLRB 556 (1987); *Textile Workers v. NLRB*, 388 F.2d 896, 904–905 (1967), cert. denied 393 U.S. 836 (1968); *Continued*

where the Board has imposed this remedy to vitiate widespread and egregious unfair labor practices, the court has given the offending employer the ''alternative, at its option, of having the notice read by a Board representative, rather than by [its] president . . . .''[11] Yet, the court has also stated that ''we do not hold that a reading provision without this alternative of reading by Board representatives would never be appropriate.''[12]

Based on the violence that Peter Salm has perpetrated, directed, and condoned here, his racial and sexual degradation of unfair labor practice strikers and union representatives, and the other unfair labor practice violations he *personally* committed as described fully above, we believe that it would effectuate the policies of the Act by requiring that Peter Salm read the notice in order to assuage the fears of the unit employees that their future involvement in union and other protected concerted activities will not result in similar misconduct on his part. This case is clearly distinguishable from *Monfort of Colorado*, 298 NLRB 73 (1990), where the Board did not require the employer's president to read the notice because he was personally responsible for only two of the unfair labor practices found. We do not impose this remedy for punitive reasons. It is designed, rather, specifically to address Peter Salm's demonstrated willingness and proclivity to resort to unlawful means, including violence, to thwart the union's organizing campaign and otherwise to run roughshod over the fundamental statutory rights of employees. Thus, because it will best effectuate the policies of the Act, we adopt the judge's recommendation directing that Peter Salm read the notice in English to the unit employees.[13]

CONCLUSIONS OF LAW

1. Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer (the Respondent), is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies' Garment Workers' Union, AFL–CIO, and Local 99, International Ladies Garment Workers' Union, AFL–CIO (the Union), are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) threatening employees with discharge or reprisals to discourage them from joining or supporting or assisting the Union;

(b) harassing employees on the job by cursing at them and insulting them, or by making obscene comments to and obscene gestures at them, or by spitting on them or making faces at them, or by making disparaging remarks or gestures, or by touching them or subjecting them to verbal abuse, or by throwing things at them in order to discourage employees from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike;

(c) threatening to assault employees or physically assaulting them or causing them to be assaulted or struck by clothing bundles or any other object, or condoning such physical assaults upon its employees, or assaulting representatives of the Union or throwing rocks at them, or damaging or spitting on the automobiles of representatives of the Union, in the presence of its employees, in order to discourage employees from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike;

(d) engaging in degrading or abusive conduct directed to its employees or to union representatives, in the presence of the employees, calculated to discourage employees from joining, supporting, or assisting the Union;

(e) interrogating employees about their own or other employees' union membership, activities, or sympathies, or concerning other protected activity, including the filing of unfair labor practice charges with the National Labor Relations Board;

(f) engaging in surveillance of its employees, or creating the impression that it is spying on employees while engaged in union activity, or offering or promising money to employees to induce them to provide Respondent with information regarding the Union or to engage in surveillance of the meetings and activities of the Union;

(g) threatening employees that their continued support for the Union is futile because the Respondent will never recognize the Union or sign a contract with the Union;

(h) threatening employees with the loss of paid sick days and holidays in order to discourage them from supporting the Union;

(i) directing employees to remove clothing with a union insignia on it.

(4) The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) of the Act by:

J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 296 (1967), cert. denied 389 U.S. 1005 (1968).

[11] *S. E. Nichols*, 862 F.2d at 962.

[12] *Textile Workers*, 388 F.2d at 904 fn. 9.

[13] We also specifically adopt, inter alia, the judge's finding in the remedy section of his decision that the Respondent's widespread unfair labor practices warrants a broad cease-and-desist order under *Hickmott Foods*, 242 NLRB 1357 (1979), and that the Respondent has the option, following Peter Salm's reading of the notice in the English language, of designating its own supervisors or allowing Board representatives, with Peter Salm remaining nearby, to translate the notice into the various other tongues spoken by the unit employees.

(a) issuing disciplinary warnings to employees James Anthony Charles and Lucien Henry because they engaged in union activity;

(b) discharging employees Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, and Francisco Moreira because they engaged in union activity;

(c) refusing to reinstate all the employees listed in the attached ''Appendix A'' to their former jobs or, if their former jobs no longer exist, to substantially equivalent jobs, because these employees engaged in an unfair labor practice strike;

(d) imposing more onerous working conditions on employees or assigning or transferring them to less desirable and more arduous work positions or videotaping them or subjecting them to more vigilant supervision or taking away privileges previously enjoyed, because the employees engaged in an unfair labor practice strike or they joined, supported, or assisted the Union;

(e) requiring unfair labor practice strikers, in order to qualify for reinstatement, to fill out and submit by registered mail, return receipt requested, application forms and Immigration and Naturalization Service ''Employment Eligibility Verification (I-9)'' forms or other documents, or to present social security cards, green cards, passports, birth certificates, or other personal identification when personally applying for reinstatement;

(f) instituting and implementing new rules in order to discourage employees from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike;

(g) withholding from employees Christmas turkeys and hams and annual employee vacation benefits in order to discourage them from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

(5) The Respondent violated Section 8(a)(4) of the Act by discharging employee James Anthony Charles in part because he refused to identify those individuals who had filed unfair labor practice charges against the Respondent with the Board and by discharging employee Maximo Martinez because he gave testimony adverse to the Respondent's interest during the unfair labor practice hearing held in this case.

(6) The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached Appendix A—to which the names of Jean Lacombe, Marie Leconte, Emilio Meredith, Jose Angel Ortiz, and Freda Osias have been added and from which the name of Marie Annette Time has been deleted—for that of the administrative law judge.

APPENDIX A

Rosa Abreu
Joseph Acces
Jean Max Adolphe
Dennis Aguilar
Marie Ahrendts
Francois Alexandre
Cesar Amador
Andreze Andral
Andrea Andre
Viergelie Anier
Joseph Aris
Marie Rose Armand
Alberto Arzu
Longina Arzu
Marie Augustin
Atulie Balan
Jean Balan
Eloge Jean Baptiste
Ronald Jean Baptiste
Gerda Benoit
Gladys Bernard
Maximo Bernardez
Rose Bertin
Edaize Blanc
Hubert Florent Boni
Jean L. Bonny
Bardinal Brice
Inovia Brutus
Lalane Camner
Bertha Camille
Claire Camille
Marie Camille
Gertha Camilus
Solange Carasco
Ghislaine Caristhene
Marie C. Casseus
Adrian Castillo
Simion Castillo
Rose Marie Castor
Marcial Santos Castro
Christianne Celestin
Jose DeLeon
Immacula Delhia
Christian Delva
Mercedes Delvillar
Gertha Denaud
Jesula Denis
Mezinette Desinor
Alama Amine Diawara
Aparicia Diego
Voltaire Dorcius
Francesca Dormetus
Antoine L. Dormeville
Jerome Dunn
Adeline Duvivier
Wilmide Estimond
Marie Estivaine
Michelet Exavier
Eduardo Roman Feliciano
Hipolito Figueroa
Yvette Fleurimonde
Marlon D. Flores
Marie Josee Francois
Luis Ramos Frederick
Marc Frederique
Michelet Germaine
Jose Gonzales
Tomas Guevaro
Rafael Gomez
Jose L. Gonzalez
Marie Gresseau
Banilia Guerrier
Rufino Guity
Hector Guity
Pablo Guity
Milka Gutierrez
Ana Hernandez
Maximo Hernandez
Yolande Heurtelou
Sako Idiessa
Marie Jacques
Louis P. Jean

Wilner Ceptus	Therese Jean
Brigitte Charles	Marie E. Jeanty
Cecile Charles	Rene Jeronimo
Eugenie Charles	Evodia Joseph
Marie Charles	Louine Joseph
Sy Chiekh	Ghislaine Joseph
Louis Cherfilus	Marc Olyns Joseph
Alourdes Choute	Marie Rose Joseph
Anne Cidienfort	Marie May Joseph
Ana Contreras	Clorina Joseph
Jean Robert Cyprien	Leanna Joseph
Julmene Joseph	Josette Philogene
Ucemeze Kernizan	Reynaldo Pierluisse
Lourdes Labissiere	Jacqueson Pierre
Teresa Lacayo	Jean Sigay Pierre
Maximo Lacayo	Marie L. Pierre
Jean Lacombe	Marcos Pitillo
Mimose Lacroix	Miracia Porsenna
Mureille LaFleur	Romulo Ramirez
Nevuis Lambert	Milton Ramos
Fritho Lapomarede	Orlando Ramos
Marie Leconte	Loficiane Raymond
Alma Louis	Violette Raymond
Marc Dala Louis	Chano Reyes
Marie N. Louis	Rene Rochez
Rachelle Louissaint	Eddy Rodrigue
Michelet Lousma	Antoinette Romain
Marie C. Lousma	Marie A. Romain
Idiamise Lovinski	Marie M. Roseau
Pierre Louis Ludovic	Antonine St. Fort
Mireya Lugo	Margaret St. Felix
Andrew Mack	Rose Marlene St. Juste
Pierre Malebranche	Yollande Sainrastil
Diankha Mamadu	Joseph Saintval
Eduardo Martinez	Monique Samedi
Maximo Martinez	Laboriano Senteno
Jesula Massena	Richard Simon
Marie Nicole Mathieu	Justo Suazo
Fernande Mathurin	Vicente Suazo
Nilda Matos	Pierre A. Surin
Rose Andree Mauvais	Marie Thelismond
Hilda Medina	Anna Thomas
Emilio Meredith	Kathy Toussaint
Alta Meuze	Celina Valentin
Jean Demard Midy	Jose L. Valentin
Miguel Flores Miranda	Josette Vaval
Marie C. Mondestin	Victor Velasquez
Roberto Morales	Imanitte Verrier
Francisco Moreira	Agare Victor
Georges Murat	Joseph Virgile
Marie A. Narcisse	Wilfrid Virgile
Rufino Norales	Lourdes Williams
Oscar Nunez	Mulert Zama
Irene S. Nunez-Reyes	Ruth Zama
Jean Olivier	Dieulenveux Zama
Carolina Olivo	Auguste Zama
Jose Angel Ortiz	Alejandro Palacios
Williams Ortiz	Juan Ramon Palacios
Freda Osias	Juana Peralta

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Ira J. Katz, Esq., of New York, New York, for the Charging Party International.

Stuart A. Weinberger, Esq., Richard M. Greenspan, Esq., and *Karen Hertz, Esq.*, of White Plains, New York, for the Charging Party Local 99.

DECISION

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaints in this unfair labor practice proceeding allege discharges, numerous threats and interrogations, and Respondent's failure to reinstate 200 employees to their former positions after they had ended their strike. The complaints also involve obscenities and obsessive hatred of the Union, and racial, ethnic, and sexual degradation of people who merely wanted to take advantage of their right to engage in protected activities under the National Labor Relations Act 29 U.S.C. § 151 et seq. Respondents deny that they did anything wrong.

FINDINGS OF FACT

I. JURISDICTION AND PLEADINGS

About the only facts that have been agreed to are the names of the parties and their functions. Domsey Trading Corporation and Domsey Fiber Corporation are New York corporations with their principal places of business in Brooklyn, New York, where they have been engaged in the grading, packing, and shipping of used clothing and exporting of textiles. Domsey International Sales Corporation is also a New York corporation at the same address, where it sells used clothing and textiles and related goods in a retail facility (the Store) located next to the plant of the Trading and Fiber Corporations. All of them have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise. I conclude, as Respondents admit, that they constitute a single integrated business enterprise and a single employer within the meaning of the Act.

During the years preceding the issuance of each of the complaints, Respondents purchased and caused to be transported and delivered to their Brooklyn facility used clothing and textiles and related products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York and sold and shipped from their facility to points outside of New York materials valued in excess of

$50,000. I conclude that Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Board asserted jurisdiction over Domsey Trading and Domsey International in *Domsey Trading Corp*., 296 NLRB 897 (1989). Because they constitute a single employer, and for ease of reference, because the record does not distinguish with great particularity the functions of each and their various officers, representatives, managers, and supervisors, I will hereafter refer to them collectively as ''Respondent.'' I also conclude International Ladies' Garment Workers' Union (International) and Local 99, International Ladies' Garment Workers' Union (Local 99), are both labor organizations within the meaning of Section 2(5) of the Act. Again, for ease, I will almost always refer to them both as the Union.

The relevant docket entries are as follows: The International filed its unfair labor practice charge in Case 29–CA–14548 on December 22, 1989, and a complaint issued on February 2, 1990. The International filed its unfair labor practice charge in Case 29–CA–14619 on January 30, 1990, and a complaint issued on March 6, 1990, which was amended on June 25, 1990, and February 22, 1991. The International filed its unfair labor practice charge in Case 29–CA–14681 on February 26, 1990, and a complaint issued on March 30, 1990. The International filed its unfair labor practice charge in Case 29–CA–14735 on March 20, 1990, and a complaint issued on April 11, 1990, which was amended on April 18, 1990. The International filed its unfair labor practice charge in Case 29–CA–14845 on May 7, 1990, and a complaint issued on June 25, 1990. The International filed its unfair labor practice charge in Case 29–CA–14853 on May 11, 1990, and a complaint issued on June 25, 1990. The International and Local 99 filed their unfair labor practice charge in Case 29–CA–14896 on May 29, 1990, and a complaint issued on July 9, 1990. The International filed its unfair labor practice charge in Case 29–CA–14983 on July 9, 1990, and a complaint issued on August 1, 1990. Local 99 filed its unfair labor practice charge in Case 29–CA–15012 on July 19, 1990, and a complaint issued on August 30, 1990. Local 99 filed its unfair labor practice charges in Cases 29–CA–15119, 29–CA–15124, and 29–CA–15137 on August 14, 16, and 22, 1990, respectively, and a consolidated complaint issued on March 1, 1991. Local 99 filed its unfair labor practice charge in Case 29–CA–15147 on August 30, 1990, and a complaint issued on October 30, 1990. Local 99 filed its unfair labor practice charges in Cases 29–CA–15323, 29–CA–15324, and 29–CA–15325 on November 2, 1990, and its charges in Cases 29–CA–15332, 29–CA–15393, and 29–CA–15413 on November 7 and December 10 and 1990, respectively, and a consolidated complaint issued on December 28, 1990. Local 99 filed its unfair labor practice charges in Cases 29–CA–15447 and 29–CA–15685 on January 8 and April 18, 1991, respectively, and complaints issued on February 22 and April 26, 1991, respectively.

II. CREDIBILITY

Most of the allegations of the complaint were disputed. The facts cannot be recited without a determination of the credibility of the witnesses. I found that the witnesses called by the General Counsel, mainly employees, attempted to tell the truth as they best remembered it. Most of them were Haitian immigrants; the much smaller percentage was Spanish-speaking. They may not have been the most educated or the most sophisticated; but they were decent people, trying to support their families and trying to be treated with dignity, as human beings. A theme, for example, that often arose during the hearing was their intense distaste for Respondent's practice of calling the employees not by their names, but by their badge numbers, and of allowing female employees to go to the bathroom only if they had a card (or pass). The latter grievance does not appear to be that significant, except that there was only one card available; so another of the female employees, among a total complement of about 200–300 employees, who needed to go to the bathroom at the same time, could not.

This is not to say that their recollections could not have been tempered by economic considerations. They were obviously motivated to regain their jobs at the end of the strike. But, in general, I find that these employees were simply trying to make the best of their low-paying, menial jobs; and their testimony was so basic, so common, so earthy, that it could hardly have been made up. Curse words were not the stuff of most of these people. Some had difficulty narrating the events, asking me for permission to repeat the obscenities that they were called to testify about. One witness broke down after narrating how she was mistreated. I watched them carefully and am convinced that they were telling the truth. I should add that some witnesses did not articulate clearly the nature of their claims. There was sometimes much difficulty of communication. However, I blame this more on cultural differences and the process of translating to and from the witnesses' native tongue. Any difficulty was not caused by the witnesses' attempt to hide facts and not tell the truth.

There is no question that there were inconsistencies in some of the testimony of some witnesses called by the General Counsel, but I did not find the vast majority of them to be of such moment that they changed my view of the overall truthfulness of the narration. In a number of instances, Respondent's brief inflated out of proportion the alleged inconsistencies. For example, one of the issues in the first discharge allegation involved whether Giles Robinson brought the business card of a union representative to Peter Salm, one of Respondent's principals, at a time when Robinson should have been working. Respondent relied principally on the testimony of employee Marie Josee Francois, who was asked whether she was present when Robinson was discharged. She answered that she was, ''because I was working on the same table with him.'' In fact, when Peter came back to Robinson's work area to fire him, which was 5 minutes after Robinson had given him the card, Robinson was then working, as was Francois. More importantly, I understood that, in so answering, she was merely identifying the area where she was, and I did not understand her to be saying that she was working at that time.

I will not dwell on each alleged inconsistency, except to note them where they were materially important. Otherwise, I note that they have all been considered and factored into my ultimate credibility resolutions and factual findings. To the extent that there was testimony that conflicts with my findings, I have credited the witnesses whose testimony I rely on. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Indeed, when a witness has been generally credible, but certain parts of that witness's testimony conflicted

with other testimony or was otherwise improbable, only those portions which I have credited have been set forth herein. In doing so, I have also taken into consideration inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

While my impression of the Union's witnesses was uniformly favorable, my impression of Respondent's witnesses was quite different. Respondent was owned by Arthur Salm and one partner, but the day-to-day operation of the plant was entrusted to his three sons, Peter, Cliff, and David. David, who ran the Store which sold used clothing, played a minor role in this drama, as did Arthur. Many of the complaints' allegations were aimed at Cliff, but most involved Peter, its manager. Peter was a participant in one of the very ugly events which occurred at the premises. In the midst of the strike, in March, when the hatred had reached the boiling point and beyond, when ugliness was spreading onto the streets where the strike was taking place, Peter had the singularly stupid idea to order that a table be brought into the street and placed in front of the Union's picket line. There, in the presence of the mostly Haitian-born strikers, a black cloth was spread over the table and, on top of that, were placed five or six bunches of bananas. Most of the strikers testified that Peter then said to them: ''This is for you monkeys to eat.'' Peter followed that by imitating a monkey, scratching himself under his arm.

This outrageous demonstration was such an act of pure hatred, hatred of the strikers' color, race, and ethnic background, that it can hardly be doubted how it was intended. But Peter did not know, half apologizing from the witness stand if someone found it offensive, but appearing not to appreciate how offensive it was and how it could not be misread into anything but a open personal attack upon his striking employees. Furthermore, he failed to understand the consequences and repercussions of what might follow from his actions. In that sense, Peter was uncontrolled; colloquially, he was a ''loose cannon.'' He acted without thinking, because of hate of the union movement which was festering in his shop and apparently because no one in the plant was able to control him.

It is his lack of understanding, his lack of normal conduct, that causes me to believe that he was capable of many of the violations which might in other circumstances seem unusual and less than wholly probable. For example, when the Union called off its strike and strikers returned to reclaim their jobs, Peter did not recognize one of the strikers, who identified himself as a former employee. Peter sent him away, although it would have been prudent and so easy for him to check his records to see whether this individual had been employed by Respondent prior to the strike. The records, in fact, showed his name. Instead, by being foolish, by being totally unthinking, Peter created a liability of probably thousands of dollars when there ought to have been no liability at all. Furthermore, Peter seized upon the most minor of alleged incidents and attempted to create reasons to terminate employees. When a returning employee hesitated for several minutes in accepting an offer to return to work, Peter attempted to transform that into a refusal. When an employee called to say that for medical reasons she would not be coming to work, and he indicated that there was no problem, Peter terminated her for missing work. When Peter gave an employee permission to leave to handle the custody of his daughter, Peter then terminated him for leaving without permission.

His intent in putting out the bananas cannot be doubted. Although Peter seemed to express some regret, what uttered from his mouth was hollow, a refusal to admit his purpose, which demonstrated not shame and penitence, but a lack of candor. He attempted to mislead me into believing that he was beyond reproach, by putting the blame on the Union's principal organizer, Jean Guesly Morisseau (Tigus). It was Tigus, not he, who said that he supposed that the bananas were intended for the monkeys (the strikers). However, Tigus was the Haitians' friend and standard bearer, and he would never have said such a thing had not Peter uttered these words first, and Tigus was merely repeating them. (Tigus recalled, in rebuttal, that Peter had said, ''[H]ere's for you monkeys to eat'' and that he might have replied, ''[T]hese bananas are for monkeys.'') Thus, Peter was wholly unbelievable when he attempted to switch to Tigus the essence of what he meant to impart to the strikers: his contempt for their union activities by attacking their ethnicity, their color, their intelligence, their morality, and their humanity.

By lying about the event involving the bananas, I find that he and his denials cannot be trusted—about that event, about his throwing rocks at a union representative, about his cursing, about his fostering discharges, and about his condoning the deeds of his henchmen, including the particularly threatening Sam Padgett, who cursed elderly alien workers with ''mother-fucker'' while Peter and other members of his family stood and watched, laughing or with smiles on their faces. I, therefore, discredit all of Peter's testimony, unless it was fully corroborated by impartial or adverse witnesses or was so probable, and the opposing testimony was so improbable, that Peter's testimony must be true.

Another younger member of the Salm family, Cliff, was not much better, and what was evident from his testimony, as well as all the other witnesses called by Respondent, was an attempt to cover up for his nonthinking brother. His narration of the incident with the bananas made as little sense as his brother's. According to him, he was looking out the window when he saw the bananas being brought into the street. He called Peter immediately on a walkie-talkie and told him to take the bananas away; Peter immediately complied with his advice and removed the bananas and the table immediately; and the incident was over in 2 minutes. Security guard Sidney Soule testified that Peter, who was standing by the door while this incident occurred, did not have a walkie-talkie. The witnesses, even in their attempt to protect Peter, could not get their stories straight. Another attempted cover-up was a rock-throwing incident: Peter threw a rock, or more likely a brick, striking Natalie Mercado, a union representative, on the head. Here, Respondent's witnesses did much better. The entire Salm family and staff came to Peter's defense, including one person who said that he was the culprit, not Peter. As admirable as it may have been for all of them to tell the same story to keep Peter from trouble, I trust the persons on the picket line who actually saw Peter throw the rock. They had little to gain by their testimony, except perhaps revenge; but I have little to believe that they were at-

tempting to fabricate what they saw. To the contrary, the witnesses for Peter were trying to save his skin, not only for this proceeding but also for the criminal action which may even now have been heard.

There were numerous other witnesses who testified on behalf of Respondent, but I found them all trying to protect their Employer, primarily Peter, rather than being forthright. For example, they uniformly testified that Peter did not use foul language or racial epithets at all; but this record does not approach cleanliness of expression. The witnesses called by the General Counsel, on the other hand, were uniformly sincere and candid. Some of the antics of the Salms, as related by the witnesses, were so typical of Peter's mentality that the testimony could hardly be made up or fabricated. Peter fired people without cause, he badgered them without cause, he treated them like animals or even, perhaps, like ciphers, as exhibited by his reference to his employees not by their names but by their badge numbers.

In sum, I watched Respondent's witnesses as they testified, and their demeanor persuaded me that little of what they said was true. Instead, they discharged many employees without any justification; and, when the Union's half-year strike ended, they tried their utmost to ensure that few union supporters would return, and that those who did would soon be terminated or forced out of the plant.

