

6 West Limited Corp., and Its Partner, Lettuce Entertain You Enterprises, Inc., d/b/a Tucci Milan and Brian Gibson, and Jill Ricci, and Gretchen Grant, and Joseph Carmolli. Cases 13–CA–32908, 13–CA–32908, 13–CA–32971, 13–CA–33047, and 13–CA–33455

January 24, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 5, 1997, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties filed cross-exceptions and briefs in support. All parties filed answering briefs, and the Respondent and the Charging Parties filed reply briefs.

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

The Board has reviewed the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employee Brian Gibson because of his union and other concerted, protected activities, and by disciplining employees Gretchen Grant Inniss, Jill Ricci, and Greg Calvird pursuant to the discriminatory application of a no-solicitation rule.² He also found that the Respondent violated Section 8(a)(1) by falsely telling employees that Hotel Employees and Restaurant Employees Union, AFL–CIO, Local 1 (the Union) had threatened to blow up a house shared by Gibson and Ricci and that employees were in imminent danger of union violence. We agree with these findings for the reasons set forth by the judge, as modified in section 1 below regarding the sus-

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

There were no exceptions to the judge's finding that employee Joseph Carmolli was terminated lawfully.

² Although the judge found that Gibson was discriminatorily suspended and discharged, he failed to include the suspension in the conclusions of law and to direct that Gibson be made whole from the date of the suspension. The judge also did not specifically include reference to the discipline of Grant, Ricci, and Calvird in the cease-and-desist paragraphs of the recommended Order. We shall modify the recommended Order and notice to employees to include this conduct and the appropriate redress therefor. Further, we shall modify the Order and notice to include the additional violations of the Act discussed infra, and to conform to our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

pension and discharge of Gibson. We also find, however, as set forth in sections 2 and 3 below, that the Respondent committed additional violations of the Act.

1. We affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended, and then terminated, union activist Brian Gibson, allegedly for his conduct in connection with the disappearance of certain "manager's logs," documents that memorialized daily events in the running of the Respondent's business and included comments on customers and employees.

The Respondent has excepted, contending, inter alia, that the judge erred in finding that the "sole" asserted reason for the suspension and discharge was the Respondent's belief that Gibson had stolen the logs. The Respondent contends that, as it stated in its termination letter, it discharged Gibson because his "explanation" concerning his "role in the unauthorized removal of Company records [was] not credible," not because it had solid proof that he was guilty of theft. Similarly, our dissenting colleague faults the judge for rejecting the Respondent's *Wright Line*³ defense on the basis of the judge's view that the Respondent had only a "thinly premised suspicion" that Gibson might have been involved in the acquisition of the documents. While we agree that the judge may not have accurately characterized the Respondent's stated reason for discharging Gibson, for the following reasons we adopt the judge's ultimate finding that the Respondent's actions against Gibson violated Section 8(a)(3) and (1).

Initially, we adopt, for the reasons stated by the judge, the finding that the General Counsel established that animus against Gibson's protected activities was a motivating factor in his suspension and termination. Our dissenting colleague assumes arguendo that this is so, and the Respondent's brief on exceptions is primarily devoted to showing that it established its *Wright Line* defense.

It is not surprising that the Respondent contends that its actions against Gibson were taken for reasons other than a belief that he had stolen the logs. According to Gibson's credited and uncontradicted testimony, the Respondent's agents had indicated that they would leave determination of the theft question to a police investigation, that Gibson would be "suspended pending investigation by the police," and that he "would be reinstated with full backpay if it turned out he was "cleared of the charges."⁴ At the hearing in this case, however, General Manager Kozak conceded that he had no knowledge of

³ *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁴ This statement was made to Gibson during a meeting with the Respondent's managing partner, Howard Katz, and General Manager Jeff Kozak, after Gibson had disclosed his role in the union organizing campaign and immediately after Katz had placed a telephone call to an unidentified person.

the final determination, if any, made by the police, and the Respondent put in no evidence of any report issued by the police or anyone else establishing who had removed the logs.

Despite the position taken in that meeting that Gibson's fate would turn on the police investigation, the Respondent terminated Gibson less than 3 weeks later on the stated grounds that his "explanation" concerning his "role in the unauthorized removal of Company records is not credible." As the judge noted, no witness of the Respondent testified as to who had made that decision, and neither managing partner Katz nor the unidentified person to whom Katz spoke before suspending Gibson testified at all. Nor did any witness testify to company policies which would support a finding that the Respondent *would* discharge an employee who failed to give credible answers in an investigation of missing property. In this regard it bears emphasizing that a mere showing that an employee did something that might warrant discharge or discipline is insufficient to carry an employer's affirmative defense under *Wright Line*. A respondent employer must show that it "*would* have fired" the employee, not merely that "*it could* have done so." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (emphasis in original). In our view, the Respondent failed to carry that burden here.⁵

2. The judge found that although the Respondent increased its use of security guards during the organizing campaign, the record did not establish that it engaged in unlawful surveillance of employees. He further found that the Respondent articulated a legitimate business justification for the increased security measures, and therefore, did not violate the Act. Although we agree with the judge that there is no persuasive evidence that the Respondent engaged in actual surveillance of the employees' union activities, we find that its expansion of the guard force was otherwise coercive and violated Section 8(a)(1) of the Act.⁶

The record establishes that prior to the organizing drive the Respondent contracted for the services of an off-duty policeman to work at the restaurant on Fridays and Saturdays. After union organizing activity began, in early October, the Respondent increased security coverage to 7 days a week. The Respondent announced the increased security to employees, telling them that it was done to ensure their safety and that of the restaurant and

⁵ We agree with our dissenting colleague that it is not for the Board to decide whether a nondiscriminatory reason for discharging an employee is wise or well supported. We rest our finding here on our view that the Respondent failed to show that it would have taken the actions against Gibson in the absence of his protected activities.

⁶ Complaint par. VIII(a), alleges:

"About October, 1994, Respondent hired security personnel at its facility in order to engage in the surveillance of employees engaged in union and/or protected concerted activities and/or stifle the union and/or protected concerted activities of employees." [Emphasis added.]

to keep them free from "harassment." The employees were told that security officers would escort them to their cars and homes if necessary. The Respondent made numerous references to the increase in security at regularly scheduled staff meetings, repeatedly linking the increased coverage with purported harassment and violence by the Union.

General Manager Kozak testified that he expanded the security arrangements after the manager of a neighboring Ruth's Chris restaurant told him that union representatives had created two disturbances at his restaurant prior to and after an organizing campaign. Significantly, however, there is no evidence that Kozak or other managers told the employees about the purported incidents at Ruth's Chris restaurant.⁷ Similarly, there is no evidence that employees reported being harassed prior to the time security was increased. Rather, the record very clearly establishes that the Respondent, on an ongoing basis, accused the Union of violence and harassment. The Respondent repeatedly made accusations about union mob connections and bombings at meetings with employees. These accusations culminated in the Respondent's telling employees in December that employee Ricci had left town because union agents threatened to blow up her home, when in fact, Ricci had gone to her family home for the holidays.⁸ In this context, where the Respondent's managers and representatives seized every opportunity to attempt to frighten employees into withdrawing their support from the Union, we find that the increased security was part of a coercive strategy to discourage support for the Union. This strategy went beyond disparaging campaign propaganda to concrete action that was intended to convey that the employees' lives were in impending danger from the Union and that the Respondent was the employees' protector. Accordingly, we find that the Respondent further violated Section 8(a)(1) of the Act by increasing the use of security guards during the union campaign.

3. The judge found that the Respondent's senior Vice President Charles Haskell and its agent and partner Richard Melman solicited grievances from employees Sarkis Akmakjian and Elaine Gonzalez in early January 1995, but found that their conduct was lawful because it "did not differ significantly" from previous actions under the multifaceted grievance procedure maintained by the Respondent. We disagree.

The Respondent's grievance procedure set forth in the employee handbook states that employees are encour-

⁷ Thus the reliance by the judge and our dissenting colleague on the Respondent's testimony that a business justification existed for the increased security is misplaced. Since this alleged justification was never communicated to employees, it cannot in any way serve to diminish the coercive effect of the increased security on the employees, as explained below.