III. THE UNION CAMPAIGN BEGINS; RESPONDENT IMMEDIATELY REACTS

The open union activities started on October 26, 1989, when the International called a meeting of Respondent's employees at a church two blocks away from Respondent's facility. There, about 100 employees met and discussed their problems. They decided that it would be best to try to organize. An employees' organizing committee was formed consisting of Giles Robinson, Marie Josee Francois, James Charles, Bardinal Brice, Jean L. Bonny, and perhaps Lucien Henry, although most witnesses testified that he was named later. Employees signed cards authorizing the International to represent them and were given blank cards to solicit support from their fellow employees.

When employees showed up the following morning at 7 a.m. to work overtime (overtime was worked an hour before and an hour after the regular workday of 8 a.m. to 4:30 p.m.), Peter told them that those who went to the meeting would not work, but would start at 8 a.m. It was obvious who went to the meeting; they had left at 4:30 p.m. the previous day and thus had not worked their normal overtime. Never before, testified some employees, had Respondent denied them the opportunity to work overtime, and Brice testified that he had never been advised that working overtime in the morning was contingent on working the afternoon before.

Sylvio Maxi, Respondent's principal supervisor under the Salms, claimed that his action was not illegal, because the employees who had been scheduled to work the prior afternoon had not told him that they would not stay for overtime. Besides, Maxi did not know where the employees had gone and could not rely on their attendance in the morning. Thus, he scheduled the employees who worked that afternoon to finish their work in the morning. However, Supervisor Juan Perez testified that he and Maxi knew that the employees were talking about a union before the meeting that night and knew that the reason why so few people remained to work overtime was that they attended the meeting.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel showed enough to state a prima facie case of a violation. There was a showing that the employees were denied overtime, ostensibly because they attended the union meeting. Respondent must then prove by a preponderance of the evidence that it would have taken the same action as it took, regardless of whether it was also illegally motivated by the employees' union activities.

Respondent met its burden. Overtime was traditionally worked in order to cleanup the plant of clothes which had not been sorted and to move away the clothes that had been graded and were contained in carts or ''wheelers.'' Overtime was scheduled in the morning to finish what had not been finished that prior afternoon and was always given to those who had worked that afternoon. If the employees scheduled to work overtime had asked Maxi for permission to leave and not work overtime, he stated that he would have granted them permission, but they would not have worked in the morning. It made no difference to him whether the employees went to a union meeting or a baseball game. They would have been treated the same. Peter's statement that the employees who had gone to the union meeting had not been assigned overtime merely reiterated the policy that those who worked overtime in the afternoon were entitled to it the next morning. No employee testified that the rule was different, and the employees who went to the meeting missed only that morning's overtime. Under *Wright Line*, supra, Respondent would have refused to give the employees overtime anyway. By consequence, I find no violation.

But that is the only allegation of an unfair labor practice that morning that I will recommend be dismissed. Peter told Nevuis Lambert that he knew that Lambert had attended the meeting the evening before. He asked Lambert to bring him his union card, promising him protection. Lambert, who had attended the meeting, denied any knowledge of a card. Peter then reassigned Lambert from his previously light work to a different job, pushing the big wheelers which, when full, were normally handled by two employees. Lambert, however, was assigned to do this job by himself, and he found the work very hard and too heavy for him. (Lambert is 5 feet 5 inches tall and weighs 125 pounds.) On December 4, Peter moved him to work on a job where he had to lift heavy bales.

Both these jobs were harder than his prior jobs. From the date when Lambert started to work for Respondent in September 1986 his job had changed little. When he started, he was a general worker and worked wherever Maxi told him, pushing wheelers and working on the conveyor belt. When working the small wheeler, his job was to bend down and take clothing out of wheeler and lift it up on to the table. He was reassigned to the big wheeler; and, although he did not have to lift anything, it was very hard to push. Baling was hard because, after the clothes were baled, he had to push the heavy bale to a standing position, a task he found very difficult.

Henry, who attended the union meeting, was reassigned to a new job by Supervisor Williams Campos at about 9:30

a.m. He was to work at the shirt line, sorting the shirts; but instead of receiving help from another employee, as was normal, no one was assigned to help him. Finally, after 5 hours of having to do two employees' jobs by himself, Campos assigned another employee to help him. Francois Alexandre had also attended the union meeting and had signed a union authorization card and took more cards to get other employees to sign. Peter moved him from his job of sorting and folding heavy coats to working on the big press. Alexandre described it as more arduous work, requiring knowledge and experience and more strength. He worked at this job for 2 weeks and then was reassigned to his former job.

Francois testified that about 20 or 25 employees were shifted to other locations. She overheard Maxi asking Peter why he was moving the employees around. Peter replied that he knew that these people went to the union meeting. With the exception of explaining that Alexandre was moved to the big press because the person employed there was sick, an allegation which was otherwise unsupported, Peter never testified about any reason for transferring these employees. I find that he moved the employees to more difficult jobs because they had attended the union meeting the night before. I conclude that Respondent violated Section 8(a)(1) of the Act.

At about 9 a.m., Peter asked Robinson how the meeting was last night. Robinson feigned ignorance, asking, ''What meeting?'' Peter, in turn, said, ''I don't know. The meeting.'' Peter just looked at Robinson and walked away. An hour later, Peter returned to advise Robinson that he was making some changes. Robinson was no longer entitled to use the upstairs bathroom that he had been using for more than a year. That afternoon was only for supervisors. At 2 p.m. Peter returned with some new rules. Several weeks before, Robinson had complained that he had not been making overtime and it appeared that he was not going to be given a raise. He asked Peter if he could purchase clothing from Respondent at a reduced price, half the normal price for all clothing up to 50 pounds, and the full price for all amounts over 50 pounds. The money that Robinson saved, $1 per pound for the first 50 pounds, was the same as a raise to Robinson, who sold used clothing for extra money. Peter agreed. Now, Peter advised that that deal was off. Respondent was expecting some labor trouble and, Peter said, ''We might as well start saving our money.''

Two hours later, Peter came to inspect the clothing that Robinson had set aside in a barrel to purchase. He turned the barrel over, throwing the used clothing on the floor. He called his brothers, Cliff and David, to come over to look at ''this good stuff'' and said that he could use the clothes to sell in Respondent's Store. Robinson said that Peter had never told him not to buy the kind of clothes he was picking out and complained that Peter was picking on him. Peter replied: ''I'm not picking on you. I can stop you from buying all together [sic] anyway and don't raise your voice at me because I'll throw you right out on your ass. I don't care if you had twenty years or thirty years, I'll throw you right out on your ass.'' (As will be seen, below, Peter carried out his threat.)

It is clear from these facts that Respondent acted quickly and somewhat harshly when it learned that the employees were interested in joining the Union. First, Peter tried to ascertain what had transpired at the union meeting, and even offered a bribe to Lambert, whom he also offered protection if he would resign from the Union. He gave Robinson the impression that he knew that the union meeting had taken place, and he reassigned many employees to different positions, the three above-named to harder positions, because they went to the meeting. Robinson was a subject of special treatment. He took away his bathroom privileges and his right to purchase clothing at a reduced rate and then threatened him with discharge on a concocted charge of secreting for purchase clothes that could not be purchased and were intended only for sale by the Store. I conclude that all these acts violated Section 8(a)(1) of the Act.

With respect to the interrogation of the employees, I have considered the Board's test outlined in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), that an interrogation is illegal when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Evidence of the coercive nature of Peter's interrogations is ample. Peter was Respondent's principal operating officer. The employees were not open and active union supporters. The questioning of them ''had no legitimate purpose and the questions . . . were designed to determine [the employees'] involvement in protected activities.'' *Hunter Douglas, Inc*., 277 NLRB 1179, 1181 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). Peter was trying to find out whether the employees were involved in the union organization effort and to use that information to defeat the Union by conduct which, I later find, violated the Act. Although the interrogations were isolated events, they were accompanied by reprisals or threats of reprisals, were part of Respondent's scheme to find out what the employees were doing and to thwart those activities quickly, and constituted only some of the multitude of the unfair labor practices committed by Respondent. *Great Dane Trailers*, 293 NLRB 384 (1989). I conclude that these interrogations, as well as the other interrogations found herein, violated Section 8(a)(1) of the Act. *Timsco, Inc. v. NLRB*, 819 F.2d 1173 (D.C. Cir. 1987).

Respondent continued to engage in various violations the next month. On November 20, Peter told Lambert that he knew that Lambert belonged to the Union and offered that, in exchange for Lambert giving him his union card, Peter would give him a raise. Lambert told Peter to give him a raise first and then he would turn over his card. Peter, however, asked for Lambert's proof first.[1] On the same day, Peter also came over to the table where Francois was working and told her that he knew that she had been going to the union meetings. He told Supervisor Fito to watch Francois as she worked, because she was in big trouble; she was on the committee to bring in the Union. He told Fito to fire her if she did anything wrong. Francois said that if she were fired, Peter would have to give back to her all the money Respondent used to deduct from her pay when the employees were represented by another union, a reference to the Board's decision, 296 NLRB 897 (1989), that required Respondent to disband a union it dominated and to repay the

[1] Marie Thelismond's testimony does not accord with this narration of Lambert, whom I find would have more accurately recalled what was said to him. I find it improbable that Peter would have attempted to bribe Lambert into going to the union meeting that night, as she testified, without having asked him to report back what happened there and who attended it.

employees for all dues illegally deducted. Peter replied that he did not care.

The following day, Peter again told Francois that he knew that she was a member of the union organizing committee. When she protested that she was not and asked how he knew, he said that someone had told him. Peter then said that he would accept the Union, but he would fire all the old employees. Later he repeated that the new workers would benefit from the Union, not the old employees, whom he would fire. At first blush, these seem like strange threats; but, as will be seen later, Peter's thinking was based on his desire to rid himself of any employees who, he believed, had betrayed him by asking the Union for help.

Thus, when the Union called a strike the following January, and the strike ended unsuccessfully, Peter attempted to avoid recalling the strikers (the old employees) or, if he did reinstate them, he used every trick to fire them or make their lives as uncomfortable as possible so that they would leave. This constitutes the answer to the numerous arguments in Respondent's brief that the General Counsel made no showing that various employees' protected conduct was a motivating factor in their discharges. Peter understood that they supported the Union, because the Union had made a demand to represent them and they had later participated in the strike.

Peter's statements supply the likely illegal motivation for much of his later conduct. He also committed numerous violations of Section 8(a)(1) of the Act. He gave Lambert the impression that he knew of his union activities, and he promised him a raise if Lambert disavowed his support of the Union. Peter interrogated Francois and gave her the impression that he knew of her union activities. He directed a supervisor to watch her more closely, and the only reason for that, I infer, was his knowledge of her union support. He threatened her and all the employees with discharge because of their union activities. But more violations were to come.

A. *The Union Demands Recognition; Robinson and Others Are Fired*

On December 1, four union representatives came to the plant shortly before 8 a.m. and Robinson, who had been expecting them, went to meet them. One of them gave Robinson his business card and asked who was in charge. Robinson told him that Peter was, and he left to find Peter, whom he told that there some people waiting to see him, giving him the business card. Peter looked at it and threw it to the ground. He told Robinson to get them out; but Robinson replied that Peter, not he, should get them out, and he left to return to his work station. (Francois recalled these events differently and more graphically. After throwing the business card to the ground, Peter said to Robinson: ''Fuck you.'' Then he turned around and left.)

The organizers met with Peter and presented him with their written demand, which listed an organizing committee of Robinson, Francois, Henry, Brice, Charles, and Bonny, and cautioned ''that they must not be punished or discriminated against in any way under penalties described in the Act.'' Respondent apparently read this not as a warning that there was a Federal law which protected employees who engaged in lawful activities, but as an invitation to punish the committee. By the end of January, three committeepersons had been discharged and one other had been threatened with the loss of his job. (Francois and Robinson had been previously threatened, as found above.)

One member of the committee was fired within minutes. At about 8:15 or 8:20 a.m. Peter told Robinson: ''Robby, due to all this trouble that we [are] having with the union, we decided to just let you go.'' He accused Robinson of having started the movement for the Union (''instigating my property,'' testified Robinson). Robinson protested that he was not the one who brought in the Union, but Peter replied that he would take his chances. Peter called for security guards and Robinson was accompanied to the front of the plant. Arthur Salm was looking out the door and turned to face Robinson, who asked him the reason for his discharge. Arthur first claimed that he did not have to give any reasons, but then answered that Robinson did not produce any more and that he made a lot of mistakes.

Because I have credited the employees generally in this proceeding, it is not difficult to find that Robinson's discharge violated the Act. Peter said to him that he was being discharged because of the trouble with the Union; the discharge took place within minutes of the Union's demand for recognition; Robinson's name was on the demand, as a member of the committee; and Peter cursed when Robinson gave him the business card of one of the union representatives. Those facts, together with Respondent's previous violations a month before, after the Union's first meeting, provide ample proof of discriminatory reasons under the Act.

Furthermore, there was no justification for the reasons given by Arthur that day. Robinson's work record was almost without blemish. Employed for more than 27 years, he had never been given a warning or suspended or otherwise reprimanded. The only failure of production, if it may be called that, is that Robinson was once promoted to be a supervisor of the area where the cotton rummage was sorted. After 6 months (2, according to Respondent's witnesses), however, Peter told Robinson that he was too soft with the employees, he had to push them harder, he had to be mean and he had to fight, and he was ''too nice a guy.'' However, Peter reassigned Robinson to the job that he had held just before he became a supervisor, so Peter could not have been dissatisfied with Robinson's work as an employee.

The only mistake that Respondent accused Robinson of making was the mixing of other fabric into a shipment of wool to Italy, which resulted in Respondent's loss of its entire Italian wool market. Respondent did not prove, however, that Robinson was the person who made this error. There were others who could have been responsible; and, until his discharge, Respondent never blamed Robinson. In any event, Respondent's loss occurred at the end of 1987 and the beginning of 1988, at least 1-1/2 years before it fired Robinson. After it discovered the problem with the shipment, it neither disciplined nor warned Robinson. Indeed, it later gave him the responsibility to supervise employees and the opportunity to purchase clothing at a reduced rate, hardly the punishment that one would expect would be given to an employee who had lost Respondent $100,000 of business.

Thus, because of Peter's statement that Robinson was being discharged as a result of Respondent's trouble with the Union, the pretextual nature of the reasons stated to Robinson by Arthur, and the timing of Robinson's discharge, I find that the General Counsel proved a prima facie case of a violation of Section 8(a)(3) and (1) of the Act. However, to the

extent that *Wright Line*, supra, requires an analysis of the reasons relied on by the Salms at the hearing, I reject Respondent's claim that it discharged Robinson for any legitimate reason.

Respondent acknowledges that it permitted its employees to purchase clothing, but contends that it forbade employees from purchasing certain types of clothing, such as work clothes, because they were easily salable and thus were saved for sale at its Store. During one period of time, the Store ran out of these salable garments, and Respondent charged that Robinson was stashing this sort of clothing. Robinson readily admitted that he did select some of these pieces, such as uniform jackets, for resale, but he expressed total surprise that Respondent was at all interested in them. He said that he had been purchasing the same type of clothing for years.

I believe him, because I cannot credit Respondent's claim that this employee of more than 27 years suddenly disobeyed orders and hid property which he should never have thought of purchasing. Indeed, Respondent claims that it knew that he was doing so since early in the summer of 1989, yet it did not discharge him until months later, within minutes of receiving the Union's demand for recognition, with Robinson's name prominently written on it. It never warned him that he was not to purchase certain garments until the Union held its first meeting in October. If Peter, Cliff, and David really thought that Robinson was stashing clothing, one would think that some discipline was forthcoming. What makes their narration incredible is that they did not discipline him, but permitted him a 50-percent break on the price of purchasing garments as a reward for his behavior.

In addition, Peter and David made up a fantastic story about how, one Saturday, in an attempt to find all the garments that they said were missing from the Store, they snooped around the work stations. Of course, they went to Robinson's station, in Peter's words, ''[b]ecause we know that Robinson purchased a lot of clothing that was missing, a lot of the items that Robbie did buy,'' a statement which supports Robinson's version that he had been buying this type of property for years, without question. The only difficulty with this story is that Robinson bought his clothes on Fridays, and Peter would not have discovered anything. Why they did not search Robinson's garments when he bought them remains a mystery. Furthermore, no one told Robinson that he was being fired for stashing clothing which was unavailable for purchase. He was told only that he did not produce well any more. Finally, secreting this valuable kind of clothing and paying for it at the rate of $1 or $2 per pound is really a form of stealing. Robinson was paying less for an item than it would have cost in the Store and was purchasing items which Respondent had allegedly advised all employees could not be purchased. Stealing is punished in Respondent's plant by immediate discharge, but Robinson's conduct was known and unpunished by Respondent for months.

Another reason alleged by Respondent is that Robinson brought strangers, the union representatives, onto its property the day that it discharged him, and he did so after 8 a.m., when he should have been working. There was no proof that Robinson brought them in, and the union representatives testified that they came in through the open front entrance to Respondent's plant. There was no lock on the door or on the gate. Admission could be gained by any vendor or customer or anyone having business to transact with Respondent. Arthur testified that people may enter the factory, but must wait at the entrance and ask to speak to someone in charge. His particular complaint that day was that the union representatives came 60 feet into the factory. Peter, however, said that they remained at the front, which, I find, is exactly what they should have done if they had followed Arthur's procedures. Arthur's testimony in this regard is completely unreliable, and I discredit him generally. Arthur was trying to cover up for Peter, who ''shot from the hip,'' conduct which will be evidenced throughout this decision. He acts without thinking. He clearly was angered that Robinson should introduce the Union into the plant, and Peter acted immediately to demonstrate that the Union would not be tolerated. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

On the same day that Robinson was discharged, at about 10:30 a.m., Peter attempted to bribe Lambert, to whom he complained that Lambert was not supplying any information about the Union. ''Here's what I'm giving to you,'' said Peter, handing him an envelope. Lambert opened it and found $13. At lunchtime Peter told Lambert that he knew that Lambert had gone to the meeting and asked him to give him the ''yellow card.'' If he did, Peter would give him protection. I conclude that Peter's attempt to obtain information about the Union by a bribe and his offer of protection if Lambert would disavow his support for the Union violated Section 8(a)(1) of the Act. The bribe constituted an interrogation for money and a benefit to engage in spying on the activities of the Union. The withdrawal of ''protection'' was a callous threat that Lambert would be unprotected and constituted a threat of some unspecified punishment. Peter's stated knowledge of Lambert's attendance at the meeting tends to give Lambert the impression that his union and protected activities were being surveilled.

Shortly after the October 26 union meeting, small union posters (they may have been stickers; Brice described them as being no more than 2 inches by 3 inches) began appearing on the walls of Respondent's facility. Their subject was two people shaking hands and, underneath that, the name of the International. On one day in late December, at least four times, Peter told Brice that if he told him who was putting up the posters, Peter would give him $150. Brice denied knowledge, and Peter responded that, if someone told him that it was Brice, Peter would fire Brice. Respondent argues that Peter was merely attempting to police the plant, but a bribe of $150 is a lot of detective work. It appears much more like an attempt to discover the identity of the active union adherents and fire them, and a threat to Brice, especially with the discharges and warnings since the Union made its demand to represent the employees, than an attempt to clean off stickers from the walls which had been affixed 2 months before. I find violations.[2]

[2] Two interrogations were alleged in Case 29–CA–14619, as to which Anne Cidienfort was to testify. She suffered a stroke before the hearing commenced and was unavailable to testify. Instead, the General Counsel offered her investigatory affidavit. Although the conduct she related is similar to other allegations and is of the type that I have credited, I find that there was no corroboration of her allegations and, of greater importance, no opportunity for Respondent to cross-examine her so that the truth of her statements could be tested. Furthermore, even if I credited them, the relief that I have

Henry was discharged on January 11, 1990. Although employed since March 7, 1988, almost 2 years, Henry had never been given any discipline by Respondent until 4 days after the union organizers appeared at the facility with the letter containing Henry's name as a member of the organizing committee. On December 5, Supervisor Fritho was pushing Henry to do his work, although Henry's work performance was as fast as usual. Finally, Henry complained of Fritho's treatment, stating that both were Haitians and that he should stop giving him problems and persecuting him. Fritho replied that he was a supervisor and was only doing his job. For this, Respondent gave Henry a written warning for insubordination to management. There is a prima facie case that Respondent did so because of his union activities: Henry had worked for 2 years without discipline, he was warned only within days of the Union's demand for recognition, and he was working as fast as he ordinarily did. Respondent failed to adduce evidence justifying its discipline. Thus, Respondent did not meet its burden under *Wright Line*, supra, of proving that it would have given him this warning notwithstanding Henry's union activities. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

On January 11 Henry was working on the line that he normally worked at. Before starting time, he arranged the barrels and wheelers so that, as soon as the bell rang, he could start his work. At about 10:25 a.m., Supervisor Juan Perez told Henry to take a barrel and put it in Juan's line. Henry complained that he had already set up his line with barrels and that Juan had removed the missing barrel. If the barrel had to be replaced, Juan had to do it. Juan again directed Henry to replace the barrel, but he refused. Then Jose Perez, Juan's brother, entered the discussion, directing Henry to put the barrel in its proper place. Henry again refused, noting that his brother, Juan, had removed it. Henry refused Jose's request at least once more. Finally, a few minutes later, Jose came back to where Henry was working, noting his surprise that Henry was still working because Jose had punched him out. Henry complained to Maxi, who said that he could not intervene in the situation because both Juan and Jose were ''bosses.'' Henry asked, ''Since when is Juan [h]is boss,'' and Maxi said that Juan was a boss.

Henry's testimony, which is the basis of findings of the fact above, constitutes a lengthy admission that he repeatedly refused to carry out the orders of Juan and Jose Perez. The General Counsel's case seems to be premised on the fact that Henry did not know that Juan was his supervisor. Because Juan testified that he had been a supervisor since March 1989, I find it strange that Henry would not have known. But, even assuming that he did not, he also refused to comply with the orders of Jose, whom he knew was a supervisor. Employees are entitled to be union activists, and they are protected by the Act for their union activity. However, the Act does not insulate them when they are insubordinate. Henry's insubordination gave Respondent a legitimate reason to discipline him.

The General Counsel contends that there was no basis to discharge him, because Respondent's rules provide for termination only after receipt of three warning letters. Respondent's warning notice has written near the top the words ''WARNING LETTER,'' followed by boxes to be marked for the first, second, and third warnings, and explains; ''Further, it is to be noted that termination can follow after receipt of three (3) warning letters.'' Henry's only other warning was the one of December 5, 1989, which I have determined was illegal. It may, therefore, not be relied upon. Nonetheless, the language merely states that termination ''can'' follow after three warning notices, and not that there must be three warning notices before an employee may be discharged. The General Counsel did not prove that Respondent had a firm practice of warning employees before firing them. Rather, the record is clear that Respondent discharged immediately anyone who stole property. Here, both Jose and Juan credibly testified that Henry not only refused to comply with the orders of both of them but also cursed at both of them. Under these facts, supervisors do not have to wait for three warnings before discharging an employee who tells them to ''fuck'' themselves. I will dismiss this allegation.

Charles was discharged on January 17, 1990. Employed since the summer of 1988, he, like Henry, had never been given a warning before his membership on the committee was announced in the Union's December 1, 1989 demand for recognition. On December 5, 1989, he returned from a break 3 minutes late. Peter warned him, stating that he was supposed to be an example to all the employees. Charles apologized. On the same day, Peter, who often would walk around to make sure that the employees were doing their work, began to stay longer where Charles worked; and, if he left, he made sure to have a supervisor replace him. Furthermore, when they left, they would always return, and leave and return, a pattern which was different from their supervision earlier.

Sometime after that and before December 20, Peter told Charles that he had been told by different workers that Charles had said that, if employees were late for work or were caught stealing, Peter could not fire them because the Union would protect them. Charles denied that he said any such thing. Peter then said that Charles should stop spreading rumors about Respondent's not having workmen's compensation or he could be in a lot of trouble. On December 20, Peter approached Charles and told him that he was a good worker, but that he had to play by the rules. Peter then gave Charles a warning for spreading false rumors that Respondent did not have workmen's compensation, informing employees that they were not allowed to utilize bathroom facilities between 1 and 2 p.m., and intervening in management and employee disputes without any authority to do so. The warning cautioned that ''further inciting'' of Respondent's employees would result in his immediate termination.

Charles denied that he had spread any false rumors that Respondent had no workmen's compensation insurance; admitted that he had talked at a union meeting about the use of bathrooms, but denied that he had made any false statements (he said at a union meeting that he did not think it was right that employees had to wait until 1 or 2 p.m. to use the bathroom if they had to go before); and denied ever intervening in disputes without authority.

On December 22, Peter gave Charles another warning, this time for not having complied, after several oral warnings, with requests that he not go into the Store during his breaks. The warning reminded him that the factory and Store em-

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recommended would be exactly the same. In these circumstances, I will dismiss these allegations.

ployees had different break periods and directed that he no longer to enter the Store ''for the sole purpose of loitering and disturbing the girls.'' Charles denied that he had received several verbal warnings. The only warning he received was the one of December 5, and that had to do solely with his late return to work. Charles had been going to the Store without reprimand since he had first been employed. On December 26, Charles was asked by Jose Perez when the Union was going to call a strike. Charles replied that none was planned, because the workers would come out losers and Respondent would be a loser. Jose agreed that the workers would come out losers and asked what he would do if he lost his job. Charles had no answer.

On January 16, Jose complained to Charles that he had heard that some employees had gone to the Board to press false charges against him and asked who they were. Charles denied any knowledge. Jose said that, if Charles named them, he would talk to them and find out what wrong he had done to them. Jose asked Charles if he thought that it was right to file false charges. Charles said he did not know. The next day, Campos also complained to Charles that he had heard that certain employees has pressed false charges against him and asked who they were. Charles replied that he did not know; but, if they were members of the committee, that would be ''ratting'' on them.

Later that day, Maxi announced to Charles, ''Sorry, buddy, you've just been fired.'' He gave Charles an envelope with a check and a new warning letter, his fourth, this time complaining of his poor production, constant talking, and playing, stating that: ''Leaves his work station whenever he pleases. When told to do a job he says that the union is going to get the supervisors.'' Charles denied that he ever had any problems with production. His job was to work in the big box, putting clothing onto the conveyors; and he said that he did not engage in talking and playing, nor did he leave his work station whenever he pleased. The only occasion that he recalled occurred on December 28, when he briefly left to take off his sweater (it was hot) and put it in his bag. When he returned, Peter was there and told him that he was paid to work in the box and that he should return there. Then Peter told Campos to keep an eye on Charles and make sure that he stayed there.

Respondent had no problems with Charles' work until his membership on the union committee was announced. Before December 1, he had received no warnings. After December 1, he could not stay out of trouble. On December 5, he was given a written warning for returning to his job 3 minutes late. That does not necessarily show that Respondent violated the Act. Peter appears to be a stickler on employees being at their work stations on time. On the other hand, Charles testified that others had been late for work and had received verbal warnings, not written ones. Respondent introduced no evidence to refute this contention, and I conclude that Charles was treated disparately from the other employees only because he was a union activist.

Regarding the remainder of the warnings given to Charles over the next 6 weeks, most are answered by Charles' denials that he did anything wrong or that he ever engaged in the conduct asserted against him or, alternatively, that Charles not only had engaged in certain conduct, such as going to the Store, but also had engaged in that very conduct for months. The latter is what is so troublesome and improbable about Respondent's defense. It wants me to believe that Charles had been engaging in this same conduct for months and months,[3] yet it was only after the union campaign began and Charles was identified as a leader of that movement that Respondent began to issue the warning letters, which it used to sustain his termination.

I find it incredible that Charles was doing anything wrong, discredit the witnesses called by Respondent, and credit the denials of Charles. I specifically note, however, that Respondent never proved that Charles had said anything about workmen's compensation. Its warning was based only on rumors, and I credit Charles' denial that he said anything about it or even knew what it was. The warning of December 20 was inherently illegal, because it impinged on Charles's right to discuss working conditions with his fellow employees. The General Counsel also contends that the warning is proof of its allegation of illegal surveillance under Section 8(a)(1) of the Act, because the only time that Charles discussed working conditions was at a union meeting. Lacking any credible rebuttal from Respondent, I agree. Furthermore, beginning on December 5, 1989, Respondent engaged in closer supervision of Charles, in violation of Section 8(a)(1) of the Act. Then Respondent attempted to restrict Charles's movement in the facility by warning him not to go to the Store, thus imposing on him more onerous and less desirable working conditions. I conclude that all the warnings and the discharge resulted solely from the Charles's union activities and find that the issuance of the warnings and the discharge violated Section 8(a)(3) and (1) of the Act.

In addition, the questioning of Charles by two of his supervisors about the identity of the person who filed unfair labor practices and by Jose about when the strike would take place violates Section 8(a)(1) of the Act.[4] Asking about the identity of persons who filed charges tends to discourage employees from filing charges. It is because of the proximity of these interrogations and the discharge that the General Counsel also contends that Charles was terminated for refusing to reveal who had filed the unfair labor practice charges, in violation of Section 8(a)(4) of the Act. I agree. Respondent presented no compelling evidence to demonstrate why it terminated Charles at the precise time that it did. Lacking that evidence, I conclude that Respondent was angered by Charles' repeated refusals to inform on his fellow employees and dismissed him for that reason.

Respondent's actions were directed not only at the individual leaders of the organizing effort but also at all the employees. The employees had in the past been given turkeys at the Christmas season. Brice was told by a supervisor in early December 1989 that Peter said that he would not give out turkeys that year. Peter said that the employees had their friends outside, meaning the Union, who would give them turkeys. Other employees, including Charles, were told by supervisors to ask the union president for their turkeys. Lam-

[3] Campos testified that Charles was late two or three times a day for 3 or 4 months.

[4] Charles also testified that in mid-December Jose and Campos asked employee Juana if the Union was paying her for saying or doing the things that she was and whether she thought that the Union could guarantee that she would have a better job. Then Jose asked her if Charles had told her to do or say the things that she was doing. I conclude that this questioning constitutes illegal interrogation under Sec. 8(a)(1) of the Act.

bert testified that the week before Christmas, he asked Peter whether he was giving out turkeys this year. Peter replied that there would be no turkeys. People who attended the union meeting would get no turkeys, and no sick days, and no holidays.

Respondent gave no turkeys to any of its employees in 1989. Respondent's reason for not giving turkeys was, according to its brief, ''strictly economic.'' The following constitutes the entirety of Peter's testimony: ''In 1989 we just felt that we were not going to spend the money on giving out turkeys.'' This is insufficient proof for the discontinuance of a benefit which had been given for years and which the Salms explained to their employees was being withheld because of their union activities. The Christmas turkey constituted part of the employees' wages, and its discontinuance because of the employees' union activities constitutes a violation of Section 8(a)(1) of the Act. *Isla Verde Hotel Corp. v. NLRB*, 702 F.2d 268, 271 (1st Cir. 1983); *Harowe Servo Controls, Inc*., 250 NLRB 958, 1039 (1980). I conclude that Respondent violated Section 8(a)(1) of the Act by failing to give out turkeys, as it did by threatening that there would be no more sick days and holidays. Contrary to the complaint, I do not conclude that Respondent threatened not to distribute turkeys. It merely failed to give them.

B. *The Union Strikes; Respondent's Picket Line Misconduct*

The employees struck Respondent on January 30, 1990.[5] The cause of the strike was hotly contested. Respondent contends that the strike was purely economic, to gain recognition of the Union and ultimately to have the employees covered under a collective-bargaining agreement which would grant them better wages and other terms and conditions of employment. I have no question that economic gains and recognition constituted some of the reasons for the strike. The Union attempted to be designated by the employees as their collective-bargaining agent, distributing cards for that purpose. It made a demand for recognition and, when Respondent refused to grant recognition voluntarily, it filed a petition for an election with the Board and participated in some representation hearings. When the strike commenced, a number of employees prepared signs (such as, ''No contract, no work'') that indicated that theirs was an economic strike. The Union tried to ensure that those signs were not used, but the thought that the strike was an economic strike certainly made itself known in chants and slogans by the picketers (such as, ''No contract, no work'' and ''What do we want? Union''). Furthermore, a number of witnesses candidly noted that they were trying to be treated with dignity in the plant, so that they would no longer be called by number rather than name and so that they would not need a pass to go to the bathroom.

However, the employees were also extremely agitated by Respondent's firing of employees, specifically Robinson, Henry, Charles, and Ann Dormeville (her discharge is not the subject of any allegation in this proceeding). The committee had discussed the possibility of a strike at various meetings. At a general meeting on January 23, attended by 100 or more employees, many employees expressed their desire to conduct a strike; but the union organizers attempted to dissuade them, insisting that they did not really know what the consequences of a strike were. When mention was made about the right to be reinstated to their jobs after an economic strike, Brice asked why they were discussing an economic strike. People were being fired, and those were unfair labor practices. There ought be no talk of an economic strike. When the employees were asked whether they wanted to strike, they all stood up.

The committee met on January 25, and the members (Jean Sigay Pierre was then a member) again insisted that there ought to be a strike. They said that Respondent had fired Robinson and Charles. Was the Union waiting for everybody to be fired and no one left? The union leadership again urged caution. Finally, on January 29, at a meeting of the committee with the top union leadership, the committee insisted that it wanted to strike, and all the workers wanted to, too. They were outraged that Respondent was firing all the committee members, specifically Robinson, Charles, and Henry; and the fact that the Union was filing unfair labor practice charges was doing no good because Respondent continued to fire all the people that wanted to be members of the Union. The union leadership consented to support a strike, and employees were telephoned to advise them that the strike would begin the following morning. Brice, in particular, advised those whom he called that the purpose of the strike was the firing of the committee members.

Although one may argue that the repetition of the employees' testimony gave some indication that their answers had been rehearsed—indeed, some witnesses gave their reasons for striking, namely, the firing of the union committee members,[6] even before being asked—I have no question that they were sincerely aroused by Respondent's harsh reaction to their organizing activities. That the employees had other reasons for their strike and that those reasons may have even been more important than the unfair labor practice activity that they were protesting does not convert the strike into an economic one. Board law is firmly established that a strike is an unfair labor practice strike if the employer's unfair labor practice had anything to do with causing the strike. *NLRB v. Cast Optics Corp*., 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 850 (1972); *General Drivers & Helpers Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962), cert. denied 371 U.S. 827 (1962); *Decker Coal Co*., 301 NLRB 729 (1991).

There is persuasive evidence that the employees were truly seeking to protest the firing of their leaders, two of whose discharges, I have found, violated the Act. The strike, therefore, was an unfair labor practice strike from its inception. Respondent contends, however, that under *Trident Seafoods Corp*., 244 NLRB 566 (1979), enfd. 642 F.2d 1148 (9th Cir. 1981), the strike reverted to an economic strike because it offered Robinson and Henry reinstatement on February 12 and May 8, 1990, respectively. Even if *Trident* stood for that proposition, Respondent never offered reinstatement to Charles, never offered to make Robinson whole for his

[5] All dates hereafter refer to 1990, unless otherwise stated.

[6] Most of the witnesses named Ann Dormeville, for whom there was apparently much sympathy. Because she was not an alleged discriminatee, there would have been no reason why the witnesses might have been coached to testify about her discharge, an indication that the witnesses were not testifying to influence the outcome of this proceeding but because of a sincere desire to cure the discharges that they had witnessed or heard about.

losses, never disavowed the unlawful discharge, and never provided the employees with any assurances against future interference with their Section 7 rights. *Gloversville Embossing Corp.*, 297 NLRB 182 (1989). The strike, therefore, never changed from what it was in the beginning. Of course, by the time that Respondent made its alleged offer to reinstate Robinson, it had committed so many other unfair labor practices by reason of its abhorrent conduct on the picket line that the strike had undoubtedly continued and been prolonged by Respondent's more recent illegal conduct.

For example, on February 12, in the presence of striking employees, Peter spit on the automobile owned by organizer Mercado. He asked her how many men did she ''fuck'' last night and how much money she made. A short time later, he repeated his obscenities and told her that, if she did not have a lot of customers, he would provide some. On other occasions in February and March, all in the presence of striking employees, he asked her why she was on the picket line and told her that she could make much more money ''fucking'' than she could on the picket line. On March 3,[7] in the morning, Peter spewed out his obscenities—''Fuck you, mother fucker. You asshole,'' and ''you stupid niggers''—at the strikers and Evens Heurtelou, a union representative who was in their presence. During this tirade, one of Respondent's truckdrivers was backing a container out of Respondent's lot and directly across from the picket line. Although it was coming dangerously close to Heurtelou's parked car and despite the protestations of Heurtelou that the truck was going to hit the car, Peter purposely directed the driver to back into the car, stating ''Park it. Hit it. I don't care.'' When the truck did in fact hit the car, Heurtelou said to Peter that he had hit his car, and Peter said: ''I don't care. I don't give a shit.''

Peter watched as the police prepared the accident report, and he ''gave the finger'' to Heurtelou as he walked away. All this took place in the presence of strikers. Respondent contends that this incident simply did not happen in this way and points to a number of errors in the testimony of the witnesses for the General Counsel. However, the discrepancies were not of such great moment that they took anything away from Respondent's deliberate attempt to slam its truck into the car of a union organizer. I conclude that Respondent violated Section 8(a)(1) of the Act.

On the same day, one of Respondent's security guards, Michael Foley, according to Blount, struck union organizer Michael Maldonado in the head; but both were arrested after Peter accused Maldonado of possessing a knife, although the police found no weapon. Respondent's defense is that it simply did not do it, and it is more difficult to resolve this issue because neither of the participants testified. There is no question that there was a scuffle and that the two locked in a bear hug. I was not persuaded, however, who started the altercation or whether either of the participants hit one another or that any of the witnesses saw the event clearly. The altercation took place at least 20 feet away from the picket line, and no employee testified about the fight. The evidence is particularly insufficient and inconclusive to prove that the event occurred in the presence and sight of any employee. If the strikers could not see what happened and who was involved in the alleged fight, the conduct could hardly have any effect on their Union and protected activities. I will recommend that this allegation be dismissed.

Also early in March, on three or four occasions, very early in the morning, probably before 7 a.m., Peter asked Mercado why she was out on the picket line. She could have made more money ''fucking'' last night. On March 12, a security guard identified as George or ''Big Nose'' came to the picket line carrying a dildo. Looking at the female pickets, and moving the dildo back and forth in his hand, he said that this is what all the ladies need and that he would ''like to take this and shove it up your ass.'' Mercado turned away for a few moments to ask another International representative whether it was legal for Respondent to do this, and then turned back to see Cliff, with the dildo in his hand, imitating the guard's lewd motions. On another day in March, Peter came out of the gate in the afternoon and announced to the strikers that ''all you black boy[s] are lazy'' and that it was because of them that the country was ''going to the bottom.'' He suggested that they all go on welfare, where they belong. He called them ''stupid niggers'' and gave them ''the finger'' and then pointed his middle finger towards his buttocks.

Later in March (but Blount thought that this occurred in early March and another witness thought this could have happened in May), two of Respondent's security guards brought out a table and placed it in front of the picket line, in full view of perhaps 100 strikers, 90 percent of whom were Haitians. They placed a black cloth over it, and on it Peter and Cliff placed bunches of bananas, Peter later saying that these bananas are for these ''fucking monkeys,'' and if they were hungry they should eat it, clearly directing his remarks at the Haitians. In fact, Peter, looking at the strikers, imitated a monkey, peeling a banana and eating it and scratching himself. (Respondent claimed that the table with the bananas remained in front of the pickets for only 2 or 3 minutes, while one of the Union's witnesses claimed that it stayed there for a long as 2 to 3 hours. I am convinced that the table remained far longer than Respondent was willing to admit.)

In April, at the end of the morning and in the presence of 40–50 strikers, Peter came out and insulted employee Yolande Heurtelou, who was singing with the other picketers: ''You old bitch. You haven't gotten fucked yet. You owe us some money. Only a dog would fuck you.'' When Heurtelou told Peter that he should be ashamed of himself, Peter replied: ''Fuck you, monkey.'' Yolande was in tears; Peter was smiling.

The sequence of the events of May 15 is not completely clear, but there is no question that water came down on the pickets from the roof of Respondent's building. Respondent contends that it contracted for a new air-conditioning compressor and that it had to pump off water which had collected on the roof. The General Counsel does not complain about the fact that some of the pickets may have been sprinkled. Rather, Peter and Cliff transformed the repair job into one of hatred and viciousness. Peter and Cliff approached the picket line and Cliff told the strikers that Haitians were monkeys, that they should go back to Haiti, and that they had AIDS. He and Peter either said or made gestures to indicate that the pickets smelled bad, and Peter said that this (the

[7] Heurtelou stated that these events occurred on March 2, but Blount said they happened on March 3, which he recalled was a Saturday, which is what March 3 was. I credit Blount's recollection.

spraying of the water) was the way that the Haitian ladies could wash out the AIDS. Thus, Peter and Cliff converted an otherwise innocent repair job into one which they condoned the spraying of the strikers because they needed to be cleansed of their smells and disease. On the same day Peter came to the picket line and, in the presence of 20 other strikers, called employee and striker Nilda Matos a whore, said that she was shameless and without dignity, and that she would go with men for $5. Later that day, Peter said that the Haitians were monkeys and they should go back to their country.

Respondent's conduct consisted of two types of activity. The first was physical violence directed against the union representatives. Such conduct, in the presence of employees, constituted a violation of Section 8(a)(1) of the Act because it tends to restrain employees from engaging in their protected and concerted activities under Section 7. *Batavia Nursing Inn*, 275 NLRB 886 fn. 2 (1985). I conclude that Respondent's collision with Heurtelou's car violated Section 8(a)(1) of the Act.

The second activity consisted of the racial, ethnic, sexual slurs, and gross vulgarities directed against the employees and the union representatives, in the presence of the employees. The Board affirmed in *Romal Iron Works Corp*., 285 NLRB 1178 (1978), the decision of the administrative law judge in which he found that the slurs and vulgarities impact ''directly on a person's sensitivities and it is natural for one to avoid being made the object thereof.'' Id. at 1182; contra *Booth, Inc*., 190 NLRB 675, 681–682 (1971), enfd. mem. 457 F.2d 511 (5th Cir. 1972). There is no question that Respondent's activities were motivated by the strike, activity protected by Section 7 of the Act; and Respondent's conduct could make the employees believe that their strike and their loyalty to the Union were not worth the effort in the face of such degradation. The vulgarities against the union representatives, occurring in the presence of the employees, were equally offensive. All must have the tendency of discouraging the employees from engaging in activities protected by Section 7 of the Act. I conclude that all the activity set forth above violates Section 8(a)(1) of the Act. In so concluding, I reject Peter's denials and his defense that he called Mercado a ''whore'' and said other things because she had baited him with sexually derogatory comments. What he accused Mercado of having said may well have happened, but her conduct does not exonerate him from violating the Act.

The final violations which occurred during the strike involved Respondent's nonpayment of vacation benefits which it traditionally paid in the second week of July. The employees asked for their vacation on July 19, but Peter refused to pay them, insisting that he would not pay for the vacations of people who were out on the streets and that no employee was paid vacation if not employed on the date when vacation pay is paid. He told the strikers to get their vacation pay from the Union.[8] Respondent does not dispute the fact that the strikers did not receive any paid vacation.

Respondent's vacation policy, which was derived from an expired collective-bargaining agreement with Respondent's assisted labor organization, was to pay an employee who completed by June 1 a period of employment indicated in the following schedule, the following vacation benefits:

Seniority as of June 1	*Paid Vacation*
6 months	2-1/2 days
11 months	5 days
18 months	7-1/2 days
23 months	10 days
5 years	15 days

Vacation benefits are earned and computed from the first day of employment. Payment for ''accrued'' vacations on a pro rata basis is made to all employees who leave the employ of Respondent, except employees who are discharged for cause. The expired agreement provided that:

> [E]mployees who do not work a full ''vacation year'' as a result of disability, layoff, leave on absence, etc., shall be entitled to vacation pay on a pro rata basis only, based upon the percentage of time such employees actually worked during the ''vacation year.'' (EXAMPLE: An employee who is laid off for six (6) months in a ''vacation year,'' shall be entitled to 1/2 of the vacation pay that such employee would normally be entitled to had such employee worked the entire ''vacation year'').

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court found that an employer violated Section 8(a)(3) of the Act by refusing to pay accrued vacation benefits to striking employees, while it paid vacation pay to nonstrikers. The Board, in *Texaco, Inc*., 285 NLRB 241 (1987), restated its test under *Great Dane*, as follows:

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. Waiver will not be inferred, but must be explicit. If the employer does not seek to prove waiver, it may still contest the disable employee's continued right to entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is ''reasonable and . . . arguably correct,'' and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be ''inherently destructive'' of impor-

[8] Peter's reply to Pierre was more graphic. Denying that he owed vacation pay, Peter said: ''Fucking Sigay, fucking dummy, you stink, you smell, go back to your country. Go to Evens [Heurtelou]. He'll give you vacation pay.''

> tant employee rights or motivated by antiunion intent. [Id. at 245–246; footnotes and citations omitted.]

The benefit is clearly accrued. Indeed, the expired agreement referred to the vacation as ''accrued.'' Based on the period of employment, the employee is entitled to a certain amount of paid vacation. If an employee leaves Respondent's employ, the employee is nonetheless entitled to a pro rata payment of vacation benefits. If the employee is laid off, the employee is entitled to a pro rata payment. Similar results occur if the employee is disabled or takes a leave of absence, and these examples are followed by ''etc.,'' so that similar cases of absence do not cause any loss of benefits. In other words, the benefit was earned by the employees at the time that they began their strike. The amount that was earned is not in question. Contrary to the suggestion made in Respondent's brief, no one claims that the strikers are entitled to receive credit for the time that they were on strike; but they are entitled to what was accrued at the time that they began their strike.

The next issue is whether the benefits were withheld because the employees engaged in a strike. It is clear that they were. Peter admitted that the benefits were paid only to employees who were on the payroll at the time the benefits were due. The only reason that the strikers were not on the payroll was because they were on the picket line. Therefore, the benefits were withheld because the strike occurred. The General Counsel has thus made a prima facie showing of a violation.

Respondent contends that Peter never promised to pay accrued vacation pay if employees abandoned the picket line as alleged in Case 29–CA–15012, paragraph 8. I agree that there is no proof in the record to sustain this allegation. But I disagree with its contention that Peter denied that the employees ever asked him for vacation pay, a position which I find is unworthy of belief. Other than this discredited claim, Respondent has failed to show any legitimate and substantial business justification for its cessation of benefits. See *Bil-Mar Foods*, 286 NLRB 786 (1987). I conclude that Respondent violated Section 8(a)(3) and (1) of the Act. *Knuth Bros., Inc*., 229 NLRB 1204 (1977), enfd. 584 F.2d 813 (7th Cir. 1978).