⁸ As stated above, we agree that this unsubstantiated remark constituted a violation of Sec. 8(a)(1) of the Act.

aged to resolve problems by going to their immediate supervisor or general manager and advises that an “Employee Resource and Dispute Resolution Counselor” (counselor) is available to answer questions and to act as an advocate and investigator. It then outlines three steps: (1) contacting the general manager or supervising partner of the division; (2) contacting the human resources department for a determination by a counselor or the vice president of human resources; and (3) requesting that a counselor prepare a report for submission to the vice president of human resources, who then may make a final decision, including offering a compromise, remanding it for further investigation, or submitting it to the executive committee for a final decision. Additionally, the Respondent maintains a “MOTO” program in which employees can use forms to make suggestions for improvements and solutions to problems.

Significantly, neither the grievance procedure nor the MOTO program contemplates that senior management officials will initiate discussions to ferret out problems or to resolve grievances. Akmakjian and employee Gretchen (Grant) Inness testified that Melman and Haskell visited the restaurant on almost a daily basis in the week preceding the election; these employees testified that, by contrast, they saw the two managers only a couple of times a year prior to the campaign. Akmakjian also testified that the discussion that Melman initiated with him 3 days before the election was the first conversation the two had had in the 13 months Akmakjian had been employed by the Respondent. Significantly, Melman told Akmakjian that he would look into the matter of the distribution of the gratuity from the Scott Christmas party held more than a year earlier, even though Melman considered that complaint to have been previously resolved. He also told Akmakjian that he would look into a lateness warning the employee believed he received unfairly. A short time later, Haskell told Akmakjian the warning had been removed from his file even though, in fact, it was never removed.

Gonzalez testified that on the evening prior to the election, Haskell sought her out and raised a number of issues with her, including the Scott party and managers’ log entries that were critical of employees. In connection with the logs, Gonzalez pointed out that a log entry erroneously stated that she had demanded \$1000 in payments for medical bills from an on-the-job injury and that worker’s compensation did not pick up the tab on her medical bills, even though OSHA cited the restaurant for using improper floor wax. Haskell gave reassurances that he would reopen both matters.

It is clear from the credited testimony of Akmakjian and Gonzalez that the high-ranking members of management not only initiated discussions of employee problems, but also agreed to revisit “closed cases,” both implicitly and explicitly promising to remedy the problems. Under these circumstances, we find that the Respondent

was not engaged in following its preexisting grievance procedure or a comparable process and that its preelection promises to reopen previously resolved matters constituted the unlawful solicitation of grievances.⁹ By engaging in this conduct, the Respondent violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and directs that the Respondent, 6 West Limited Corp., and its Partner Lettuce Entertain You Enterprises, Inc., d/b/a Tucci Milan, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Cease and desist from

(a) Unlawfully and disparately prohibiting employees from engaging in nondisruptive, union-related discussions while performing nonserving duties, and disciplining them therefor.

(b) Suspending or discharging employees because of their concerted protected activities or their activities on behalf of Hotel Employees and Restaurant Employees Union, AFL–CIO, Local 1.

(c) Increasing security to discourage employee support during a campaign by the above-named Union, falsely telling our employees that the Union is responsible for bomb threats to employees, or explicitly or implicitly warning that they are in imminent danger of union violence.

(d) Soliciting and promising to resolve employee grievances in order to dissuade employees from supporting the above-named Union.

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

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

(a) Within 14 days of the date of this Order expunge from any of its files and records, wherever located, the disciplinary warnings issued to Gretchen Grant Inness, Jill Ricci, and Greg Calvird in November 1994, and all references to such personnel actions, and within 3 days

⁹ Our dissenting colleague speculates that it is not unusual for high-ranking officials to visit a site during an organizational campaign and that since conversations in which “those officials promise to look into specific employee grievances” are “a normal consequence of a high-level visit,” no violation occurred. Nothing in the Act, however, accords greater leeway to high-ranking management officials than lower-ranking officials to engage in conduct which interferes with, restrains, or coerces employees in the exercise of their Sec. 7 rights. To the contrary, the Board and the courts have long recognized the highly coercive effect on employees of promises and other forms of misconduct by high levels of management during organizational campaigns. See, e.g., *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996); *Adam Wholesalers*, 322 NLRB 313, 314 (1996); *America’s Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 115 S.Ct. 2609 (1995).

thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.

(b) Within 14 days from the date of this Order, offer Brian Gibson full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

(c) Make Brian Gibson whole for any loss of earnings and other benefits suffered as a result of his suspension and discharge, with interest.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Brian Gibson, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Chicago, Illinois restaurant copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 1994

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

MEMBER HURTGEN, dissenting in part.

I disagree with my colleagues in three respects.

First, I would reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by

¹⁰ 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."

suspending and discharging employee Brian Gibson. I assume *arguendo* that the judge correctly found that a *prima facie* case was established, but I conclude that the Respondent successfully rebutted it.

The judge found that the Respondent did not demonstrate anything more than a "thinly premised suspicion" of Gibson's involvement in the use, if not the acquisition, of confidential documents. I disagree with this reasoning. It is not for the judge or the Board to decide whether Respondent's reason for discipline was well supported or not. Rather, it is our function to determine whether that reason was the true reason. In any event, I find that the Respondent had more than a "thinly premised suspicion." The Respondent learned that Gibson had distributed copies of the documents in question, and Gibson evasively resorted to verbal games when questioned by the Respondent. These games included the effort to draw distinctions between the original documents and the copies, and between parts of the documents and their entirety. Indeed, the judge noted that Gibson was an evasive and unresponsive witness on the subject of the missing documents. Gibson was at least as evasive and unresponsive when questioned about them by the Respondent at the time of the events in question.

The judge also found that the Respondent had failed to adduce any evidence that the person who made the adverse employment decisions was motivated by Gibson's misconduct. In this regard, the judge noted that no witness testified that he made those decisions or why he made them. However, I note that the Respondent's managing partner (Katz), during the meeting at which Gibson was suspended, read a statement saying that Gibson had been seen passing out stolen documents and that a police investigation was underway. Katz asked Gibson if he had stolen the documents. Gibson denied having done so. Katz asked if the documents were in Gibson's possession and if he had ever seen them. Gibson replied in the negative. After leaving the room to make a telephone call, Katz returned and told Gibson that he was suspended, pending a police investigation into the disappearance of the documents.

In sum, the person who made the accusation was directly involved in the suspension.

Further, Gibson's termination letter, signed by General Manager Jeff Kozak, stated that Gibson was terminated because his explanation concerning his role in the unauthorized removal of the Respondent's records was not credible. Thus, the reasons relied on by the Respondent for both Gibson's suspension and his later termination were clearly communicated to him at the time that each of those events occurred.

My colleagues point out that, when the Respondent told Gibson that he was suspended pending investigation by the police, he was told that he would be reinstated if cleared. They further point out that Kozak, the Respondent's general manager, admitted that he had no knowl-

edge of the final determination, if any, made by the police, and that the Respondent introduced no evidence of any police (or other) report establishing who had removed the logs.

I see no inconsistency here. The fact that Kozak did not know what conclusion, if any, the police had come to about the theft does not establish that Gibson had been “cleared.” Indeed, the likelihood is that if he had been “cleared,” the police would have informed Kozak and/or Gibson of this fact.

In any event, the fact is that a criminal prosecution is not begun unless the prosecution believes that it can prove beyond a reasonable doubt that the crime was committed by the suspect. Obviously, Respondent can have a lower standard of proof. Respondent did not believe Gibson’s denials concerning the removal of the logs. In view of that, Gibson was not “cleared” in Respondent’s mind.

My colleagues assert that Respondent did not have a “policy” for discharging an employee for failing to give credible answers concerning missing property. The assertion has no merit. It does not seem reasonable to me that, in order lawfully to discharge an employee for (to put it gently) being economical with the truth about a matter as clearly important as the incident in question, an employer must have a “policy” in place stating that it will do so. Not every contingency need be covered by a formal policy or procedure. Providing an incredible explanation to one’s employer as to one’s role in the unauthorized removal of the employer’s records is egregious misconduct. The fact that Respondent had no express “policy” against it does not preclude Respondent from acting with respect to that conduct.