C. *The Union Ends its Strike; August 13*

The Union decided to end the strike during the first full week of August. On August 10 it wrote to Respondent unconditionally offering on behalf of all the employees on strike to return to work and be reinstated to their positions. It added: ''To assist in reinstatement workers will be at your facility on Monday August 13, 1990 at 8 a.m. ready to return to work.'' That morning approximately 132 employees gathered at the gates of Respondent's facility between 7 and 7:30 a.m. and waited to be called back to work. At about 8 a.m. Peter caused the main gate of the facility to be closed and had a side gate, which was narrower, opened. He set up a table at that gate. Over a loudspeaker, Peter instructed all the returning strikers to line up and enter through the side. It was announced in English, Haitian-Creole, and Spanish, that they would have to give their names and social security numbers, and they would be given applications which had to be filled in and mailed, but Respondent would not accept any bulk mailing. The returning employees lined up and, when they reached the table at which Peter was sitting, they were asked to sign their names on a yellow pad and include their social security numbers. Peter handed out a new form which had been prepared on the letterhead of Domsey International, entitled ''*APPLICATION FOR REINSTATEMENT*,'' which he and Cliff asked all employees to fill out ''100 percent'' and return by registered mail, return receipt requested, to Respondent.[9] This sign-in procedure lasted at least until almost noon.

On one side of the form were spaces for date, time, social security number, employee identification (or badge) number, name, address, home telephone number, last date of employment at Respondent, date hired, next of kin or friend, and that person's address and telephone number. The form ended with the caution that ''ALL INFORMATION MUST BE COMPLETED 100% TO BE CONSIDERED FOR REINSTATEMENT.'' On the other side of the form was a photostat of an Immigration and Naturalization Service (''INS'') form (Form I-9), which asked for the employee's name, address, date of birth, social security number, and an attestation of citizenship or alien status.

When strikers make an unconditional offer to return to work, the employer is obligated to make them an unconditional offer of reinstatement. *Presto Casting Co. v. NLRB*, 708 F.2d 495, 498–499 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983), enfg. in relevant part 262 NLRB 346 (1982). The general rule is that an employer, absent a legitimate business reason, may not condition the reinstatement of any employee on the filing of an application as a new employee. Id.; *Weather Tec Corp*., 238 NLRB 1535 (1978), enfd. mem. 626 F.2d 868 (9th Cir. 1980). In *Globe Molded Plastics Co*., 204 NLRB 1041 fn. 1 (1973), the Board stated; ''Hiring strikers who have not been replaced as new employees does not constitute full reinstatement. *The Laidlaw Corporation*, 171 NLRB 1366 [(1968)], enfd. 414 F.2d 99 [(7th Cir. 1969)], cert. denied 397 U.S. 920.'' Thus, the Board will not permit an employer to require its returning strikers to sign an employer-prepared request for reinstatement as a condition of reinstatement, *Presto Casting Co*., 262 NLRB 346, 360 (1982); or require that returning strikers take physical examinations which are normally required only of new employees, *Woodlawn Hospital*, 233 NLRB 782, 794 (1977); or require returning strikers to submit themselves to interviews, *Fugazy Continental Corp*., 231 NLRB 1344, 1357 (1977), enfd. mem. 603 F.2d 214 (2d Cir. 1979).

The Supreme Court stated, in *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 381 (1967), that: ''The right to reinstatement does not depend upon technicalities relating to application.'' The theory behind that statement is that striking employees remain employees. By treating them as if they are new employees, an employer discriminates against them because it does not treat their employment relationship as continuing. Thus, just as an employer may not reinstate the strikers and eliminate all their past employment or vacation credit, the employer must do nothing to make the employees feel that they are being treated in any way other than as returning, and not new, employees. The employer may impose

[9] Despite Respondent's instructions, the employees gave their applications to their union representatives, who returned 126 applications, in one package, to Respondent, by mail, on or before August 20.

some new condition only when it can show that its action was due to a legitimate and substantial business justification.

Respondent makes numerous arguments that its requirement that the strikers sign the applications was justified, but none of them have merit. Respondent urges that its specially devised application for reinstatement was evidence of its ''good faith effort to return the strikers to work as quickly and as effectively as possible. The applications sped up the reinstatement process by providing [Respondent] with vital payroll and personnel information in a concise and organized arrangement. This was necessary due to the mere three days that the [U]nion gave [Respondent] to prepare for the reinstatement process and thus served a clear and legitimate business purpose.''

The underlying fallacy of this argument is the premise that the Union dictated when employees were to be reinstated. The Union did not dictate that Respondent had only 3 days to reinstate its employees. It merely made arrangements for returning strikers to appear at Respondent's facility at 8 a.m. on August 13, and it was then Respondent's duty to offer the strikers reinstatement, not necessarily that day, but pursuant to Board law. Board law did not require employees to be hired that day. Under *Drug Package Co*., 228 NLRB 108 (1977), modified 570 F.2d 1340 (8th Cir. 1978), on remand 241 NLRB 330 (1979), an employer is entitled to 5 days to reinstate returning strikers because of the ''administrative difficulties entailed in reinstating large numbers of striking employees on short notice. An employer requires at least some time to effectuate the strikers' orderly return and, if necessary, to discharge the lawfully hired replacements.'' Id. at 113. Thus, the Union's notice that it was ending its strike does not justify Respondent's requirement that the strikers complete the application.

Respondent next contends that the applications were designed to update Respondent's personnel and payroll records as to the strikers' current addresses because it assumed that many of the strikers had changed addresses and it planned to reinstate the employees in small groups, thus requiring the prompt mailing of reinstatement letters. Its contention fails for two reasons. First, its brief contains much argument which is based on no record evidence. There was no evidence that its employees moved and no evidence of any fact which would have led someone to assume that its employees moved. Second, subject to the limitations of *Drug Package*, supra, Respondent was required to reinstate its employees immediately to their former positions. Respondent contends that it was necessary to ''assimilate'' 200 strikers back into the work force gradually and ''prevent plant violence,'' but no one explained what made that necessary. All there is in the record are blanket statements of Peter, which parrot Respondent's contention, and otherwise have no substance. In these circumstances, Respondent had no legal right to reinstate employees at its leisure, and in small groups. *Gitano Distribution Center*, 294 NLRB 695 fn. 3 (1989).

Respondent argues that its application for reinstatement was not an application for employment or new hire because new employees are not required to fill out application forms. If that is so, Respondent's position is even more suspect because it has imposed upon strikers, returning employees, an even greater burden than it imposes on persons whom it hires off the street. Respondent also argues that returning strikers were also required to fill out an I-9 immigration form before they returned to work because the INS had criticized Respondent in late 1989 or early 1990 for inaccurately filling out those forms for a number of the employees. The difficulty with this argument is that Respondent attempted to prove it through hearsay testimony, and I sustained objections to various questions, so no showing was made that this contention was accurate.

Even with my rulings, it should have been easy enough for Respondent to produce the inaccurately completed forms to demonstrate its need for new ones to be prepared or to produce correspondence from the INS directing that new forms be filed for all its employees. In addition, Respondent never attempted to prove that all the forms were inaccurately filled out, but only the forms of some employees. When Respondent was faced with the return of the strikers, it did not limit its demand for new forms to the few who were affected but asked all returning strikers to sign new forms, without showing any necessity for them to do so. Respondent's argument that all the strikers were required to fill out the forms ''due to the difficulty in determining exactly which strikers had to complete the new forms'' is not supported by any record evidence and is ridiculous. I summarily reject it.

Furthermore, because the INS had allegedly asked for this information as long ago as late 1989, Respondent should have taken care of this even before the strike. Certainly, because the Act provides that strikers remain employees, Respondent could have attended to this alleged problem during the strike. Finally, Respondent never showed or attempted to show the necessity for obtaining the I-9 form when the strikers returned. It could have waited until after the employees had been reinstated, so that it could have avoided the appearance that the completion of the form was linked to the employees' possibility of reinstatement. All this discussion assumes that Respondent really had a problem with INS. In light of its failure of proof, I doubt it. In any event, I find that Respondent had no legitimate business justification for its requirement that the forms had to be completed in their entirety.

By consequence, on August 13 Respondent illegally conditioned the reinstatement of all its strikers on the completion of the application form and the INS form. Thus, the strikers who did not return to work did not receive any valid offer and are still entitled to reinstatement. There was ''no valid offer to trigger a response.'' *Esterline Electronics Corp*., 290 NLRB 834 (1988). However, that day and on succeeding days, Respondent alleges that it offered various employees reinstatement. In order to consider the legal ramifications of what ensued, it is helpful to set forth some basic rules involving the rights of unfair labor practice strikers to reinstatement. Those strikers are entitled to their former jobs upon their unconditional offer to return to work. *Pecheur Lozenge Co*., 98 NLRB 496, 498 (1952), modified 209 F.2d 393 (2d Cir. 1953).[10] It does not matter that the employer has hired replacements to do what the strikers formerly did, or that it transferred other employees to assume those posi-

[10] Respondent contended at the hearing that the Union could not have made an unconditional offer to return to work because it never represented Respondent's employees. Board authority is to the contrary. *F. M. Homes, Inc*., 235 NLRB 648, 649 fn. 4 (1978); *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975), modified 542 F.2d 691 (7th Cir. 1976); *I. Posner, Inc*., 133 NLRB 1567, 1570 (1961), enfd. in relevant part 304 F.2d 773 (2d Cir.).

tions; those employees must be discharged. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 528–529 (3d Cir. 1977).

As stated above, the employer's duty is to reinstate its workers immediately to the employees' former positions; but *Drug Package* permits an employer 5 days to reinstate returning strikers. The caveat to that rule is that, if the employer engages in unfair labor practices in the course of reinstating its workers, the 5-day grace period is lost, and back pay will accrue starting with the day the employer received the unconditional offer of reinstatement. *McCormick-Shires Millwork*, 286 NLRB 754, 755–756 (1987). Furthermore, there is an exception to the rule that employees must be returned to the positions that they occupied before the strike. That occurs when there are no such positions, such as when the position has been eliminated or merged with another position in such a way that the returning employee is no longer qualified for that position. No such claim has been made in this proceeding.

A number of Respondent's employees were not reinstated into precisely the same positions that they occupied before the strike. Respondent contends that its reinstatements were legal, based on the following: Its employees are generally assigned to work as clothing sorters, clothing movers, or hi-lo operators; and employees are assigned as needed to various categories within these broad classifications. Peter or Maxi decides where workers will be assigned each day. There is frequent interchange between classifications, and jobs may be changed daily or every other day.

I do not agree. The facts reveal that generally employees reported to the same jobs day after day. There might have been a change from time to time, but that was due to someone's illness or vacation or the like. Generally, workers stayed on the same job and, on the conveyor belt, in the same position on the line. But what is involved here is not Respondent's repositioning of employees from the third to the seventh person on the conveyor belt. What is evident here is a deliberate effort to assign many of the returning strikers to jobs that they did not hold before, and, regarding the women, to positions at the front of the conveyor belt, which required the use of more strength and energy because of bulkier garments and the responsibility of pulling the clothing onto the belt. Those assignments had another advantage to Respondent: the employees would be next to Padgett, Respondent's goon, so that he could roughhouse them into quitting or make them so uncomfortable that they would be harassed and possibly be distracted and make errors.

The easiest cases to resolve involve those returning strikers who were turned back at the gate on August 13 and not even permitted to sign Peter's yellow pad. Juan Ramon Palacios returned from the strike and Peter asked what he was doing there. Palacios replied that he was there to work, and Peter asked him where he had worked before. When Palacios replied truthfully that he had worked on the big press, Peter disputed that, said that he had never seen him before (despite the fact that Palacios' name appears in Respondent's payroll records), refused to permit him to sign, and told him to get off the line. He never heard from Respondent again and did not return to work. However, in his cross-examination at the hearing held on Friday, March 29, 1991, Respondent's counsel asked Palacios a few perfunctory questions and then offered him reinstatement for the following Monday, April 1.

When Nilda Matos appeared in front of Peter and signed in, Peter merely said, ''Forget it'' and crossed her name off the list. Respondent later offered reinstatement to Matos, and she returned on September 19, 1990. Respondent delayed both employees' return to work past the five days allowed by *Drug Package*. They are both entitled to backpay from the date of the Union's offer to the date when they were actually reinstated. However, most employees, like Robinson, Francois, and Brice, merely received their applications, but were not asked to work. Brice, for example, testified that after that day he stood at the place where the picket line was[11] and almost daily, whenever Peter came out, asked Peter for his job. Peter would reply: ''Good job, good job, stay outside.'' Brice would say, ''Union,'' and Peter would reply, ''Welfare.''

Respondent made offers of reinstatement to some employees on August 13, but those offers proved illusory when it conditioned employment on its illegal demands that the employees produce their social security and green cards. Marie Lousma was asked to work and agreed to do so. However, when she entered the building, Roberto Melendez, Respondent's supervisor who was in charge of checking the employees' working credentials, asked for her social security and green card. She had not brought them and asked to work that day without them. She pleaded that she had worked there for 8 years, and she would bring them tomorrow. Melendez told her that she could not work and to emphasize it, ''Fuck you, get out of here.'' Lousma came every day for the next 2 weeks, exhibiting both cards that had been requested, but Peter ignored her.[12]

Murielle LaFleur's story was little different. She accepted reemployment and she was brought in the plant by Cliff, even though she refused his request to remove her T-shirt which had the International's logo on it. (Cliff said that there were some employees in the shop who did not like the International; and, if she wore it at work, they would kill her.) But she, too, had not brought her alien and social security cards; and, despite that fact that she was first employed by Respondent in October 1985 and promised to bring them the next day, Melendez and Cliff refused to let her work that day without them, and Cliff told her to leave.[13] Mimose Lacroix also was permitted to return, but Maxi said that, because she had not brought her alien and social security cards, she could not work. She was called back to work on September 7.

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[11] The picketing ended when the Union ended its strike. However, employees and union organizers still congregated in the same area that had been designated for picketing during the strike. For ease of reference, although there was no picketing going on, the location will be designated as the picket line.

[12] In her investigatory affidavit, she did not mention her social security card, but it appears that Melendez, who never denied this testimony, required the production of that card, as well as the green card. A viewing of G.C. Exh. 64A supports this finding. Peter and Cliff were dismayed that employees had not returned with their social security cards. That evidenced to them that the employees were not interested in working that day, which equates with their understanding that the possession of the card was a necessary predicate to reinstatement.

[13] LaFleur was offered reinstatement to return on September 19, 1990, and returned that day.

The employees had already written down on Peter's yellow pad their social security numbers, and Respondent could have checked their accuracy because the employees had given their numbers when they were first employed. The requirement for the employees to bring their green cards was equally unnecessary. But for Respondent's factually unsupported claim that the INS required some new form to be filled out, Respondent already had the information necessary for the employment of the returning employees, even if they were aliens. Under the relevant INS regulations employers are not required to reverify an alien employee's employment eligibility where ''[t]he employee is on strike or in a labor dispute.'' 8 C.F.R. § 274a.2(b)(1)(viii)(d) (1990). The result of Respondent's actions is that it did not treat the employees as continuing employees and exacted an obligation that it should not have. It treated them as new employees; and that, the Supreme Court and the Board have held, may not be done.

When Fritho Lapomarede finally reached the front of the line, he, like the other returning strikers, was asked to fill out the reinstatement form and return it to Respondent. Then, Peter, accompanied by Cliff and David, told him not to fill out the application. They needed him right away. Confused, Lapomarade returned to Blount to ask what he was supposed to do. Blount told him to go to work. Within no more than 2 minutes, he returned to the gate; but David told him that he was no longer needed. Although he reported for work at 7 a.m. every day thereafter, Respondent made no offer of reinstatement to him.

Others signed in and were offered employment, but they declined for not wholly impressive reasons. Both Gerda Benoit and Marie Porsenna testified that they were so elated to return to work that they did not have time to pack their lunches, which they insisted they would need if they were to work. Both remained at the picket line. Although their excuses are not particularly satisfying, I agree with Porsenna's testimony that, by the time that she was asked to return to work, she had been standing in line on a hot, sunny day for 3 hours or more (Benoit testified that it was past 10:30 a.m.); and it was understandable that Porsenna did not want to return to work that day. Both offered to return the following day, but their offers were not accepted. Both returned to the picket line daily for the next 2 weeks and asked for their jobs; but Respondent never offered them reinstatement. Instead, on one occasion, Peter made what one newspaper has euphemistically referred to as a ''digital reply'' to Benoit's appeal for a job.[14] Daily during the next 2 weeks, in response to the employees' requests to get back their jobs, he told Porsenna to ''shut up'' and brushed aside Benoit's requests, saying: ''Shit.''

Respondent sent letters to Lousma, Lapomarede, Benoit, Porsenna, and the following additional 24 employees, who were denied reinstatement because they did not have the requisite documents or who were refused permission to begin work the next day, stating that, because they had refused to start work on August 13, Respondent had no further obligation to reinstate them:

Alourdes Choute	Pierre Malebranche
Joseph Saintval	Jean Robert Cyprien
Christian Delva	Jean Olivier
Claire Camille	Ghislaine Caristhene
Jean Midy	Julmene Joseph
Jean Max Adolphe	Gladys Bernard
Andreze Andral	Marie Narcisse
Richard Simon	Yollande Sainrastil
Violette Raymond	Marie Gresseau
Rachelle Louissaint	Josette McVaval
Ghislaine Joseph	Marc Olyns Joseph
Leanna Joseph	Cecile Charles

Respondent's blanket termination of all these employees (McVaval was not named as a discriminatee) violated Section 8(a)(3) and (1) of the Act. Regarding those who were turned aside for failing to produce the documents which Respondent illegally required, the violation is obvious. As stated above, Respondent had no right to treat the returning strikers as new employees and to require them to produce documents to support their eligibility for reinstatement. Regarding those who refused to return to work immediately, the Board in *Esterline Electronics Corp*., 290 NLRB 834 (1988), quoted with approval the 10th Circuit in *NLRB v. Betts Baking Co*., 428 F.2d 156, 158 (1970):

> Both employer and employee are bound by the requirement of good faith dealings with each other. And it does not place an undue burden on the employee to require him to inform his employer of his intentions concerning reinstatement within a reasonable time after notice.

Esterline, supra, holds that ''an order of reinstatement is not rendered invalid simply because it affords the discriminatee what may be regarded as an unreasonably short period of time in which to consider it.'' Id. at 835. The whole purpose is to encourage the returning striker (in *Esterline*, the discriminatee) ''to make some response to the employer, if only to ask for more time to consider the offer.'' Id. Here, the employees offered to return the following morning. That satisfies the Board's ''requirement of good faith dealings,'' and Respondent's intransigent inflexibility and refusal to permit the employees the right to return at any moment other than when it made its offers on August 13 made its offers invalid. Thus, the employees' backpay never tolled, and Respondent's discharge of the employees violated Section 8(a)(3) and (1) of the Act. *Gitano Distribution Center*, 294 NLRB 695 (1989).

Respondent's termination of them was particularly offensive because its own actions caused such confusion that the employees, most of whom did not speak English, had no reasonable understanding of what they were required to do. Peter clearly announced that he was giving out applications for reinstatement which all employees had to fill out and return to Respondent by mail. That should have left the impression in the minds of the returning strikers that, before they would be considered for hire, their applications would have to be reviewed by Respondent. No wonder, when Peter told an employee to come to work, after he had been waiting in line for several hours, that the employee left the line and asked his union representative what to do. When he did, Respondent seized upon that opportunity to fire him. When others entered the plant, they were immediately asked for documentation; and when they did not have that, they were fired.

[14] Washington Post, May 9, 1991, at A8, col. 4–5.

When others, having stood in the sun for 2, 3, or 4 hours,[15] refused to work that Monday, but offered to start work the following morning, they were fired. (The record is silent as to whether these employees had the necessary documentation with them to be entitled to work, even if they entered the plant that morning.)

Respondent's offers were not serious and were not made in good faith. Peter was mouthing these offers, but he did not intend to reinstate the employees. Rather, he was trying to make the strikers' reinstatement as difficult as possible, as shown by his insistence that the employees produce their social security cards, despite the fact that he required the social security numbers to be included on the yellow pad when the employees signed in. His bad faith continued.

D. *After August 13; Written Offers of Reinstatement*

After August 13 Respondent wrote a series of letters to 87 persons, only 84 of whom were strikers, offering them reinstatement. These letters[16] had the same infirmity as Respondent's oral requirement of August 13, to wit, most required the production of documents which Respondent was not entitled to demand. Thus, the letters were illegal offers of reinstatement. In addition, the letters were not sent to all the strikers, but each was sent to a group of employees, apparently pursuant to Respondent's unsupported legal theory that it was entitled to reinstate unfair labor practice strikers piecemeal, and at its own pace. The result of Respondent's actions is that it did not comply with *Drug Package*, supra, and delayed the reinstatement of the strikers. It is not entitled to the 5-day grace period.

Respondent concedes that its reinstatement of employees was delayed after August 13 ''for a number of days,'' an understated admission that it failed to offer reinstatement to more than half its employees until, at the earliest, the hearing commenced. In any event, Respondent contends that staggered offers of reinstatement are neither unlawful nor a sign of bad faith, citing *Southwestern Pipe*, 179 NLRB 364 (1969), modified 444 F.2d 340 (5th Cir. 1971). That decision deals with strikers who did not accept their employer's offer of reinstatement because a substantial number of the unfair labor practice strikers were not reinstated. The decision holds only that the employer is not subjected to continuing backpay liability for those employees who reject reinstatement in favor of continuing the strike. There is no contention here, and I do not so conclude, that returning strikers who were offered legitimate reinstatement, without more, were entitled to continue to receive their backpay if they, without legal justification, rejected the offer. If they did reject the offer, under *Southwestern Pipe*, they would continue to be treated as unfair labor practice strikers, protesting the employer's refusal to reinstate all the rest of the strikers. That is not, however, what happened in this proceeding.

What did happen is that Respondent began to offer reinstatement to strikers piecemeal, and this time, rather than asking for the application or orally asking those who came into the plant for their social security and green cards, Respondent asked the strikers to bring documents with them. Its first letter was dated August 15, directed strikers to return on August 20 at 8 a.m.,[17] with ''1) Photo I.D. or Birth Certificate'' and ''2) Social Security Card.''[18] It will be recalled that a number of employees were invited into Respondent's plant on August 13 but quickly told not to stay when they could not produce their social security and green cards. That I held to be illegal. For the same reasons, the request that the strikers return with the above documents was illegal. By asking for this material, Respondent treated these employees not as continuing employees, but as new employees; and that it may not do, unless it has a legitimate and substantial business justification for doing so.

Respondent contends, first, that the documents were merely requested and not required. That is errant nonsense. The letter directed the employees to appear at Respondent's premises and stated: ''Please bring with you.'' An employee would have reasonably understood that as a command. Later in its brief Respondent argues that all of the documents requested by it of the employees ''must have been in the possession of the strikers because they needed them to obtain employment at [Respondent] in the first place.'' Little needs to be said to show the ridiculousness of its position. If Respondent had all these documents, it can hardly complain when I find, as I do, that its requirement to produce this material was intended not for its legitimate needs but only to make the strikers' reinstatement more difficult.

There is no record support for Respondent's contention that social security numbers were needed to locate personnel files and payroll records to make sure that the employees were put back to their former jobs at the same rate of pay. Rather, many of the complaints are directed to Respondent's failure to assign returning strikers to their original positions; and Respondent defended on the ground that it always switched its employees from job to job. Thus, if Respondent is to be believed, it had no need to establish what their former jobs were, and its argument is disingenuous. Similarly, its argument that it would have needed the social security numbers and employee identification or badge numbers of all the strikers in advance because it could not identify the strikers by name or face is also unsupported. In any event, Respondent had a slew of supervisors who could recognize the employees whom they supervised. *Coca-Cola Co. of Memphis*, 269 NLRB 1101 (1984), cited by Respondent, is distinguishable, because the employer there made clear in a written notice that employees were not being treated as new employees and that the application form was intended only to bring its records up to date. In addition, the strike there lasted 14 months, more than twice as long as the strike in this proceeding. Finally, Respondent never demonstrated its need to bring its records up to date.