Based on the above, I find that the Respondent has established lawful motives, i.e., Gibson’s misconduct, for the suspension and the termination. I find that the Respondent has shown that these adverse actions would have occurred irrespective of Gibson’s union activity. I would therefore dismiss the allegation that the Respondent’s suspension and discharge of Gibson were unlawful.

My second disagreement with my colleagues concerns the Respondent’s increased security measures during the organizing campaign. My colleagues, reversing the judge, find that the increased security was part of a coercive strategy to discourage support for the Union, and that the Respondent violated Section 8(a)(1) of the Act by increasing its use of guards during the campaign. I agree with the judge, and I therefore disagree with my colleagues.

As an initial matter, I note that my colleagues concede that there is no persuasive evidence that the Respondent engaged in surveillance of the employees’ union activities. They nevertheless find that the Respondent’s expansion of its guard force was unlawfully coercive. As support, they assert that “the Respondent’s managers and

representatives seized every opportunity to attempt to frighten employees into withdrawing their support from the Union.” Of course, the phrase “every opportunity” is an overstatement. Many of the actions taken by Respondent are found lawful in this case. Further, even as to the Respondent’s conduct that is found unlawful, I would not jump from that finding to a finding of improper motive for the increased security. Rather, I would rely on *the judge’s findings* on the specific matter of increased security. In this regard, the judge credited Respondent agent’s testimony that Respondent acted out of a reasonable fear of union misconduct similar to that which allegedly occurred at a union organizational drive at another restaurant. My colleagues seek to discount this finding by stating that Respondent did not tell employees about this alleged misconduct. However, this “failure to tell” does not undermine Respondent’s credited explanation that the misconduct elsewhere was in fact the reason for the increase in security. Further, even if Respondent improperly accused the Union of some misconduct at Respondent’s restaurant, this does not belie the credited testimony that Respondent had concerns which prompted it to increase security.

As noted above, the main thrust of my colleagues’ opinion is that the increased security was unlawfully motivated, i.e., that it was part of a coercive “strategy” to discourage support for the Union. However, as discussed above, the judge credited Respondent’s explanation as to the lawful reasons for the increased security. Apparently recognizing this fact, my colleagues shift gears and say that the increased security had a coercive *effect* on the union activity of employees. They cannot support even this proposition, for there is insufficient evidence of actual surveillance of union activities. Instead, my colleagues note that employees were not *told* of the lawful reason for the increased security. In sum, my colleagues appear to be of the view that a lawfully motivated increase in security becomes unlawful if the employees are not told of the lawful reason for the increase. They cite no authority for this proposition, presumably because there is none.

As to the increased security itself, I agree with the judge’s analysis and with his distinguishing of the instant case from *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), and *Parsippany Hotel Management Co.*, 319 NLRB 114 (1995). Accordingly, I find that the Respondent’s increase in security was lawful.

My final disagreement with my colleagues concerns the alleged solicitation of grievances by Haskell and Melman. Granting my colleagues’ factual premises, I nevertheless agree with the judge’s finding that the activities of Haskell and Melman were not unlawful.

My colleagues note that, under regular procedures, lower level officials of Respondent deal with employee grievances. My colleagues then note that, during the campaign, higher level officials promised to look into the

grievances of two employees. Based on that change, they find a violation. I disagree. It is not unusual for high-level officials of a company to visit a facility in response to an organizational campaign, even if they do not regularly do so. Clearly, such visits are not unlawful. If, in the course of such visits, those officials promise to look into specific employee grievances, I would not necessarily condemn that as unlawful, even if the regular procedure is to have such matters initially considered at lower levels. In my view, such conversations are a normal consequence of a high-level visit which, as discussed, is not itself unlawful.¹

Contrary to my colleagues, my view is not "speculation." Rather, it is based on experience. My colleagues correctly point out that neither high-ranking nor lower-ranking management officials may lawfully engage in conduct that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. However, by so phrasing their rationale, my colleagues have "put the rabbit in the hat." The *issue* is whether these officials of Respondent solicited grievances and promised to remedy them as an inducement for employees to abandon the Union. It is my view that they have not done so. I would, accordingly, dismiss the allegation that the Respondent unlawfully solicited grievances, in violation of Section 8(a)(1) of the Act.²

APPENDIX

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

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

WE WILL NOT unlawfully and disparately prohibit employees from engaging in nondisruptive, union-related discussions while nonserving duties, and WE WILL NOT discipline them therefor.

WE WILL NOT suspend or discharge employees because of their concerted protected activities or their activities on behalf of Hotel Employees and Restaurant Employees Union, AFL-CIO, Local 1.

WE WILL NOT increase security to discourage employee support during a campaign by the above-named Union, falsely tell our employees that the Union is responsible

¹ If it were shown that the high-level officials granted the grievances, contrary to the usual procedure of letting such matters percolate up for lower levels, a different result might obtain. However, that is not the case here.

² I agree with my colleagues that the Respondent violated the Act by disparately prohibiting employees from discussing the Union. I note that there is no contention by the Respondent that it had a practice or policy of allowing solicitations for charitable purposes but not for other purposes.

for bomb threats to employees, or explicitly or implicitly warn that they are in imminent danger of union violence.

WE WILL NOT solicit and promise to resolve employee grievances in order to dissuade employees from supporting the above-named Union.

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

WE WILL, within 14 days of the date of the Board's Order, expunge from any of our files and records, wherever located, the disciplinary warnings issued to Gretchen Grant Inniss, Jill Ricci, and Greg Calvird in November 1994, and all references to such personnel actions, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the warnings will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, offer Brian Gibson full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Brian Gibson whole for any loss of earnings and other benefits suffered as a result of his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Brian Gibson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

6 WEST LIMITED CORP., AND ITS PARTNER
LETTUCE ENTERTAIN YOU ENTERPRISES, INC.,
D/B/A TUCCI MILAN

Denise Jackson, Esq., for the General Counsel.

Richard L. Marcus, Esq. (Sonnenschein, Nath & Rosenthal), of Chicago, Illinois, for the Respondent.

Sarah Vanderwicken, Esq. (Despres, Schwartz & Geoghegan), of Chicago, Illinois, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The unfair labor practice charge in Case 13-CA-32908 was filed against 6 West Limited Partnership, and Its Partners, and Lettuce Entertain You Enterprises, Inc., General Partners, d/b/a Tucci Milan, (the Respondent)¹ by Brian Gibson on October 17, 1994, alleging that he was unlawfully suspended on October 15, 1994, because he engaged in union and/or protected concerted activities. A first amended charge was filed on June 2, 1995, to allege Gibson's termination of November 4, 1994, by the Respondent as unlawful. A second amended charge was also filed on October 17, 1996, alleging that on or about October 19, 1994, and after learning of Gibson's union activity, that the

¹ The Respondent's name appears herein and in the caption as corrected by the pleadings.

Respondent hired security personnel, that one of the security persons was Robert Davino, also a city of Chicago police officer, that Davino telephoned Gibson at his home and threatened to arrest him on false charges of theft of a manager's log in retaliation for his activities on behalf of Hotel Employees and Restaurant Employees Union, AFL-CIO, Local 1 (the Union or HERE.)

Case 13-CA-12971 was filed against the Respondent by Jill Ricci on November 7, 1994, alleging that it disciplined her on November 3, 1994, because of her union and/or protected concerted activities. It is also alleged that employee Greg Calvird was disciplined by the Respondent for engaging in union and/or protected concerted activities. A first amended charge was filed on May 30, 1995. It alleged that on or about November 3 and 4, 1994, the Respondent unlawfully applied its no-solicitation policy, and that on or about November 3 and 4, 1994, the Employer unlawfully disciplined its employees Jill Ricci and Greg Calvird, because of its disparate application of its no-solicitation rule and/or because Ricci and Calvird engaged in union and/or protected concerted activities. A second amended charge was filed by Ricci on October 18, 1996, alleging that Ricci and her roommate, Brian Gibson, received threatening phone calls to the effect that their house would be blown up and that the next day, the Respondent's manager coercively announced to employees that the bomb threat was from the Union and that Ricci was so frightened that she was forced to leave town.