In four letters dated from August 20 to September 6,[19] Respondent offered reinstatement to the strikers to return on

[15] G.C. Exh. 64A, a 2-hour tape, shows that returning strikers were still signing in at 11:45 a.m.

[16] There is no proof that they were properly addressed, mailed, or delivered, except that some employees testified that they received them.

[17] All the letters which follow required the employees to return at 8 a.m.

[18] This letter was sent to Josette Philogene, Marie Camille, Marie Rose Joseph, Marie S. J. Charles, Viergelie Anier, Marie C. Casseus, Bardinal Brice, Imanitte Verrier, and Agare Victor.

[19] The letter, dated August 20, directed the following to return on August 24: Yvette Fleurimond, Idiamise Lovinski, Dieulenveux Zama, Luis Ramos Frederick, Mulert Zama, Oscar Nunez, Ucemeze Kernizan, Ronald Jean Baptiste, Solange Carasco, and Antoinette

various dates from August 24 to September 13, with ''1) Photo I. D. or Birth Certificate/Green Card,'' ''2) Social Security Card,'' and ''3) Employment Authorization.'' In addition to all of the arguments considered above, Respondent contends that these letters were legal, because the only change that they made was to inform employees that they could bring their green cards if they did not have birth certificates or photo identifications. Respondent's brief then says: ''The only reason for this change was that [Respondent] became aware that [it] could accurately complete the I-9 forms with these new documents if a striker did not have a social security card accessible.'' This is a curious argument, not simply because it is not supported by any record evidence, but also because the argument had been made by Respondent earlier that the social security cards were necessary to expedite the reemployment of the employees. The green card could hardly serve such a purpose, so Respondent's argument that it needed social security cards to expedite the reinstatement of the employees must fail. Furthermore, the employees who reported to Respondent's premises on August 13 were required to write down their social security numbers. Respondent's requirement thereafter for them to bring their social security cards was a needless and illegitimate one, particularly because it already had those numbers from the employee's prior employment. The new requirement constituted mere harassment.

Respondent contends that the other documents that it asked its employees to produce had valid reasons. First, Respondent says that it needed the photo identification ''to ascertain that the person reporting for work was definitely the same worker that had previously worked at Domsey because [Respondent] did not know all of the strikers by face.'' The sole example that it gives for this remarkable contention is his failure to recognize Palacios, but Peter testified that he knew all the employees, except Palacios; and there were assuredly many supervisors who could have identified employees whom they supervised. Many employees had worked there for years. If it were really true that Respondent could not identify employees, they could not have employed anybody that first day and they could not have identified those employees whom they accuse, discussed below, of picket line misconduct. Furthermore, Respondent made no showing that a birth certificate would serve to identify employees, if that was its real purpose as an alternative to a photograph. As stated above, Respondent also contends that the social security card was needed to pull the striker's personnel file immediately; but Peter took the social security numbers of the 132 strikers who showed up on the morning of August 13, and employees were perfectly capable of giving him their numbers when they reported for work. There was thus no necessity for the card itself.

Respondent's final letters, dated September 11, 19, and 24,[20] offering reinstatement on September 19, 24, and 28, respectively, omitted the requirement that employees bring any documents. They were requested only to bring their social security numbers; and this request is not alleged as a violation of the Act. Of course, Respondent sent these letters long after the 5 days permitted by *Drug Package*; so the employees, at least those who were actually reinstated without incident, are entitled to be made whole from the date of the Union's offer to the date when the employees actually returned.

These letters did not necessarily result in the reinstatement of all the employees to whom they were allegedly sent. (Despite the fact that many of them were allegedly sent by certified mail, Respondent produced no proof that they were received by the employees. I credit Francois' denial that she ever received a letter offering her reinstatement.) Certain employees accepted Respondent's offers; but they were badgered, harassed, humiliated, assigned to harder jobs, and then left, either on their own decision or because they were fired. Other employees did not receive the letters in time for them to return by the time set by Respondent, who proceeded to tell the employees that they had missed their time and that they were no longer needed.

Maximo Lacayo was not home when delivery of Respondent's letter was attempted, so he had to pick up the letter at the post office. When he received his letter on August 29 and reported to Respondent's facility that day, Peter said that the letter had already expired (he was to have returned the day before) and that he could not work there any more. He reported to his fellow employees at the picket line what had happened. He never heard from Respondent again. Luis Ramos Frederick received his letter on August 30 at the post office, because he too was not home to sign for it. Frederick testified that his reporting time had already expired (I find that he was requested to report on August 24), so he went to Respondent's plant the next day. Peter told him that he was supposed to be there before and added only: ''Adios, Adios.'' Frederick left the plant, went out to the picket line, and reported to his fellow employees what had just happened to him. He was never called back to work again.

When Marie Mondestin returned to her home in the early evening of September 6, she found a notice from the post office that an attempt had been made to deliver to her a reg-

Romain. By letter dated August 22, Respondent directed the following to return on August 28: Maximo Lacayo, Pierre A. Surin, Gertha Camilus, Gertha Denaud, Rose Marlene St. Juste, Laboriano Senteno, Lourdes Williams, Alta Meuze, Ruth Zama, and Francesca Dormetus. The following were directed to return on September 7, in Respondent's letter of August 31: Marie Rose Armand, Adeline Duvivier, Michelet Exavier, Marie N. Louis, Eduardo Roman, Carolina Olivo, Nevuis Lambert, Marie A. Romain, Mimose Lacroix, Pablo Guity, Margaret St. Felix, Eugenie Charles, Brigitte Charles, Alma Louis, Jesula Massena, Anna Thomas, Marie Nicole Mathieu, Reynaldo Pierluisse, and Marie Augustin. The final letter, dated September 6, directed the following employees to return on September 13: Romulo Ramirez, Hector Guity, Edaize Blanc, Andrea Andre, Joseph Acces, Mezinette Desinor, Auguste Zama, Marie Jacques, Eddy Rodrigue, and Clorina Joseph.

[20] The second and third letters were designated by Respondent as ''second recalls,'' probably because Respondent had previously sent offers of reinstatement to the same employees. Of course, these new letters eliminated the demand to bring documents which had been requested in the earlier letters, undoubtedly the result of the Union's unfair labor practices. The September 11 letter directed the following employees to return to work on September 19: Williams Ortiz, Therese Jean, Juan Guerrero, Simion Castillo, Orlando Ramos, Pierre Louis Ludovic, Alama Amine Diawara, Banilia Guerrier, Rafael Gomez, Hubert Florent Boni, Vicente Suazo, Inovia Brutus, Marie Josee Francois, Aparicia Diego, Voltaire Dorcius, Victor Velasquez, Nilda Matos, Tomas Guevaro, Andrew Mack, Murielle LaFleur, Louis P. Jean, Loficiane Raymond, Wilfred Virgile, Chano Reyes, Marie L. Pierre, Marie Thelismond, Francisco Moreira, Jose DeLeon, and Hilda Medina.

istered letter. She went to the post office the next day at 1 p.m. and found Respondent's letter asking for her to return that day at 8 a.m. Because she knew that it would be unavailing for her to return after the workday had begun (she had seen other workers try to come to work late, but they had been turned away), she did not return that day; nor did she return on Monday, September 10, because she had another appointment. However, she did try to return shortly before 8 a.m. on September 11. She was surrounded by a number of men.[21] Peter yelled: ''What do you want here? What do you want here?'' Mondestin pulled out her letter. Peter grabbed it, said, ''September 7, 374 [her badge number]. September 7, 374.'' Peter just stood there. Finally, Mondestin said, ''Thank you,'' turned around, and walked out.

Dieulenveux Zama picked up Respondent's letter at the post office on August 27, only to find Respondent's letter telling him to return on August 24. He went to the plant where he saw Peter, who grabbed the letter, looked at it, and told him that he was too late and he should leave. Rose Marlene St. Juste also had to pick up her registered letter at the post office, and she did so on Wednesday, August 29. Unfortunately, her letter required her to be at Respondent's facility the day before. She went to Respondent's plant anyway, but when she arrived, Peter repeatedly said that she had returned ''too late'' and that she was supposed to return on Tuesday. Respondent's second attempt in September to reinstate St. Juste also failed. Again, the letter was not delivered directly to her, and she had to go to the post office the following morning, September 28. There, at 7:30 a.m., she read her letter, which required her to report by 8 a.m. that day. She took a taxi and arrived outside the plant at about 8 a.m. She explained to Maxi that she had just received the letter. Maxi said that it was already 8 a.m. and the boss told him not to let in any person after then, so she left and stayed at the picket line. At 1 p.m. St. Juste went into the plant to try once again to get her job back. She asked Maxi to see Peter or Cliff because her letter said that she was to work that day. Maxi called Cliff on the telephone. Maxi told her that Cliff wanted her number and she gave it to him. Maxi then relayed that Cliff had said: ''Goodbye, goodbye, goodbye.'' St. Juste returned to the picket line and, in the presence of other employees, told of what had happened to her.

Nevuis Lambert was not invited to return when he signed the list on August 13, but he received a letter on September 12, asking him to return to work on September 7, 5 days before. Lambert reported on September 13, but Peter said that he did not need him and that he should go to the Union. Lambert said that Peter chased him out of the facility. When Solange Carasco received her letter in August, which she also had to pick up from the post office, the date for her return (August 24) had already passed and she did not even make an attempt to report to work, knowing, from what she had heard on the picket line, that Peter would not accept her if she reported even a minute late. Respondent sent her another letter, which she also obtained late because on the first attempt to deliver it, she was not home to receive it. When she got to the post office on September 24 and opened the letter at 10:15 a.m., she found that she was supposed to report that morning at 8 a.m. She took a chance, however, and went to Respondent's facility. Maxi asked why she came in at this time, and she replied that she had just received the letter. He gave her a job.

Under the *Esterline* test, an employer's offer of reinstatement will be treated as invalid ''if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date.'' 290 NLRB at 835. Respondent's letters were not invalid; but Respondent's conduct demonstrated that the offers had been dependent on the employees' acceptance of them by the dates set forth in the letters. *A.P.A. Warehouse*, 302 NLRB 110 fn. 2 (1991). With certain exceptions, all the employees returned within a reasonable time and offered to return to work. Respondent relied on the dates set forth in its letters and refused to permit them to return. I find that Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate those employees who returned late. All of them had legitimate reasons for not reporting on time, and Respondent did not satisfy its requirement of good-faith dealing.

Carasco did not make a response, and Respondent contends that she had a duty to respond to Respondent, if only to ask for more time to consider the offer. *Esterline* does not deal with the issue of an offer of reinstatement received after the report-back date. It could be reasonably argued that such an offer is invalid on its face, assuming some evidence that it was Respondent's intent that the letter not arrive on time. Here, however, no one saved the envelopes, so there is no proof of when Respondent mailed its letters. But it is unnecessary to reach that issue here, because the employees who returned late and were summarily dismissed by Peter returned to the picket line and reported to the union representatives and their fellow employees how they were treated. When other employees received their letters from Respondent too late to report timely, they were justified in assuming that they would be treated in the same way and would not be reinstated. *Woodline Motor Freight*, 278 NLRB 1141, 1142–1143 (1986), enfd. in relevant part 843 F.2d 285 (8th Cir. 1988).

So, too, were employees who received letters from Respondent offering them reinstatement but also had seen their fellow employees who were harassed or terminated, returning to the picket line. A number heard what had happened and, when they later received Respondent's letters offering them to return to work, they declined to do so. Marie Rose Armand and Gertha Denaud testified that they were afraid of being hurt (as Romain was, see below) or insulted, harassed, or attacked (as Dormeville was, see below.) Armand said that she had two children and it was not worth getting hit. In other words, even if Respondent's offers of reinstatement were facially valid, its own conduct of turning back employees who reported even the same day, but a few hours late, or by harassing and discharging employees who had been reinstated earlier, was enough to undermine the validity of its offers and make them invalid. The employees' backpay is not tolled by their refusal to report.

[21] Mondestin testified that Peter was making gestures at her (no one asked what kind of gestures) and that the men were laughing. Interestingly, they remained there, even though the bell had rung, showing that, depending on who you were and who you favored, an employee did not have to be on time all the time.

E. *12 Reinstated Employees Are Discharged*

Arthur testified that Respondent usually did not like to fire people. This record does not support that statement. Many of its offers of reinstatement ended unhappily, with conduct demonstrating that Respondent intended to use its power to discourage and rid itself of even those whom it had reinstated. For example, Louis Antoine Dormeville was involved in a serious accident and was rehabilitating from December 20, 1989, to March 20, 1990. When he had recovered sufficiently to return to work, the strike had already started; and he joined the strike. He returned with the other strikers on August 13; but, when he signed in, Peter said that he thought that Dormeville was ill. Dormeville replied that he had been, but he would bring his doctor's note the next morning showing that he was able to return to work. The following morning Dormeville returned with his note and was required to wait for Peter for 2 hours, who (in the presence of Cliff, Maxi, and a security guard) looked at the note and then told him to mail it so that he would receive it in the mail. Changing his mind as Dormeville was leaving the plant, Peter called after him, took the note, and, with the others, accompanied Dormeville to a table where he was to work, which was not his assignment before his accident. Peter called Padgett and another black man to ''help me with this mother fucker over at the table.'' Help, they did. While Dormeville was attempting to work, they were harassing him with ''mother-fucker,'' ''dummy,'' and ''hurry up.''

Dormeville complained to Peter about his treatment and the fact that he was not used to working at that job, which was taking pants and putting them on a conveyor belt. Peter reassigned him to his earlier job, the big press, saying: ''[W]ork here, work here, mother fucker.'' Dormeville said to Peter that he was his boss and he respected him, and Peter should respect Dormeville. That mutual respect was apparently lacking, because the two black men followed Dormeville, standing at the big press and shouting the same obscenities, and adding that Dormeville needed a union. At 12:30 p.m. Dormeville left the plant and, before buying his lunch, went out to the picket line. Evens Heurtelou and Brice asked him how his job was going. Dormeville replied that it was very hard. Peter had followed him and told him, according to Dormeville, that he was fired, that he was not to come back, and that he should: ''Go to your fucking union.'' He was not permitted entry back into the grounds of Respondent.

For some reason, someone had a change of heart and attempted to cover for Peter's rashness. Respondent claims that Peter questioned with Cliff, Dormeville's legal right to go to the picket line and talk to the union representatives. (Employees had always been allowed to leave the premises to buy their lunch.) Peter testified that he told Dormeville to ''stay here, stay here,'' while he called his attorney; but Peter also admitted that he said, ''C'est fini,'' which he knew was French for ''It is finished.'' According to Respondent's defense, it was not until 2 p.m. that Cliff reached the attorney, and then he went to the picket line to ask Dormeville to return. Dormeville became alarmed at seeing Cliff come out, looking for him; and Dormeville began to run in the opposite direction, down the street, with Cliff calling from far behind to come back to work. And there is a question whether that offer was legitimate, because Respondent had a videotape of this Mack Sennett scene. After viewing it, I am convinced that, although Cliff yelled ''Antoine,'' Dormerville was far down the street and appears not to have heard it. Then, Cliff merely spoke loud enough for the microphone of the recorder to pick up Cliff's comment that he was there to offer Dormerville ''reinstatement,'' a word which would not have been used if Cliff and Peter had not fired Dormeville, as they denied in their testimony. Thus, no offer was extended by Respondent, and it certainly was never received. Furthermore, Respondent did not intend it to be received. Dormeville was at the picket line the very next day, and no one came out to see him to offer him his job back. Respondent did not turn to the mails, either. It sent no letter to him. I find that no valid offer was ever made.

That leaves the state of this record with only a showing of animus against Dormeville and his discharge for no reason but for Peter's passionate hatred of the Union and his apparent belief that, once an employee was reinstated, the employee could no longer talk with the union leadership. Respondent's brief contends that it showed good faith by telephoning its attorney in an attempt ''to make a well-informed, legally correct decision and avoid any possible misconduct.'' This is utter nonsense. Who else, other than the Salms, would discharge an employee for going out of the plant at lunch hour, which he had a right to do, to confer with union representatives; and, after being advised that he had made a mistake, not take action to correct it? There was only one reason that Respondent terminated Dormeville, and that was his consultation with the union representatives. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act. In addition, even though he was assigned to a different job for only 15 or 30 minutes before he was reassigned to his original job, Respondent obviously made this assignment in order to harass him, as it did with so many others. It also used Padgett and the other employee to give Dormeville trouble, directing them to follow him and fostering their obscene and insulting comments.

Respondent contends that it is not responsible for Padgett's conduct, casually describing him in Respondent's brief as ''happy-go-lucky'' and ''an interesting person who likes to talk and play a lot.'' He is described elsewhere as ''a funny person.'' He is as happy-go-lucky as Attila the Hun and Conan the Barbarian. He is not funny; he is obscene and he is gross. A short (5 feet 5 inches) black man with a shaved head, he weighs 200 pounds and is built like a professional football guard. He can be ferocious looking, and I can readily understand how the employees were menaced. From all the employees' testimony, it is clear that Peter used him as his hatchet man to harass employees and make their lives as miserable as possible. Thus, he either sent Padgett from time to time to locations where the returning employees were working or assigned returning strikers to positions near him. Too many of them testified to being subjected to his obscene conduct to make his presence merely a coincidence. His ubiquitousness was purposeful.

I infer from all the conduct that Peter instructed him to harass the employees and to be as forceful as he wanted, or at least not to hold back his anger against the returning strikers and the Union.[22] And that is what happened, with Padgett cursing the employees in the vilest language, making obscene

[22] There was apparently some fear that the returning strikers would cause the replacements to lose their jobs.

gestures,[23] and throwing garments at the employees, often with Peter, and sometimes Cliff and even Arthur, standing by and smiling and laughing, thus giving Respondent's approval to Padgett's conduct. On other occasions, Peter and Padgett joined in harassing the returning strikers. Peter never disciplined Padgett for these acts, and he and members of his family condoned them. Thus, I find that Padgett had actual authority. In addition, he had apparent authority because the employees would reasonably believe that Padgett was reflecting Respondent's policy and speaking and acting for its management. *Technodent Corp*., 294 NLRB 924 (1989); *Community Cash Stores*, 238 NLRB 265 (1978), enfd. mem. 603 F.2d 217 (4th Cir. 1979). I conclude that Padgett was Respondent's agent for all purposes and specifically hold Respondent liable for his acts.

Respondent sent Dieulenveux Zama another letter offering him reinstatement and he returned on September 28 to a new job. Before the strike, Zama had been assigned to fill wheelers and replace full wheelers with empty ones. Now, he was assigned to unstrap and unravel big bales of clothing and push the material toward the conveyer belt. Normally, this job was assigned to two people, if the employees were not that strong, and only one person if that person was strong. Zama was the only one doing this; and, from what I observed, he was of slight build, and he said that he was not very strong. In addition to the more difficult job, Padgett stood by his side, yelling at him to work faster and calling him a ''fucking union guy.''

On October 2, Zama took his break at 10:30 a.m. and was waiting in line to get a drink of water when the bell rung for the employees to return to work. Peter told Zama to get back to work but did not tell other employees, who had not joined the strike, to return to their work stations. When Zama protested that he was thirsty, Peter asked him what his number was. Zama said that his name was Zama. Peter put his finger to Zama's face, again asking him for his number. Zama again and again said his name was Zama, but he finally gave his number to Maxi. Peter terminated Zama immediately.

Although Peter had a somewhat different story, he never denied that there were others at the water fountain at the same time as Zama was there. Yet, of all the people, all of whom were nonstrikers, he picked out only Zama, who was a union adherent. Besides, when Peter asked for his number, he stood up with one of the Union's rallying cries against Respondent's reference to employees by their numbers, clearly showing that Zama was a union supporter. So, Peter terminated Zama for drinking water, but let the nonstrikers drink without discipline of any sort. That constitutes disparate treatment because Zama engaged in the strike and was a Union supporter.[24]

In addition, although there is no question that Peter was sensitive about workers returning to their work station on time, Respondent's general practice was to discipline employees for lateness by giving them warning letters. It practiced a progressive form of discipline, so that three warnings for lateness were required in order to support the termination of employees. By terminating Zama for his first lateness, Peter violated Respondent's own rules solely, I find, because he engaged in protected and union activities. I conclude that his discharge violated Section 8(a)(3) and (1) of the Act. I also find that Respondent assigned Zama, as he did so many others, a more difficult job when he returned from the strike. That was its way of teaching the employees a lesson to discourage them from engaging in their union and protected activities and to make their lives difficult, in the hope that they would quit. I conclude that Respondent's assignment of Zama, as well as of the other returning strikers, discussed below, violated Section 8(a)(1) of the Act.

Respondent did not offer Marie Rose Joseph reinstatement on August 13, but sent her a letter offering reinstatement for August 20. Peter asked for her social security card and her passport, both of which were requested in the letter; and Peter also requested her to fill out an application, which she refused because it was the same one she had filled out when she had started work 1 year and 4 months before. (She is the only one who testified that Respondent had an application for for new employees.) Peter called for Marie Camille, another returning striker, and assigned them jobs where they faced each other on both sides of the conveyor belt, pulling down coats, dresses, sheets, and blankets. Joseph stated that this type of job, which involves much effort and is extremely dirty work, is usually assigned to employees when they first start on the job. Indeed, when she first started working for Respondent in April 1989, that was her job for the first 2 months. The employees uniformly testified that there was a difference in the difficulty of the work depending on where one worked on the conveyer belt. In particular, it was more difficult at the very front, when the clothes were first being pushed or pulled onto the belt. The clothes were heavy and they were hard to pull onto the belts. They were dirty, sometimes even containing feces or knives.[25] Because, almost without exception, all the returning workers who were assigned to the conveyor belt were assigned to this position, I will merely refer to the position as ''the conveyor belt.''

In addition to the assignment, Respondent made sure to make her life as difficult as possible. Peter replaced Camille with Padgett, who spat on Joseph and cursed at her with ''fuck you'' and ''mother fucker.'' While he was cursing at her, Peter came to her work table, stood next to her, and smiled. At about 11 a.m. Peter called for her and advised that she did not have permanent residence status. He said that when she did, she could come back at any time. Joseph had a valid work permit and was entitled to work in Respondent's facility, despite Peter's remarks. In any event, she was released, with a check for $9.23 in her hand.

The dispute here centers about what Peter examined and whether he was entitled to see it anyway. Peter contended that Joseph showed up to work with an expired employment

[23] A photograph is in evidence which shows Peter's arm around Padgett, who is giving the finger to the person taking the picture.

[24] Peter's testimony about the reason that he dismissed Zama is ambiguous, because it could be read that the insubordination he was complaining about was Zama's refusal to give him his badge number. I understood that Peter alleged that the insubordination was Zama's lateness in returning to his work station because of his insistence on getting a drink. So did Respondent's counsel in his brief.