The charge in Case 13-CA-33047 was filed by Gretchen Grant² on December 6, 1994. It alleges that about November 7, 1994, the Employer disciplined Gretchen Grant because of her union and/or protected activity. On May 30, 1995, her charge was amended to allege that about November 7, 1994, the Employer unlawfully applied its no-solicitation policy and unlawfully disciplined its employee, Gretchen Grant, because of its disparate application of its no-solicitation rule and/or because Grant engaged in union and/or protected concerted activities.

The charge in Case 13-CA-33455 was filed against the Respondent by Joseph Carmolli on June 5, 1995. It alleges that on or about May 12, 1995, the Respondent issued a written warning to Carmolli and on or about May 18, 1995, terminated him in retaliation for his support of the Union, and/or in retaliation for his displaying an item bearing the Union's insignia at work, and/or because of his involvement in protected concerted activity.

The Regional Director, having found merit to the allegations in Cases 12-CA-32908, 13-CA-32971, and 13-CA-33047, issued a consolidated complaint against the Respondent alleging violations of Section 8(a)(1) and (3) of the Act, exclusive of the conduct of Officer Davino, security personnel, and Kozak's bomb threat attribution. On April 26, 1995, the Regional Director, having found merit to allegations in Case 13-CA-33455, issued the order consolidating cases, amended consolidated complaint and notice of hearing, (the complaint), alleging violations of Section 8(a)(1) and (3) of the Act.

The complaint also alleged as violations of Section 8(a)(1) of the Act an alleged threat of unspecified reprisal by the Respondent's agent and employee resource counselor, Jacqui Glasby on November 4, 1994, to an employee in a telephone conversation; and on January 8, 1995, an alleged threat of termination of

employees by the Respondent's agent and senior vice president, Charles Haskell, because of the employees' union activities. The complaint further alleges that in early January 1995, Haskell and the Respondent's agent and partner, Richard Melman, solicited employee grievances and that Haskell impliedly promised the remedy thereof and granted benefits to employees, including the removal of disciplinary personnel file writeups of employees, to discourage the union activities of its employees.

The complaint was amended at the trial to allege that from October 1994 through January 1995, security personnel hired by the Respondent engaged in surveillance of its employees' union and/or protected concerted activities, for which purpose they were hired, as well as for the purpose to "stifle the employee's union and/or protected concerted activities." The amendment alleged further that in October 1994, the Respondent, by its agent Davino, threatened employees with arrest because of their union and/or protected concerted activities. Finally, the amendment alleged that on December 22, 1994, the Respondent, by its agent and general manager Jeff Kozak, "in an employee meeting, attributed the above referenced bomb threat to the Union in order to disparate [sic] and undermine the Union in the eyes of its employees." The amendment was made in the form of a pretrial, "Notice of Intention to Amend [the] Amended Consolidated Complaint," dated October 24, 1996. The last amendment on its face refers to a bomb threat allegation attributed to Davino which had been withdrawn at trial prior to the offer. However, the parties litigated the issue of whether Kozak engaged in the same conduct but in reference to an anonymous bomb threat, i.e., he attributed an unidentified person's bomb threat to the Union.

The Respondent timely filed answers to the complaints, the last of which was dated May 3, 1996. All the Respondent's answers, including that made on the record to the most recent amendment, denied the commission of any unfair labor practice.

The issue raised by the complaint as amended were litigated before me at trial held in Chicago, Illinois, on October 30 through November 1, 1996, and December 17 and 18, 1996.

The parties were given full opportunity to and did adduce documentary, stipulated, and testimonial evidence. Briefs were received by the Judges Division no later than February 25, 1997.³

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of fact and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs and my observation and evaluation of witnesses' demeanor, I make the following findings.