[25] Respondent contends that each job on the conveyor belt is of equal difficulty. But Supervisor Jean Augustine, who testified to this, also stated that the most he would assign an employee to the position of feeding is 1 month. Although he said that the reason for changing employees was for them to learn other positions, I find that the reason was that the position was too difficult for the female employees to work for long periods of time.

authorization card, whereas Joseph contended that all she was requested to produce was her passport and her social security card. These were the documents that Respondent's letter offering her reemployment had asked her to produce. How, then, Peter came to ask for something different is unclear. In Peter's investigatory affidavit, he averred that he was not sure whether Joseph had given him an ''Employment Authorization Card'' or whether he merely had a copy in his personnel file. Peter testified that he asked her for an up-to-date card, which Joseph said that she had at home. But she testified that she never told him that, because he asked her for her green card, which would demonstrate her permanent resident status. She replied that she did not have one and she would not be getting one until at least December. In fact, as of the time of the hearing, she had not yet received it.

The question, then, is whether Peter asked for a document that Joseph says that she had at home, and insisted at the trial was always kept current, and Joseph merely refused to produce it, at the risk of losing her job; or whether she was asked to produce another document, something that she did not have and something that she still did not possess at the time of the trial. I find the latter for two reasons. Joseph understood fully the difference between what Peter had asked her to produce and what Peter was claiming at the hearing that he asked to be produced. I believe that she would not have mistaken the two documents. Furthermore, I find that Joseph wanted to remain employed. She did not risk the loss of her job based on the outcome of this proceeding. Even after the charge was filed on her claim, Peter made no offer for her to return to work on the basis that there had been a misunderstanding of what he was requiring. I conclude, therefore, that he discriminated against her by insisting upon the production of a green card, which she had told him that she did not have. That violated Section 8(a)(3) and (1) of the Act. In addition, Padgett harassed her, as he did so many others; and that conduct, as well as similar ugly harassment by Padgett, discussed below, violated Section 8(a)(1) of the Act.

Ronald Jean Baptiste returned on Friday, August 24 with three other strikers, including Antoinette Romain and Mulert Zama. After checking their green cards and social security cards, Peter used the four employees as examples for the other employees, gathering them together in the middle of the plant and telling the other employees that the Union could no longer take care of them and now they were returning to Respondent to ask for their jobs back. Their return was greeted with sounds of derision from the nonstriking employees. Zama's description of his return to the plant differed somewhat from Baptiste's. He testified that Peter brought all four employees into the middle of the factory, that he pointed to Zama in particular and said to the employees, ''Look, this is Zama, he wants to bring the union to Domsey.'' Peter mentioned the three other employees and said: ''[H]ere they come back to work today. No union, no union.'' That encouraged the employees to begin screaming, ''No union, no union,'' a slightly more graphic description than Baptiste's, but no less a violation of Section 8(a)(1) of the Act, because the conduct of embarrassing these employees had a tendency to discourage them from engaging in protected activities. Furthermore, while this was going on, Padgett came over and put his hand on Zama's shoulder. Zama asked him to remove his hand. Although there was no further explanation of this event, it appears clear that Padgett was attempting to intimidate Zama to discourage his union activities, and I conclude that Respondent violated Section 8(a)(1) of the Act.

After this opening act, the second act began with Peter's assignment of them to their jobs. Baptiste, who before the strike pushed wheelers, was assigned to the conveyor belt, a job that he found more difficult. Peter brought Padgett to come to the table across from him, where periodically, until about the break for lunch, he prodded Baptiste to hurry up and made gestures which upset Baptiste enough that he thought that he was going to be attacked at any moment. In addition, Padgett declared that the Union could not take care of the strikers, who had to come to ''us'' for their jobs. Peter would walk by from time to time, once making a loud noise, and asking Baptiste whether he was okay. Often Peter checked his work, a practice that Baptiste found unusual because Peter did not check his work before the strike.

Baptiste's employment lasted for 1-1/2 days. On Monday morning, as he was being videotaped, Peter came along and grabbed Baptiste and escorted him to the front door. There, Peter announced that he was told that Baptiste had a tape recorder that was recording everything that was taking place inside the plant. Baptiste denied it. Peter said that he had taken his friend, Mulert Zama, and found a tape recorder on him and made him take it to the union organizer. He then showed him a sign that was on the wall and said that, when employees come to work, they are not to carry tape recorders. (Baptiste, however, was unable to read it. It was written in English.)

Notwithstanding Cliff's testimony that this rule had been in existence for 16 years, the rule was first posted only after August 13, the day the strikers returned to get their jobs back. In a shop whose employees spoke little English and, more particularly, did not read English, one might wonder whether this sign was meant to be obeyed or to be used as a convenient excuse to fire people. In any event, Baptiste denied that he carried a recorder and showed Cliff, who was leading him outside, that inside a little pouch bag that he carried was his lunch, a container of milk and some food. Baptiste even opened the container and drank the milk in front of Cliff, who appeared to be persuaded that the employee did not carry a recorder and, with Maxi, asked him to return to work. According to Baptiste, Peter was unconvinced, did not believe that Baptiste did not have a tape recorder, and fired him.

Respondent contends that it did not fire Baptiste, but he merely quit. All agree that Baptiste demonstrated that he was not carrying a recorder with him and that Cliff asked him to return to the shop. But Respondent's story is most illogical. First, as an aside, is it not curious that Baptiste should have been escorted from the plant in the first place, when he had no recorder and there was not even a hint that he had one? But Respondent was anxious to get something on all of these returning strikers, and grasped even at the ''straw'' of a milk container in a pouch. What is important is that, although Cliff and Peter testified about this event, Peter never denied that he refused to let Baptiste return. Apparently, once Peter made a decision based on what he thought was a fact, he could not change his mind even if that fact proved to be untrue.

Equally important, Respondent admitted that it had videotapes of this event and never produced them, a certain indication that the tape would not have corroborated its witnesses' testimony. Finally, I would not have believed Respondent's witnesses even if they had all testified alike. It makes no sense that Cliff and Peter would have ordered Baptiste to leave the premises and that, when Baptiste was found not to have a tape recorder, Baptiste should then have quit. Baptiste came to work that morning, and there is no suggestion that he had any motive to quit, other than Respondent's harassment of him, which would have supported a finding of a constructive discharge in any event. There being no reason which would motivate Baptiste to quit, I find that he did not. Rather, I find that Peter discharged Baptiste for no just reason. The only reasons inferable from this record for the discharge are Baptiste's union and protected activities. Thus, his discharge violated Section 8(a)(3) and (1) of the Act. Padgett's harassment and Respondent's assignment of him to a more difficult job also violated Section 8(a)(1) of the Act.

Mulert Zama's employment on his return was a little longer than Baptiste's, but hardly less eventful. First, he was assigned with Baptiste to the conveyor belt, a job that was different from sorting shoes, his job before the strike. Furthermore, Peter signalled to a man who had been assigned to a position across the table and then pointed to Zama, at which point the man began screaming ''no union'' and ''no fucking union'' for 10–12 minutes and throwing clothes at Zama, several times hitting him.

On August 28, Cliff talked with Zama, while another person was videotaping them (he had been taping Zama before this conversation). Cliff said that he had been told that Zama was carrying a tape recorder, and pointed to the new sign on the wall, which Maxi translated, advising that no worker was allowed to enter the shop with a tape recorder. Cliff asked whether Zama had ever seen the sign, and Zama, who does not read English anyway, said that he had not. Cliff offered to hold on to the tape recorder, but Zama refused; so he told Zama to give his tape recorder to someone on the picket line.

The next day, at about 3 p.m., Peter approached Zama and asked how he was. When Zama answered that he was fine, Peter said that, because he was fine, he did not need a union. Shortly after, as Zama was leaving the plant to attend school, Peter asked to see what was in his bag. Zama at first refused, but then opened it. There was a tape recorder and a camera. Peter immediately fired Zama. Zama always carried a tape recorder before the strike. Zama testified that he had always been searched as he left the plant before the strike, and no one ever said anything to him about his tape recorder. The General Counsel amended the complaint at the hearing to allege that the adoption of the rule, after the commencement of the strike, was intended to chill the protected and concerted activities of the employees.

I have made it plain that I think little of the credibility of Respondent's witnesses. The factual resolution of this dispute results in major part on my distrust of Peter and Cliff, but there was no understandable explanation from Respondent of the reason for its precipitate posting of the notice in August. After 16 years of having such a rule, it would have been more meaningful to post it for the benefit of all the new replacement workers when the strike occurred, so that they would be aware of the rule. One would have expected that it would have been posted sometime after January 30. On the other hand, Respondent had a substantial turnover of employees; and thus there was no reason not to inform its employees during the previous 16 years. That it was posted only after the strike had been terminated and the strikers, those who should have been aware of the rule from their earlier employment, were beginning to return to work indicates that some other purpose was behind the posting of the rule. Furthermore, if Respondent wanted to ensure that its employees would obey its rules, why would it have posted the rule in English only?

More troubling is the fact that Zama had always carried a tape recorder to work and had never been questioned before. No one denied that testimony. Therefore, if the rule had not been enforced before the strike, it was either not enforced or there was no rule. My inclination is to find, and I do so, that there was no rule. The imposition of a new rule in response to union activity is illegal. *Joe's Plastics*, 287 NLRB 210 (1987). Having found the rule invalid, then using the rule as a basis for Zama's discharge is enough to establish a prima facie case that the action is unlawful. Id. at 212.

Even if there had been a rule that was not enforced, my conclusion that Zama was illegally discharged would not change. The posting of the previously unenforced rule had no legitimate purpose. Respondent tried to make up one, but failed. Cliff testified that the reason for the rule was that Respondent was an innovator in the use of conveyors to sort old clothing. I find it impossible to fathom how the use of a tape recorder could divulge this ''innovation.'' Perhaps recognizing that his answer was silly, he then changed that reason to a fear that container numbers and destinations could be recorded. I must admit my reaction that this reason was no less concocted. No one prohibited the use of pencils and papers, and the employees did not appear to be interested in industrial sabotage. Rather, the rule was intended to prevent the returning strikers from recording the harassment and the obscenities that they were being subjected to, exactly one of the reasons that Zama testified that he brought his recorder that day. The rule's purpose was solely to hide Respondent's unfair labor practices.

Strangely, while employees were being discharged for the real or imagined possession of tape recorders, Respondent was videotaping them in an attempt I believe, to harass them. Indeed, Respondent videotaped this entire incident, but failed to offer the tape in evidence, an indication that the tape does not sustain its position. No matter whether the rule was new, or whether the enforcement was new, Respondent's discharge of Zama, a union supporter, violated Section 8(a)(3) and (1) of the Act. I further conclude that Respondent also violated the Act by not assigning him to his former position, by assigning him to a more arduous job, and by subjecting him to foul language and verbal abuse and by throwing objects at him. I note that the complaint alleges that Padgett was the person who did this, but Zama did not identify him. I suspect, nonetheless, that it was; but I note that Peter directed this individual to perform these acts, and I hold Respondent responsible.

Antoinette Romain was not hired when she came to Respondent's premises on August 13, but soon thereafter she received a letter asking her to return on August 24. She came in at 8 a.m. and Peter asked for her social security and alien cards. After reviewing these, he assigned her to a job that

was different from her old one of sorting cotton and polyester pants. To her, it was dirtier and the clothing that she had to handle was heavier.[26] Equally important, she had to work with three men, one of them Padgett, who were chanting that she was no good and Padgett was yelling ''mother fucker'' at her. In addition, they were handling the clothing roughly and raising dust; and then two of them rolled some of the big coats into bundles or balls, 3 to 4 feet in diameter, and threw two at her, both striking her in the back as she attempted to duck. Although she tried to avoid the attack by hiding in a box, she was afraid and finally ran out of the factory, screaming for help from the Union. An ambulance was called by the police who were in attendance, and she was taken for emergency care at a hospital. She did not return to work, being injured for a month; and, she testified, she could not go back because she would not have been accepted by Peter and Respondent, as evidenced by the fact, she explained, that Peter was always insulting people who favored the Union.

Respondent did not terminate Romain, but its actions constituted a constructive discharge of her. Respondent, because of Romain's protected and union activities, made her conditions of work so difficult and unpleasant that she could not reasonably continue to work. *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976), cited with approval in *American Licorice Co*., 299 NLRB 145 (1990). Respondent's goons not only hospitalized her but also put her in fear for her life. She hid in a box to avoid the attack and fled by running, screaming, out of Respondent's plant. I discredit all of Respondent's testimony that she was not attacked. Her hospital bill and her prescription evidence her physical state. Respondent's witnesses recalled a woman running out of the factory, screaming. One of Respondent's witnesses recalled seeing Padgett working in the exact location identified by Romain. She did not have to suffer being attacked again. I conclude that she was constructively discharged, in violation of Section 8(a)(3) and (1) of the Act.

When Marie Nicole Mathieu returned to work on September 7 (she and seven other returning strikers were holding the letters from Respondent offering them reinstatement and were wearing T-shirts with the International logos on them), Peter grabbed the envelope from her hand, commenting ''fucking union,'' and assigned her to work. He repeated that epithet the several times that he passed by her work station that day and he repeated it the following workday, Monday, September 10. On Tuesday Mathieu had left for lunch and was standing at the door to the factory. Peter approached, told her that she smelled, and spat on her face. On Wednesday, when she went to the bathroom, Peter was outside banging on the door and yelling something that she could not understand. When she went to get a drink of water, Peter followed her and told her: ''Don't touch, don't touch.'' On Thursday, Peter was distributing chocolates; but when she did not take any, he picked up a sock and threw it, hitting her.

This pattern of degradation and humiliation continued. The same day, Maxi asked her why she always wore the same dress and said that Peter said that she smelled when she wore her union T-shirt and that she should go home. Mathieu replied that, if he was terminating her, he should give her a letter stating his reasons. On Friday, September 14, as Mathieu was leaving work and going to catch her bus, she was attacked by Padgett, who pushed her onto a parked car and kicked the bag that she was carrying, also bearing an International logo. He punched her in the head. She was bleeding from her nose and mouth and suffered injuries to her back. All this occurred in the presence of other of Respondent's employees. Padgett got on the same bus as Mathieu and threatened to push her into the street when she was about to get off, but he never touched her. The following day, she filed a complaint against him with the police, which resulted in the later arrest of Padgett.

She never returned to Respondent. On Monday, September 17, before she went to the hospital, her husband called Respondent and told Peter that she could not come to work that day because of her injuries. Peter said, ''No problem.'' Mathieu was at Coney Island Hospital on Monday, where she had X-rays taken and received an intravenous injection all day. Her husband called once in the next two days, too, to explain that his wife was still too ill to come to work. However, by letter dated September 19, Respondent terminated her, stating: ''Left Friday 9/14/90—Never Returned—No Show No Call—You are hereby terminated fr. yr. job.''

Respondent's position is quite simple: neither Mathieu nor her husband called. If an employee does not call for three days, the employee is terminated. Normally, I would find that I did not believe Peter. Here, however, Peter never even denied the fact that Mathieu and her husband called to advise him of her medical condition. It is thus undisputed that she called and that the termination notice is based on a fabrication. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act. In addition, I conclude that the various acts of verbal and physical abuse, some of which were not contradicted by Respondent, constitute violations of Section 8(a)(1) of the Act. The physical attack by Padgett also violated the Act. He was Respondent's agent for inflicting fear in the returning strikers in the plant, and it is not surprising that his violent behavior should have extended outside of Respondent's facility. As he approached Mathieu, he mentioned the Union's name; and I conclude that his attack was well within the scope of his actual authority.[27] *Batavia Nursing Inn*, 275 NLRB 886 fn. 2 (1985).

Margaret St. Felix also returned to work on September 7, and Padgett was assigned to badger her, repeating several times ''fuck you'' and ''fucking union'' and ''fuck the union'' and prodding her to work faster with ''Let's go, let's go, let's go.'' Both Peter and Maxi were present some of the times that this was happening and neither took any action to stop it. Furthermore, when St. Felix complained to them, they said nothing. While encouraging this mistreatment of a returning striker, they also said several times ''Domsey, yes;

[26] She testified that she had to work at a ''machine'' where she had to take old clothing, material, and fabric and place them in boxes. I suspect that she, too, was working at the conveyor, especially because of Padgett's presence.

[27] Antoine Dormeville, according to Mathieu, witnessed Padgett's attack upon her; but he did not testify about this event. I consider his lack of testimony damaging to her case; but, in weighing her testimony against that of the witnesses who testified on behalf of Respondent, I find her more credible. One thing is clear: there was a cause of her hospitalization, and I do not believe that she made up that cause.

union, no.''[28] Peter and someone else put up 3-foot wide posters with the name of the International and a red line across it; and Peter pointed at it, saying to St. Felix: ''You see, you see.''

On October 23, St. Felix was terminated. On that day, someone aimed a camera (which she described only as ''big'' and I assume was a videotape recorder) at her for 30 minutes while she was working (she had never been taped before the strike), all in the presence of Peter. Padgett then began to bother her even more. Padgett stood up on the table where she was working and stood on her hand, proclaiming, once again, ''fuck you'' and ''fuck the union.'' Peter, without provocation, suddenly said that she could not work. He gave no reasons, and St. Felix testified that she had been given no warnings about her work.

St. Felix's testimony was not the model of clarity, and I could not sense how often these various events happened. In addition, she appeared to forget what she was being asked to testify about and had to be led on numerous occasions. As a result, I was not overly impressed by her testimony. On the other hand, the 8(a)(1) activity she recalled was the same kind of harassment that so many other employees were subjected to that it is highly probable that she was not misstating what happened. I thus find that she was harassed and that Padgett (whom I would refuse to believe under any circumstance) committed the acts as she testified, because she complained to Maxi, a complaint that Maxi corroborated. Respondent showed no reason why it had to videotape her for 30 minutes, and I find that this conduct was engaged in solely to harass and distract her. Therefore, I find all the 8(a)(1) violations.

What gives me more cause for reflection is the ultimate end of her employment, which, she alleges, did not result from her conduct. Peter claimed that he had spoken to her about her poor performance at least six or more times. Arthur testified that in the fall he observed her working at a very slow pace. He asked her to work faster and she cursed him and said, ''I'm working as fast as I can, if you don't like it do it yourself.'' Her answer prompted him to tell Peter to terminate her. The difficulty with Respondent's case is that St. Felix does not speak English; and, although she was capable of understanding some words, and presumably speaking some curse words, because she was able to narrate Padgett's filth, I have no reason to suspect that she uttered the words that Arthur said that she did. In addition, Arthur identified the person whom he complained about not by name, because he did not know her, but by her position at the conveyor belt. St. Felix was not working where he testified. I thus find that Arthur's testimony was not credible and conclude that her discharge violated Section 8(a)(3) and (1) of the Act. Even if I had found that she was not working so fast, I might well have been inclined to find that Respondent's harassment of her would cause anyone to slow down.

Nilda Matos, it will be recalled, was the employee who returned with many other striking employees on August 13 and signed in, but Peter crossed out her name. She was ultimately recalled and returned on September 19 with Jose DeLeon and Victor Velasquez. As soon as they entered Respondent's factory, they encountered four people, Supervisor Augustine and Padgett and two other black men, all of whom were wearing signs with the International's name on it, with a red diagonal line across it. They shouted, ''No union, no union, no union'' and said, ''fucking union,'' ''union shit,'' and even ''Jesse Jackson shit.'' (Jackson appeared at one of the Union's rallies at the picket line.) According to Velasquez, one shouted that this was to be like the returning strikers' first day at school. Another said that the returning employees were ''slaves'' like them. Padgett declared that he was the boss. All of the men were simulating masturbation. The Salms were there; but, instead of stopping this disgusting display, they laughed and scoffed at the returning employees.

Matos was assigned to the head of the conveyor, a different position than before the strike. As if it were not difficult enough to be working on a new and more arduous job, Peter stood where she was working, telling her that she had to work, that she had had a 7-month vacation, and that in this place you have to work and work a lot. He also prodded her to do her work, calling to her attention that the belt was empty and that she should continue to pull the clothes. Augustine was there, too, telling her to work and telling her that she came in without a union and she would leave without a union. He told her to take off her smock (it had the name of the International on it), but she refused. ''Work, work, work,'' he told her. ''If you don't want to work, just go home.''

The conduct of Augustine and the three blacks continued, with repeated declarations of ''Domsey, yes; Union, no'' and ''No Union.'' Her work was checked constantly, every minute, then every 5 minutes, while other employees' work was not checked at all. Before the strike, the word ''please'' was used; but after, all she heard was ''rush,'' ''rush,'' ''work,'' ''work.'' Augustine continued to hound and bait Matos, by saying, ''Fucking union'' and grabbing his penis. Augustine reassigned her from her job to one which was more trying, removing big, heavy coats. She worked with another woman, on a job normally worked by two men or, at least, one man with one woman. By the third day of her return, September 21, with Augustine constantly reviewing her work, and repeated statements that, if Matos did not want to work, she could go home, Matos, who was 50 years old, responded that she would go home only if she got a letter to take to the Department of Labor showing the reasons that she was fired. Augustine punched her timecard. Matos called for Maxi and told him that Augustine was firing her. Maxi said that Augustine was a boss and that he could fire people. He told her to come back on Monday and talk to Peter. She returned on Monday, but Peter was not there. Cliff told her that she should leave and that Respondent would send her a letter.

Respondent contends that this was not at all the way things happened. Augustine informed her that she had been making mistakes, and she told him to ''get out of here, I don't want to see your fucking face.'' For this insubordination, he fired her. I do not find that Matos was incapable of making such a reply. Matos used a lewd gesture, when Respondent photographed her on the picket line, and that indicates that she was not averse to using an obscenity. Her repeated misstatements that her gesture was not obscene did nothing to help her credibility.

[28] The transcript inaccurately reflects that they were saying: ''Union yes, Domsey no,'' which makes no sense in the circumstances and is contrary to my notes. The Tr. p. 1340, L. 25, is corrected accordingly.

On the other hand, much of the conduct that she testified to was corroborated by Velasquez and DeLeon, discussed below, and is typical of the harassment Respondent heaped on the returning strikers. Even if it is true that Matos complained about Augustine's treatment by using an obscenity, that was caused by his concerted effort to make it as uncomfortable as possible for her to remain on the job. Augustine gave her trouble all day and had badgered her with the most vulgar of obscenities the 2 preceding days. In these circumstances, she could not have been the aggressor. In any event, if there were some credibility problems in Matos' testimony, Augustine's was filled with problems because he incredibly denied his part and Peter's part in harassing this employee. I therefore credit her narration and discredit his.

Thus, there was no legitimate or believable reason for her discharge. Rather, she was discharged solely because she was a union adherent. I conclude that Respondent discharged her in violation of Section 8(a)(3) and (1) of the Act. I also conclude that Respondent did not assign her to the same job as it did before, assigned her jobs that were more onerous, subjected her to harassment and lewd and obscene and indecent gestures, and supervised her work more closely, all in violation of Section 8(a)(1) of the Act. These violations were common to Respondent's plant. The only new one was Augustine's direction that she take off her smock with the International's insignia on it. That order interfered with her right to proclaim her support for the Union, in violation of Section 8(a)(1). *Publishers Printing Co*., 246 NLRB 206, 209 (1979), enfd. 650 F.2d 859 (6th Cir. 1981).

Velasquez, too, was assigned upon his return to the conveyor belt. This required greater strength and lifting and bending, whereas his old job merely required the operation of a machine, a hi-lo. That was particularly important because Velasquez still suffered from injuries incurred in a very serious automobile accident, of which Respondent was or should have been aware, because Velasquez had reported it to his supervisor when he was first hired. He tried to explain to Peter how difficult his assignment was, but Peter told him to ''shut up.''[29] So, he continued to perform this job for 5 hours but could no longer stand the pain. He told Augustine that the work was too hard for him and that he could not do it. He told Campos that he was leaving because he could not do the job to which he had been assigned, ''[b]ecause of this bad thing Peter did to me,'' showing Campos his scars, and he left.

Among the aftereffects of his accident, Velasquez had an iron bar in his left leg, which he could bend only partially; and he had another piece of metal in his right ankle. Except for the first week of his employment, and even there the testimony is ambiguous, he never did any physical work for Respondent. Even when he was first employed as a wheeler for 5 days only, and then he was switched to the hi-lo, it appears that he did not do lifting but had someone else do that. Respondent contends that it never knew of Velasquez's physical disabilities. I simply do not believe that someone with as serious scarring from and aftereffects of his accident would not have told his supervisor about them. Even Campos agreed that Velasquez loved to show off. I find that it is probable that Respondent had knowledge of his condition.

Respondent was required to assign him to the same job as he had before. Respondent put Velasquez on a job that it should not have, that is, he was put in a different position than he occupied before the strike. That in itself violated the Act. The reinstatement was not legitimate. It was a nullity, and in these circumstances he was entitled to walk off his job and did not have to accept Respondent's offer. Equally important, Respondent assigned him to a job that he was unable to perform without extreme pain. It forced Velasquez to leave his job. The only reason that Respondent engaged in this activity was because Velasquez was a striker. Respondent offered no other explanation. That constitutes a constructive discharge in violation of Section 8(a)(3) and (1) of the Act.

Jose DeLeon was also not reassigned to his old job. For the first week, he was assigned to keeping the floor clean. But in the second week he was assigned to open the bales, and that required him to handle filthy and smelly clothing. In particular, before the strike, he worked with another employee on the small press, making small bales weighing from 75 to 200 pounds. After he returned, he had to take apart big bales of clothing of 700 to 800 pounds, and he had to do it alone, on a job normally assigned to two employees. Furthermore, on his old job, he had the opportunity to work overtime, but he could not work overtime on his new jobs.

That day and every day that DeLeon worked, Peter came over to his work place and shouted at him that there would be no union, and no contract, and that the union would never ''enter'' the Company. Padgett continued ''to do this gesture like holding his penis and pointing at'' DeLeon.[30] DeLeon was watched. One day during the week of October 15, a man videotaped[31] DeLeon for one hour, while Peter watched and laughed and encouraged the man to continue taping. DeLeon could recall no instance prior to the strike when Respondent taped employees while they were working.

Respondent contends in its brief that its videotaping of employees was legal, because it was to be used as evidence in this proceeding and was done on the advice of counsel and was not shown to be related to union activity. The problem with Respondent's position is that no one testified about the reason that the videotaping took place. Indeed, when I asked during the hearing whether Respondent had the videotape of one of the episodes, Respondent's counsel represented that he did not think that there was any tape in the recorder. Even without that statement, it is clear that the taping (or, at least, aiming of the recorder) for 1 hour was done only to harass a known supporter of the Union.

Hilton Mobile Homes, 155 NLRB 873 (1965), enfd. in part 387 F.2d 7 (8th Cir. 1967), cited by Respondent, is readily distinguishable because the picture taking was unaccompanied by any threats or actual reprisals. It is not so easy to

[29] Peter's response leads me to believe that Velasquez was assigned to this job for no reason other than to punish him for striking. That he may, when on the picket line, have stated, ''Just wait until I come back, just wait,'' had nothing to do with his reassignment. So many others were reassigned that this constituted Respondent's pattern of dealing with the returning strikers, not with its treatment of one employee because of one indefinite remark. If Respondent really took this remark seriously, it would not have reinstated him.

[30] Respondent's brief compares this and similar gestures made by Padgett as ''a regular occurrence during baseball games as seen on television.'' To the contrary, I understood the motion to be an invitation to DeLeon and others to engage in fellatio.

[31] DeLeon testified that he was being filmed with a movie camera, but I find that Respondent was using a videotape recorder.

distinguish *M. P. Building Corp*., 165 NLRB 829 (1967), enfd. 411 F.2d 567 (5th Cir. 1969), except to note that it has never been cited in a Board decision for the proposition that it is legal to indiscriminately take pictures of employees, as long as they are not, at the moment that pictures are being taken, engaged in union or concerted activities. There, the trial examiner found that ''the evidence does not preponderate in favor of a showing that it was connected with the union activity which was in process.'' Id. at 840. Here, the conduct was accompanied with all sorts of the vilest antiunion behavior, and there is a hint that the recorder had no videotape in it. I deem this inherently threatening and intimidating. For that reason, it violates Section 8(a)(1) of the Act.

On Friday, October 19, DeLeon asked Peter for time off to attend a temporary custody hearing that had been scheduled for the following Monday and then time to travel to New Orleans to pick up his daughter. He showed Peter the court papers. Peter told him that would be no problem and he should take his time. DeLeon promised that, if he could be back by the following Friday, he would return that day; but he did not. DeLeon returned on Monday, October 29, and found that his timecard was not in the rack where it normally was. He asked his supervisor, Augustine, about it, and Augustine claimed that he knew nothing and that DeLeon would have to talk to Peter. When DeLeon met with Peter, Peter said that DeLeon was fired because he had never given him permission to leave. DeLeon persisted in an attempt to save his job. He showed Peter his bus ticket for New Orleans, but Peter pushed it away, unconcerned and unimpressed.

Augustine testified that DeLeon asked him for only 1 or 2 days off. Augustine said that he could give 1 day; but, if DeLeon he needed more, he would have to go to Peter. That DeLeon went to Peter demonstrates that DeLeon was looking for more than 1 day. DeLeon testified very openly about his troubles in obtaining custody of his daughter; and, if he had asked for only one day to go to court, as Peter admitted, there would have been no reason for him to go to Peter. Augustine could have given him that day. I find it probable that he would not have omitted asking for sufficient time to take care of his domestic problems.

As probable as this is, Peter's behavior is typically outrageous. He permitted his employee to take care of his legal affairs, without losing his job, and then turned around and denied that permission was sought. I find that DeLeon had permission and that Peter's discharge of him on the ground that he had no permission violated Section 8(a)(3) and (1) of the Act. I also conclude that Peter's statement that the Union would never get into Respondent and there would be no contract violated Section 8(a)(1) of the Act. They indicate that supporting the Union was a futile act and thus tend to discourage employees from engaging in protected and union activities. I also conclude that Respondent violated Section 8(a)(1) of the Act by failing to reinstate DeLeon to his former position, by assigning him to a job that was more arduous than his prior position, and by harassing him by making insulting and obscene gestures and by videotaping him as he was working.

Francisco Moreira returned to Respondent on or about September 19 and instead of being assigned to weigh the clothing, which he had done before, he was assigned to work at a position on the conveyor belt, a different job which he claimed was more difficult. Within a week, he was reassigned to the job of removing bundles of clothing at the beginning of the line and pushing the clothing onto the conveyor belt. Moreira's description of his duties were not persuasive that his former job was less difficult than the job that he was assigned to on his return. Nonetheless, the General Counsel met his burden of showing that the assignment was different, and Respondent offered no reason that it did not assign Moreira to his former position. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act by not reinstating him to his proper position.

Moreira stayed on his job for another month; but on November 2, as he was leaving, a routine search of his bag resulted in a security guard's discovery of two T-shirts in his bag. Peter was called over, and, according to Moreira, Peter then told Moreira to take them. Contrary to the normal rule, testified to by Cliff, that an employee is subject to immediate discharge for stealing, Peter did not fire him. Instead, Moreira returned to work the next day. As he was punching in his timecard, Peter took the card away and announced that there was no more work for him. Moreira averred that he did not steal the T-shirts and had no idea how they got into his bag.

Moreira's is a rather incredible story, and it might not have taken much to persuade me to dismiss this allegation. But Peter engaged in some incredible conduct, and his hatred for the Union made him unpredictable. When Respondent moved to dismiss this allegation at the close of the General Counsel's case, I denied the motion, noting that the employee had not made the strongest of cases, but had made a prima facie case under *Wright Line*. Respondent's case was even weaker. It offered nothing in its defense, not even a statement by Peter that the reason for the discharge was that Moreira stole property.

I am thus left with a finding that the General Counsel presented a prima facie case: Moreira engaged in union activities by striking, he was reinstated to a different job, and he was fired by Peter, who said nothing to him about why he was firing him. Because employees are normally fired immediately for stealing, and Moreira was not fired until the next morning, I infer that there must have been some other reason for his discharge. The inference that I make is that Peter fired him for his union and protected activities. Respondent was silent in defense. I conclude the Respondent violated Section 8(a)(3) and (1) of the Act.

The foregoing completes the General Counsel's case involving the reinstatement of the strikers, except for eight who, Respondent claims, committed picket line misconduct and were denied reinstatement. The Board adopted the following objective test for determining whether an employer may legally deny reinstatement because of striker misconduct in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1983), enfd. mem. 765 F.2d 148 (9th Cir. 1985): ''whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.''

I recognize that I have generally discredited the Salms in this decision, but Cliff gave a vivid and credible account of the blockade of a bus which Respondent hired to pick up replacement workers to transport to the plant. On February 1, eight union organizers and employees, including Joseph Aris and Jean Sigay Pierre, formed a human chain to prevent

some replacement employees from gaining access to the bus. In the process, they pushed and shoved Cliff and the others back towards the bus. The two employees generally denied the incident, and the one identified union representative never testified. I found Pierre not very believable; in various respects not germane to this incident, his testimony did not conform to his investigatory affidavit. Aris was much worse a witness. He was combative and argumentative, and I had the impression that his denials were absolutely untrue. I, therefore, credit Cliff. In *Clear Pine*, the Board stated that employees have no right ''to block access to the employer's premises.'' Id. at 1047. Here, Pierre and Aris blocked access to employees who were attempting to board a bus to go to Respondent's plant. Other than the location of the ''access,'' I see little distinction between this situation and what the Board has clearly said entitles an employer to deny reinstatement to a striker.

However, from all the violent conduct discussed above, and from my conclusion below that even Peter threw a rock or a brick, injuring one of the union representatives, it appears that this strike more resembled a battlefield. And Peter condoned it. Not only did he condone it. He fostered violence. He encouraged his truckdriver to back into a parked car. He encouraged Padgett's brutality, which led to two middle-aged helpless women going to the hospital. Obviously, Peter did not care about his own behavior, and he has done nothing about the behavior of his two employees, because he caused them to act as they have. In all these circumstances, the singling out of Aris and Pierre for some pushing on the first day of the strike, while encouraging and not punishing more violent acts which resulted in physical injury, demonstrates that Respondent's denial of reinstatement was not made in good faith and constitutes disparate treatment. *Champ Corp*., 291 NLRB 803, 806–807 (1988), enfd. 933 F.2d 688 (9th Cir. 1990).

Although I have not credited the testimony of Respondent's witnesses regarding much of the other alleged picket line conduct, I also rely on *Champ Corp*. in denying Respondent's right to deny them reinstatement. Thus, I believe Bonny when he testified that he did not push Maxi, whose testimony I have not generally credited. Security guard Soule testified that Yolande Heurtelou blocked the entrance to Respondent's store on many occasions, and Cliff testified that she blocked the entrance with a banner, and had to be removed by the police on two occasions. Heurtelou was overly exuberant and danced every day of the strike. She denied that she carried a banner; she said that she wore a picket sign. Furthermore, she testified that she always remained behind the picket line. Although Respondent took 600 hours of videotapes, it produced nothing to support this allegation, so I discredit Cliff. Even so, I would not be surprised if she went in front of the picket line on occasion. On the other hand, she is a middle-aged woman who harmed no one; and if she was guilty of two excesses, I am persuaded that she blocked nothing but at most created some very minor interference, which was not of the level of misconduct intended to be encompassed by *Clear Pine*, supra.

Although not discussed in Respondent's brief, Soule also testified that Brice spat at security guard John Tubior, who did not testify. Brice denied that he committed the conduct as alleged, and I credit him, not only because he was credible and Soule was not but also because Respondent desperately sought to rid itself of all the returning strikers, and it does not shock me to see its witnesses continue to make up stories to achieve its goals. Furthermore, Respondent twice offered Brice reinstatement and only belatedly withdrew its offers on the ground that they were extended by inadvertence. I do not credit that account and find that Respondent never intended to rely on any of Brice's conduct to deny him reinstatement. Finally, it is questionable whether spitting, which one could do by inadvertence even when talking, qualifies as the type of misconduct which would bar a striker from reinstatement under *Clear Pine*. The description of what allegedly happened was so vague that it cannot be said with assurance, even if I found that it happened, that it was coercive or intimidating. Respondent contends that Juana Peralta tried to drag Peter behind the picket line. Peralta is retarded, and I did not find that she was at all capable of harming people. She seemed to me to be very sweet; and she testified that she was merely trying to greet Peter one day and he pushed her and she cried. Peter is much more likely to push a retarded woman than she was likely to try to hurt Peter.

On February 2, a dispute arose regarding Respondent's payment of wages to the employees for the period preceding the strike. The Union suggested that Respondent deliver the payroll to the police, but Cliff refused. He rejected a later request from a union representative who was standing by a patrol car. He said that the payroll would be mailed. What followed was that Caesar Amador and Roberto Morales and an unidentified female started to walk, backwards, onto Respondent's property, waving to the pickets to follow them to get their pay checks. They were headed off by a police car, 25 feet from the employee entrance, and escorted back to the street. This conduct was not trifling, because the employees obviously stepped on Respondent's property, where they were not wanted; but they were still in the employees' parking lot far removed from any of Respondent's then employees. Their conduct does not rise to the level required by *Clear Pine.*

Finally, Respondent wants to bar Brice, Bonny, Pierre, and Aris because they engaged in mid-May in antisemitic behavior, which started with a union organizer's complaint to Cliff that he should not have gotten away from Hitler and that Hitler should have killed ''every fuckin' Jew.'' Subsequently, Brice, Bonny, and Pierre began chanting: ''Hitler, kill you fuckin' Jews.'' A few minutes later, the chant was changed to ''Hitler, Hitler, Hitler.'' Aris joined in this chant, but not the earlier one. Sadly, although Respondent produced no videotape of these incidents, I suspect that this behavior occurred; and I note that charges against the Union for much picket line misconduct were filed, a complaint issued, and the Union entered into a formal settlement agreeing never to engage in certain conduct again, conduct which, the counsel for the General Counsel represented, included this particularly vivid and horrible event. There is nothing that really excuses it, but Brice, a Haitian immigrant and the only employee who testified about these incidents, testified that he really did not know who Hitler was, and the chants do not make that much sense; so I am not exactly sure how malevolent the strikers intended to be.

Furthermore, recognizing how extremely ugly this incident was, it should not be viewed in a vacuum for the purpose of determining whether this is the type of misconduct suffi-

cient to justify Respondent's denial of reinstatement. Respondent's conduct was not angelic. It slandered the pickets, saying that Haitians were monkeys and should return to their country, that they had AIDS, that they smelled bad, and that their women engaged in sex for money. There were enough racial and ethnic attacks from Respondent's side of the picket line that I can at least understand the pickets' anger, although I find their words contemptible. But these words, although harmful, do not constitute a threat of harm and, in these circumstances, do not rise to the level of prohibiting these employees from returning. In *A.P.A. Warehouses*, 291 NLRB 627 fn. 2 (1988), the employer's owner, Moskowitz, told Diaz, an unfair labor practice striker, that he would never work again for Moskowitz, to which Diaz answered that Moskowitz was ''like Hitler.'' The Board concluded under *Clear Pine*, supra, that Diaz's statement did not reasonably tend to coerce or intimidate. *Calliope Designs*, 297 NLRB 510 (1989).[32] Finally, Respondent did not police its own employees, no less its managers, for their degradation of the pickets. Respondent's denial of reinstatement to these four pickets, while continuing to employ Padgett, constitutes disparate treatment under *Champ Corp*., supra. I conclude that these employees should have been reinstated.

In addition to all these issues involving reinstatement, there were a number of other allegations of the commission of unfair labor practices. At about 6:30 or 7 a.m. on December 5 organizer Mercado was standing next to her car which she had parked next to the entrance to Respondent's Store. Rocks were thrown over the fence which surrounded Respondent's property. One missile, probably a brick, thrown by Peter, hit her car and fractured, and part of it caromed, hitting her on the side of her head. She suffers from headaches and bloodshot eyes and hears sounds in her ears. As she testified, I noticed that her eyes were red, a result, she explained, of being hit. Respondent denied this testimony in full. Peter said that he was holed up in his office; Cliff, Arthur, a secretary, and a cleaning woman confirmed it, and even a maintenance mechanic testified the stand to say that he was on a roof and pickets threw a rock at him, so he threw a rock back. However, he denied that the rock hit Mercado or her car, so no one has admitted culpability.

I do not believe Respondent's witnesses, because I observed Mercado and she appeared to be shaken by this incident and to be still suffering from it, both physically and emotionally. Her testimony was corroborated by Tigus and DeLeon, who saw the event while they were standing on the picket line. They had no reason to lie, and Peter had much reason, including a date in criminal court, to try to defend himself. Peter often does not understand the consequences of his actions. He was capable of having thrown the brick. I conclude that Respondent violated Section 8(a)(1) of the Act.

Peter held a meeting of the employees on December 28, 1990, at which he thanked everyone who had come to work during the strike and did not allow Respondent's factory to close. Everyone who came to work during the strike would find a ticket in their pay envelopes, which entitled them to a turkey and ham. The employees who found no ticket would know why. Those who participated in the strike found no tickets. Respondent claims that the turkeys were given as a ''token of appreciation'' and that turkeys were not given to employees who ''interfered with the productivity of [Respondent's] business.'' Cliff admitted that in 1990 there was no way that Respondent was going to reward the strikers with turkeys. As shown above, it was Respondent's practice to hand out turkeys at Christmas.

The Board has held that granting benefits to its employees who work during the strike, while withholding benefits from whose who strike, violates Section 8(a)(1) of the Act because of its impact on the right of employees to engage in protected and concerted activities. Furthermore, it violates Section 8(a)(3) of the Act because the disparate treatment may discourage the employees from further activity in such protected activity and in union membership. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act. *Desert Inn Country Club*, 282 NLRB 667, 668 (1987).

One of the stranger allegations in this proceeding involved employee Maximo Martinez. After the General Counsel had rested on his case-in-chief, the hearing recessed for 2 weeks to permit Respondent time to prepare its defense. When the hearing resumed on April 15, 1991, the General Counsel moved to reopen his case to present a new allegation, which essentially involved Respondent's tampering with Martinez. Martinez was clearly frightened when he testified and appeared reluctant to testify. After prodding by the counsel for the General Counsel, he stated that his sister-in-law had received a telephone call threatening that, if he were to testify, the caller would kill his family. The inference that I was to draw was that this call came from someone connected to Respondent, but the sister-in-law's telephone number was new and Martinez never gave that number to Respondent and had no explanation for someone from Respondent being able to telephone her.

At any rate, Martinez did not testify clearly and could not recall all of what he had been called to testify about. He stated that he received an offer from Respondent to return to work on April 1, 1991, and at the end of that work day, Peter offered him a raise from $5.15 to $12 per hour and also offered him money (he stated in his investigatory affidavit that he was offered a bribe of $8000). However, he did not know what service he was to perform or what service he had to perform in order to earn it. (According to his affidavit, Peter offered him the money and the raise if he would testify against the Union and would speak to his coworkers and persuade them to testify, also.)

Martinez was not shown the copy of the affidavit and thus had no opportunity to have his memory refreshed, nor did he affirm the truth of the affidavit. There is thus no testimonial evidence to find a bribe, and Martinez's testimony did nothing to persuade me of what Peter offered and the reason he offered it. No one revealed what information Martinez could possibly supply at this hearing which might be meaningful to Respondent. The discussion might just as well have been about Martinez' overtime rate or some other matter. Martinez' testimony was unsatisfactory, and I discredit it. Accordingly, I conclude that the allegation of the raise increase and bribe should be dismissed.

However, Peter apparently thought that Martinez' testimony was more damaging than I have just found. He fired Martinez the morning after he testified, April 16. It is true

[32] *Old Town Shoe Co*., 91 NLRB 240, 273 (1950); *Chalk Metal Co*., 197 NLRB 1133, 1148 (1972); and *NLRB v. National Furniture Mfg. Co*., 315 F.2d 280 (7th Cir. 1963), relied on by Respondent, are inapplicable because they preceded *Clear Pine*.

that Peter insisted that he did not fire the employee, but he lied once again. Martinez testified that he went into the plant that morning and did not find his timecard where it was normally maintained in the rack, at the place where his employee number was written. That meant to him that he had been discharged. Other employees testified that the removal of a timecard from its normal place meant that Respondent had fired the employee. Peter testified, however, that when an employee misses a day, his or her card is put in the lower right hand corner of the rack (Peter never testified, in his first appearance as a witness, that this was his policy; but Martinez' discharge was not then at issue). No one else testified that there was ever such a practice, and I do not believe it. If he put the card there, it was only to hide it from Martinez and create this defense.

As a result of not finding his card, Martinez left the plant. Four days later, Mercado made a phone call to Peter and announced that she was Martinez' wife, that she had a family to support, and asked Peter to give him his job back. Peter replied that he was sorry, but Martinez had lost his job. Peter testified that the reason he would not have reinstated Martinez was that he was not looking out for Peter's interests. When asked to explain that comment, Peter stated that Martinez had made some very serious allegations against him in his testimony in this proceeding. I infer from this admission that Peter had the same concerns when he removed Martinez' timecard from its normal place on the rack. Accordingly, I find that Peter's discharge of Martinez was the direct result of his testimony and conclude that Respondent violated Section 8(a)(4) of the Act.

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain 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. The cease-and-desist provisions are not unusual, except for the provision dealing with Respondent's vulgar conduct and heinous verbal abuse of the strikers, which is intended to be limited in scope, so as not to forbid the use of vulgarities and curse words which does not constitute an unfair labor practice. *M. K. Morse Co*., 302 NLRB 924 (1991).

I will grant the ordinary relief for the illegal discharges. I shall order Respondent to offer immediate reinstatement, unless it has already done so, to Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, Francisco Moreira, and Maximo Martinez to their former positions, without prejudice to their seniority or to other rights and privileges previously enjoyed or, if their former jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against them, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because Respondent appears to have little conception of its responsibilities under the Act, I hasten to add that, in reinstating these employees, it must displace, if necessary, any newly hired or reassigned replacement employees.

In connection with these employees and all other employees who were disciplined as a result of violations which I have found in this decision, I shall recommend that Respondent rescind or remove from its employees' personnel files all notices of discharge, warnings, or other discipline and refrain from relying on any such discipline as a justification for further discipline. Furthermore, Robinson was deprived of his benefit of purchasing clothing at a discount, and I shall order that Respondent pay him back for each purchase he made on and after October 27, 1990, $1 for each of the first 50 pounds of clothing he purchased, with interest computed as prescribed above. DeLeon was deprived of overtime, and I shall order that he, too, be made whole for the overtime that he lost, with interest.

Respondent failed to pay all its employees their Christmas benefits in 1989 because of the union organization campaign and failed to pay those who participated in the strike in 1990 their accrued vacation benefits in July and their Christmas benefits in December. I shall recommend that Respondent make whole the employees who were not paid these benefits with an equivalent amount of money, together with interest.

The principal affirmative relief which is warranted is to require Respondent to reinstate all the strikers for whom the Union made its offer. The relief must ensure that all employees be made whole for their losses: those who have not been reinstated; those who have been reinstated, but whose reinstatement was late, and this seems to include, if not everyone, almost everyone; those whom Respondent did not properly recall to work; and those whom Respondent recalled late, and then discharged. Which employees fit into which category cannot be fully determined from this record. Respondent did not prove that its offers of reinstatement were validly served on any striker. Although I have listed above the results of my review of Respondent's offers in August and September 1990, including the names of the persons to whom most of the offers were made, no proof exists in the record that the offers were received, except for the admissions of those employees who testified in this proceeding.

I make no finding as to anything else, but note merely, as I have above, that those employees who refused to respond to letters which were invalid had a right not to respond to them and that Respondent's backpay liability to them continues to run. Respondent submitted into the record documents intended to show that it made further offers of reinstatement during the course of the hearing, including offers to a mass of employees on March 22 and April 11, 1991. I make no finding about the validity of those offers: whether they were sent, whether they were sent to the proper addresses, whether they were received, whether they were unconditional, and whether they offered the employees the same positions as they held before the strike, not equivalent positions, unless the original jobs no longer existed. There was enough testimony in the record to reveal that documents were not being mailed and not being received and enough indication that Respondent's witnesses were not generally worthy of belief for the Regional Director for Region 29 to insist that documents

be sent by certified mail, return receipt requested, before crediting any representation that an offer of reinstatement was made. In sum, I would expect that Respondent should make all reasonable efforts to ensure that its offers are extended to everyone entitled to them, if it has not already done so.

The General Counsel proved the identity of the strikers by the following means: All strikers received strike benefits from Local 99. Starting with January 30, the first day of the strike, Local 99 compiled a list of the names and social security numbers of all the strikers and required proof of the fact that they formerly worked for Respondent. That proof consisted of pay stubs, and Respondent failed to adduce evidence that anyone on the list was not employed by it before the strike. (However, a small number of employees listed on Local 99's compilation did not work the pay period immediately preceding the strike.) During the strike, each employee, in order to receive strike benefits and food expenses, had to come to the church where the October 26 meeting had been held and sign sheets for those benefits. In addition, Local 99 had someone present who identified the employees as persons who were appearing at the picket line. Finally, the General Counsel offered Respondent's payroll records for the pay periods ending January 24 and February 7, 1990, which for the most part correlate with the other records, to wit, missing from the payroll of February but present in the earlier payroll are those persons who are listed as having received strike benefits, thus proving that they were not being paid by Respondent because they had joined the strike. At the hearing, Respondent objected to this method of proving the identity of the strikers, but failed to show any reasonable alternative. Its brief is silent.

There is attached to this decision ''Appendix A,'' which is the list of the persons who, I find, were strikers and entitled to be reinstated. There is missing from that list Henry, the sole employee who I have determined in this decision was not entitled to reinstatement, and Robinson and Charles, whose right to reinstatement and to be made whole is fully covered, above. Others have also not been included, because I had no proof that they ever were or that they remained strikers. For example, some were listed on the Union's list, but they were never paid any benefits. The names of others, although originally listed in the Union's records for benefits, were crossed out. The following are those employees: Crespin Bruno, Macarthur Davis, Climan Duval, Verrance Joseph, Jeanne Simone Lacombe, Marie Leconte, Zenon Lopez, Yves Malivert, Saleem Malik, Jean Malvoisin, Emilio Meredith, Herbert Melendez, Victor Olague, Augusto Ordonez, Jose Angel Ortiz, Freda Osias, Y. Perlatta, Marie D. Pierre, Macarthur Raymond, Eduardo Roman, Joseph Santual, and Marie Annette Time.

Accordingly, I shall order Respondent to offer immediate reinstatement, unless it has already done so, to all its strikers, to their former positions, without prejudice to their seniority or to other rights and privileges previously enjoyed, displacing, if necessary, any newly hired or reassigned replacement employees or, if their former jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's discrimination against them, to be computed as set forth above. The reinstatement offers shall be subject to the provision that Respondent shall not require the employees to fill out any documents or provide any information other than their names and current addresses. Respondent's Exhibit 20 demonstrates that Respondent has the badge number of all the employees. From that, it has access to all the employees' relevant documents. Respondent's time for engaging in technicalities and delaying tactics must end. Furthermore, this relief is applicable to all employees, except for those who may have been reinstated within the time limits provided in *Drug Package Co*., 228 NLRB 108 (1977). It is intended to make whole those employees who were reinstated untimely and maintained their employment; those who were never reinstated; those employees who were discharged on August 13 (see above); and those who are specifically named above, many of whom are also entitled to be made whole for periods prior to their reinstatement and subsequent discharge.

I shall recommend a broad order in this proceeding under *Hickmott Foods*, 242 NLRB 1357 (1979). Respondent has demonstrated a proclivity to violate the Act, having previously been found in violation of the Act for assisting its labor organization in *Domsey Trading Corp*., 296 NLRB 897 (1989). Furthermore, the violations found herein are egregious and widespread and demonstrate that Respondent has a general disregard for its employees' fundamental statutory rights.

The General Counsel requests a variety of extraordinary remedies for Respondent's flagrant and repeated unfair labor practices. First, he requests that Respondent send copies of the notice to all of the discriminatees, including those who were never reinstated or were discharged, by certified mail. In *Workroom for Designers*, 274 NLRB 840 (1985), the Board found that the requested relief was warranted because ''it is essential that each employee be made individually aware of his or her statutory rights'' and that each employee's ''exercise of those rights will be respected.'' Id. at 841–842. Furthermore, the Board noted that, because the notice was long, as it is here, ''each employee should have an opportunity to read and absorb it fully,'' citing *Loray Corp*., 184 NLRB 557 (1970). Id. at 842. For both reasons, I agree.

In order that the employees are able to read the notice, it must be translated into at least two languages, because most of the employees do not read English. During the hearing, witnesses' testimony was translated from Spanish and what I had been advised was French-Creole. The General Counsel requests that the notice be translated into ''the employees' dominant languages, i.e., Haitian-Creole, French and Spanish.'' I do not recall that any one testified in French, and I have no basis for recommending that French translations be prepared. I will accept the representation of the General Counsel that the dominant language of the Haitian employees is Haitian-Creole, but I shall specifically qualify my recommended order that it is my intent that, if there are employees who read languages other than Spanish and Haitian-Creole, the notice must be translated for those employees, too. *Water's Edge*, 293 NLRB 465 (1989); *International Automated Machines*, 285 NLRB 1122 fn. 3 (1987). Respondent's reinstatement offers must also be translated so that they can be read by the employees. The General Counsel also requests that Respondent bear all costs of reproduction, translation, and mailing by certified or registered mail. I agree, with the proviso that the translations shall be submitted to the Regional Director for approval and correction, if

required, before they are mailed or read to the employees, as provided below.

I agree with the General Counsel's request that the notice be read to the assembled employees for two reasons. First, there is no question that these violations are egregious and affect the vast majority of employees. The plant must be overwhelmed with intimidation and obscenities which deserve to be dispelled. Many of the violations were so personal, involving slanders heaped on men and women because of their color and national origin, that they deserve to be ''undone'' personally. *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292, 305 (2d Cir. 1967). Second, some of the employees were illiterate. A review of the 2-hour videotape (G.C. Exh. 64A) of the returning strikers signing in on August 13 shows that some employees had great difficulty writing (the camera zeroed in on a few of them), and I believe that they could not write or they could not read the letters and numbers that they were attempting to copy. An examination of the signin sheet (G.C. Exh. 35) supports this finding. Accordingly, I conclude that the notice should be read. *Jackson Tile Mfg. Co*., 122 NLRB 764 (1958), enfd. 272 F.2d 181 (5th Cir. 1959); *Taylor-Colquitt Co*., 47 NLRB 225 (1943), enfd. 140 F.2d 92 (4th Cir. 1943); *NLRB v. Bush Hog, Inc*., 405 F.2d 755 (5th Cir. 1968); *NLRB v. Texas Electric Cooperatives*, 398 F.2d 722 (5th Cir. 1968); contra, *NLRB v. Laney & Duke Storage Warehouse Co*., 369 F.2d 859 (5th Cir. 1966).

A reading of the notice is not without its difficulties. As noted above, most of the employees do not understand English and will not understand the notice unless it is read in their native tongues. For this reason, the notice will have to be read in English and at least two other languages. The General Counsel requests that Peter read the notice. He can do so only in English, but it is proper that he should. He is in charge of the plant, and the employees look to him as their boss. He was responsible for the vast majority of the unfair labor practices. Before the strike, he interrogated, he threatened, he warned, and he fired two of the Union's leaders. His unfair labor practices caused the strike, at least in part. During the strike he accused women of prostitution and having AIDS and said that the Haitians were ''monkeys.'' When the strike ended, he was at the desk on August 13, signing in the returning strikers, to whom he gave illegal instructions. He delayed and impeded their reinstatement. He directed Padgett in all of his activities, and Padgett's harassment and obscenities were joined in by Peter. He personally fired almost all of the 12 reinstated strikers who were discharged in 1990, and it was his henchman, Padgett, who caused the constructive discharge of another. He threw a brick at a female union representative, in the presence of employees. He fired an employee who had the courage to testify in this proceeding.

Because of Peter's intimate involvement with the vast majority of the unfair labor practices found in this decision, the requirement that he read the Notice is ''necessary 'to dispel the atmosphere of intimidation created in large part by [Peter's] own statements and actions.''' *Food & Commercial Workers v. NLRB*, 852 F.2d 1344, 1348–1349 (D.C. Cir. 1988), enfg. 284 NLRB 1429 (1987), quoting from *Conair Corp. v. NLRB*, 721 F.2d 1355, 1386–1387 (D.C. Cir. 1983). Contra *NLRB v. S. E. Nichols, Inc*., 862 F.2d 952 (2d Cir. 1988), in which the Second Circuit found that the employer must be given the opportunity to choose either a personal reading or have the notice read by a Board representative. The court found that requiring the company official to read the notice would be humiliating. However, the court expressly did not hold that a personal reading would never be appropriate. Id. at 962. Here, much of Peter's illegal activity humiliated the employees. It is appropriate that they be given a personal guarantee that Respondent's conduct will not be repeated.

Obviously, Peter cannot read the notice in Spanish or Haitian-Creole or in such other language as the Regional Director determines might be required. I will recommend that Respondent be given the option to designate its own supervisors (such as Maxi, for Haitian-Creole and Jose Perez, for Spanish) to read the Notice, or allow Board representatives to do so. *NLRB v. S. E. Nichols, Inc*., supra; *Textile Workers v. NLRB*, 388 F.2d 896, 904–905 (2d Cir. 1967), cert. denied 393 U.S. 836 (1968). In all cases, Peter shall remain near the person reading the Notice, so that the employees will be assured that Respondent's promises to reform its illegal conduct are coming from him. Finally, Respondent shall afford a reasonable opportunity to provide for the attendance of a Board agent and additional translators to be designated by the Regional Director of Region 29 at any assembly of employees called for the purpose of reading such notices. In addition, each reader of the Notice shall announce, by name and title, the attendance of the Board agent, so that the employees will have the assurance that it is the intent of the Board to monitor compliance with this decision.

The General Counsel also requests that Respondent give copies of the Decision and Order to all its managers and supervisors, together with a written directive signed by a responsible official not to violate the terms of the Order, citing *NLRB v. S. E. Nichols, Inc*., 284 NLRB 556, 561 (1987), affd. in pertinent part 862 F.2d 952 (2d Cir. 1988). Respondent's operates in one facility in Brooklyn, although part of the facility is the separate Store. All of the illegal conduct took place in that one facility, whereas *S. E. Nichols* involved a recidivist employer which did business in numerous locations and engaged in outrageous conduct for years. Indeed, that decision relied on *J. P. Stevens & Co*., 244 NLRB 407 (1979), enfd. 668 F.2d 767 (4th Cir. 1982), and Domsey is not yet the *J. P. Stevens* discussed in that decision. Respondent should not find it difficult to communicate with its managers and supervisors the results of this decision and the requirements of the recommended Order. I will not grant this relief.

Nor will I grant the General Counsel's request for a broad visitatorial clause which would require Respondent to give to the Board access to Respondent's facility to monitor compliance with the posting requirement and to assure itself that the reinstatement order is being honored. Reinstatement orders have been issued in thousands of Board decisions without the necessity a visitorial clause. Although many of the acts committed by Respondent are no doubt extremely offensive to anyone's sensibilities, most of the remedies provided in the Order are ordinary and run of the mill, issued since the Board began to operate more than a half-century ago. The decisions relied on by the General Counsel involve extraor-

dinary problems of compliance.[33] Here, the employees can easily complain, if they should find that Respondent continues to harass them; but a Board agent ought not to have to stand around Respondent's plant to ensure Respondent does not again lapse into this kind of conduct.

On these findings of fact and conclusions of law and on the entire record,[34] including my observation of the demeanor of the witnesses as they testified, and my consideration of the briefs and comments filed by the General Counsel, Respondent, and the Charging Party,[35] I issue the following recommended[36]

ORDER

The Respondent, Domsey Trading Corporation, Domsey Fiber Corporation, and Domsey International Sales Corporation (Respondents), Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening their employees with discharge or reprisals to discourage them from joining or supporting or assisting the International Ladies' Garment Workers' Union, AFL–CIO, or Local 99, International Ladies Garment Workers' Union, AFL–CIO (the Union).

(b) Discharging or issuing warning letters to or in any other manner discriminating against their employees, because they engaged in an unfair labor practice strike or they joined, supported, or assisted the Union or they gave testimony in a proceeding before the National Labor Relations Board.

(c) Failing or refusing to offer to their unfair labor practice strikers immediate and unconditional reinstatement to their former positions of employment.

(d) Requiring their unfair labor practice strikers, in order to qualify for reinstatement, to fill out and submit by registered mail, return receipt requested, application forms and Immigration and Naturalization Service ''Employment Eligibility Verification (I-9)'' forms or other documents, or to present social security cards, green cards, passports, birth certificates, or other personal identification documents when personally applying for reinstatement.

(e) Imposing more onerous working conditions on their employees or assigning or transferring them to less desirable and more arduous work positions or videotaping them or subjecting them to more vigilant supervision or taking away privileges previously enjoyed, because they engaged in an unfair labor practice strike or they joined, supported, or assisted the Union.

(f) Harassing their employees on the job by cursing at them and insulting them, or by making obscene comments to and obscene gestures at them, or by spitting on them or making faces at them, or by making disparaging remarks or gestures, or by touching them or subjecting them to verbal abuse, or by throwing things at them, in order to discourage their employees from joining, supporting, or assisting the Union, or to retaliate against them for engaging in an unfair labor practice strike.

(g) Threatening to assault their employees or physically assaulting them or causing them to be assaulted or struck by clothing bundles or any other object, or condoning such physical assaults upon their employees, or assaulting representatives of the Union by throwing rocks at them, or damaging or spitting on the automobiles of representatives of the Union, in the presence of their employees, in order to discourage their employees from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

(h) Engaging in degrading or abusive conduct directed to their employees or to representatives of the Union, in the presence of their employees, calculated to discourage their employees from joining, supporting, or assisting the Union.

(i) Questioning their employees about their own or other employees' union membership, activities or sympathies, or concerning other protected activity, including the filing of unfair labor practice charges with the National Labor Relations Board.

(j) Engaging in surveillance of their employees, or creating the impression that Respondents are spying on their employees while they are engaged in union activity, or offering or promising money to their employees to induce them to provide Respondents with information regarding the Union or to engage in surveillance of the meetings and activities of the Union.

(k) Threatening their employees that their continued support for the Union is futile because Respondent will never recognize the Union or sign a contract with the Union.

(l) Instituting and implementing new rules in order to discourage their employees from joining, supporting, or assisting the Union.

(m) Threatening their employees with loss of paid sick days and holidays in order to discourage them from joining, supporting, or assisting the Union.

(n) Directing their employees to remove clothing with a Union insignia on it.

(o) Withholding from their employees Christmas turkeys and hams and annual employee vacation benefits in order to discourage them from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

(p) Implementing new work rules to discourage their employees from joining, supporting or assisting the Union or to

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[33] *El Mundo Corp*., 301 NLRB 351 (1991); *299 Lincoln Street, Inc*., 292 NLRB 172 (1988); *Smythe Mfg. Co*., 277 NLRB 680 (1985). Cf. *Cherokee Marine Terminal*, 287 NLRB 1080, 1083 (1988).

[34] The transcript is often inaccurate. Many of the colloquys attributed statements and questions to the wrong persons, and there are some answers and some questions which reflect more of a discussion between the questioner and the interpreter, rather than the purported answers being exact translations of what the witness said. Finally, one glaring error that ought to be corrected appears on p. 3000, L. 21: ''not'' should be inserted after ''will.''

[35] The General Counsel and the Charging Party object to my receipt and consideration of a letter from Respondent's counsel, dated August 6, 1991, which was filed in response to my inquiry, made known to all parties, about record support for the persons who the General Counsel claimed were strikers and who Respondent claimed were not. The letter unfortunately goes far beyond the record and makes claims that the record will not support. To the extent that it does, it is not received; and the motion is granted. In so doing, I note that exhibit B, purportedly annexed to Respondent's submission, was not.

[36] If 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.

retaliate against them for engaging in an unfair labor practice strike.

(q) In any other manner interfering with, restraining, or coercing their employees in the exercise of 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) Remove and remove from their files any references to the discharges, warnings, or other discipline imposed on Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, Francisco Moreira, and Maximo Martinez and notify them, in writing, that this has been done and that the discharges and warnings will not be used against them in any way.

(b) Offer full and immediate reinstatement, if they have not already done so, to Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, Francisco Moreira, and Maximo Martinez and to all their employees listed in the attached ''Appendix A'' to their former jobs or, if their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, displacing, if necessary, any newly hired or reassigned replacement employees. No reinstatement offer shall require any of their employees to fill out any documents or provide any information other than their names and current addresses.

(c) Make the above employees whole for any loss of earnings they may have suffered by reason of their discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Reinstate the privilege of Giles Robinson of purchasing clothing at the discount which existed prior to the advent of the union activity and make him whole for any losses he incurred, with interest as provided in the remedy section of this decision.

(e) Make all their employees whole for Respondents' failure to give Christmas turkeys in 1989, their reinstated employees for Respondents' failure to give Christmas turkeys and hams in 1990, and their striking employees for Respondents' failure to pay vacation benefits due them for the year ending June 1, 1990, with interest as provided in the remedy section of this decision.

(f) Make whole Jose DeLeon for his loss of overtime pay caused by their reinstatement of him to a different position than he held before the 1990 strike, with interest.

(g) 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.

(h) Mail to each of their current employees and each of the employees listed in the attached ''Appendix A'' and post at their place of business in Brooklyn, New York, copies of the attached notice marked ''Appendix B.''[37] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material. Moreover, copies of the notice shall be posted in English, Haitian-Creole, Spanish, and such other written languages used by the employees as shall be determined by the Regional Director of Region 29. Copies of all other documents required by this Order shall be similarly translated, and copies of all translations shall be provided to the Regional Director of Region 29 at the time of their posting or mailing.

(i) Convene during work hours, by shift, department or otherwise, and have Peter Salm, Respondents' manager, read to the assembled employees the contents of the attached notice in English, followed by a reading of the foreign language translations by Respondents' representatives fluent in the relevant language or by designees of the Regional Director of Region 29. The Regional Director for Region 29 shall be afforded a reasonable opportunity to provide for the attendance of a Board agent and additional translators of the Regional Director's choosing.

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

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

APPENDIX B

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

WE WILL NOT threaten our employees with discharge or reprisals to discourage them from joining or supporting or assisting the International Ladies' Garment Workers' Union, AFL–CIO, or Local 99, International Ladies Garment Workers' Union, AFL–CIO (collectively, the Union).

WE WILL NOT discharge or issue warning letters to or in any other manner discriminate against our employees, because they engaged in an unfair labor practice strike or they joined, supported, or assisted the Union or they gave testimony in a proceeding before the National Labor Relations Board.

WE WILL NOT fail or refuse to offer to our unfair labor practice strikers immediate and unconditional reinstatement to their former positions of employment.

WE WILL NOT require our unfair labor practice strikers, in order to qualify for reinstatement, to fill out and submit by registered mail, return receipt requested, application forms and Immigration and Naturalization Service ''Employment Eligibility Verification (I-9)'' forms or other documents, or

to present social security cards, green cards, passports, birth certificates, or other personal identification documents when personally applying for reinstatement.

WE WILL NOT impose more onerous working conditions on our employees or assign or transfer them to less desirable and more arduous work positions or videotape them or subject them to more vigilant supervision or take away privileges previously enjoyed, because they engaged in an unfair labor practice strike or they joined, supported, or assisted the Union.

WE WILL NOT harass our employees on the job by cursing at them and insulting them, or by making obscene comments to and obscene gestures at them, or by spitting on them or making faces at them, or by making disparaging remarks or gestures, or by touching them or subjecting them to verbal abuse, or by throwing things at them, in order to discourage our employees from joining, supporting, or assisting the Union, or to retaliate against them for engaging in an unfair labor practice strike.

WE WILL NOT threaten to assault our employees or physically assault them or cause them to be assaulted or struck by clothing bundles or any other object, or condone such physical assaults upon our employees, or assault representatives of the Union by throwing rocks at them, or damaging or spitting on the automobiles of representatives of the Union, in the presence of our employees, in order to discourage our employees from joinging, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

WE WILL NOT engage in degrading or abusive conduct directed to our employees or to representatives of the Union, in the presence of our employees, calculated to discourage our employees from joining, supporting, or assisting the Union.

WE WILL NOT question our employees about their own or other employees' union membership, activities, or sympathies, or concerning other protected activity, including the filing of unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT engage in surveillance of our employees, or create the impression that we are spying on our employees while they are engaged in union activity, or offer or promise money to our employees to induce them to provide us with information regarding the Union or to engage in surveillance of the meetings and activities of the Union.

WE WILL NOT threaten our employees that their continued support for the Union is futile because we will never recognize the Union or sign a contract with the Union.

WE WILL NOT institute and implement new rules in order to discourage our employees from joining, supporting, or assisting the Union.

WE WILL NOT threaten our employees with loss of paid sick days and holidays in order to discourage them from joining, supporting, or assisting the Union.

WE WILL NOT direct our employees to remove clothing with a union insignia on it.

WE WILL NOT withhold from our employees Christmas turkeys and hams and annual employee vacation benefits in order to discourage them from joining, supporting, or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

WE WILL NOT implement new work rules to discourage our employees from joining, supporting or assisting the Union or to retaliate against them for engaging in an unfair labor practice strike.

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

WE WILL remove from our files any references to the discharges, warnings, or other discipline imposed on Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, Francisco Moreira, and Maximo Martinez and notify them, in writing, that this has been done and that the discharges and warnings will not be used against them in any way.

WE WILL offer full and immediate reinstatement, if we have not already done so, to Giles Robinson, James Anthony Charles, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nicole Mathieu, Margaret St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, Francisco Moreira, and Maximo Martinez and to all their employees listed in the attached ''Appendix A'' to their former jobs or, if their former jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, displacing, if necessary, any newly hired or reassigned replacement employees. No reinstatement offer shall require any of our employees to fill out any documents or provide any information other than their names and current addresses.

WE WILL make the above employees whole for any loss of earnings they may have suffered by reason of our discrimination against them, with interest.

WE WILL reinstate the privilege of Giles Robinson of purchasing clothing at the discount which existed prior to the advent of the union activity and make him whole for any losses he incurred, with interest.

WE WILL make all our employees whole for our failure to give Christmas turkeys in 1989, our reinstated employees for our failure to give Christmas turkeys and hams in 1990, and our striking employees for our failure to pay vacation benefits due them for the year ending June 1, 1990, with interest.

WE WILL make whole Jose DeLeon for his loss of overtime pay caused by our reinstatement of him to a different position than he held before the 1990 strike, with interest.

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A SINGLE EMPLOYER