1. The business of the Respondent

At all material times, the Respondent, a limited partnership, has been owned jointly by 6 West Limited Corp. and Lettuce Entertain You Enterprises, Inc., doing business as Tucci Milan. The Respondent, with an office and place of business in Chicago, Illinois (the Respondent's facility), has been engaged in the business of operating a restaurant. During the past calendar

² Since the events herein, Ms. Grant has married, and her last name changed to Innis. She will be referred to herein as Gretchen Grant.

³ The unopposed motions to correct the transcript by the Respondent, dated January 15, 1997, and the Charging Parties, dated February 22, 1997, are corrected.

year, the Respondent, in conducting these business operations, derived gross revenues in excess of \$500,000. During this period of time, the Respondent, in conducting its business operations, purchased and received at its Chicago, Illinois facility products and goods valued in excess of \$5000 directly from points outside the State of Illinois.

It is admitted, and I find that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times, Hotel Employees and Restaurant Employees Union, AFL-CIO, Local 1 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Tucci Milan is an Italian restaurant which is part of the Lettuce Entertain You Enterprises (LEYE) chain, which consists of over 20 restaurants in the Chicago area. Tucci Milan was the focus of a union election campaign by employee supporters of HERE in the fall and early winter 1994, which culminated in an election in January 1995. The employees of the Respondent voted against representation by HERE. The Union did not file objections to the election.

1. Brian Gibson's suspension, termination, and related events

a. The suspension

In late August or early September 1994, Jeff Kozak, general manager of Tucci Milan, began to prepare the restaurant's budget for the following year. Part of this process involved examining the manager's log of Tucci Milan, which is a three-ring binder containing a one-page synopsis of business for every day that the restaurant is open, as well as managers' sometimes derogatory and embarrassing comments on employee and customer's behavior and personalities. It is also used as a tool for business prognostication. The current log for the present and prior year is kept in the manager's locked office and contains one-page summaries of each business day usually dating back 1 to 2 years. When Kozak examined the log for the previous year, he discovered that large number of pages, sometimes covering entire months, were missing. He asked every person who had access to the office if they knew the whereabouts of the logs, including the weekday and weekend office managers, the restaurant's chef, Tucci Milan's managing partner, Howard Katz, former general manager Steve Schwartz, LEYE President and Founder Richard Melman, and all of Tucci Milan's other managers. None of them were aware of the log's disposition. At the time, management did not suspect theft or that an employee might be involved although from time to time, employees were given keys to the office to use the Xerox-type copy machine for short periods of time. No immediate investigatory action was taken with respect to employees either by referral to the Chicago City police or by use of the Respondent's private security service, which it claims it had previously engaged for other purposes. That service, WBE Security, was staffed by off-duty city of Chicago police officers. Those assigned to the restaurant were selected and supervised by off-duty patrol car police officer, Robert Davino, Kozak's friend of long standing.

Also in early summer or late August 1994, 19 employees of the Respondent met at the residence shared by servers Brian Gibson and Jill Ricci to discuss various work-related problems they perceived at the restaurant, including health and safety conditions, the alleged lack of effectiveness of the Respondent's open-door policy as a grievance resolution mechanism, and the distribution of tips received at a large 1993 Christmas party sponsored by customer Anita Scott. Attendees of this meeting were shown a copy of a document entitled "Constructive Criticism," which consisted of a cut-and-paste compilation of comments taken from the Tucci Milan manager's log and which denigrated employees and some customers.⁴

Gibson testified that he had received copies of the missing manager log segments in the mail at an unspecified time in the summer 1994. He testified that he concluded that the information in the log segments was so important as to warrant sharing it with his coworkers regardless of the source. The copy of the segments was shown but not given to 19 employees in attendance. Ricci and servers Greg Calvird and Elaine Gonzales testified that they each had also received a copy in the mail. The contents were discussed at the meeting. Attendee server Gretchen Grant stated that she would contact OSHA; other attendees stated they would seek advice from private resources. Gibson and Calvird stated that they instead would call the Union and inquire of their rights. Gibson testified that within 1 week of the meeting, he contacted the Union and he and Calvird met with Union Representative Terry Maloney and discussed employee complaints, the benefits of union representation, and the mechanics of organizing the Respondent's employees. Thereafter, a meeting was arranged for and held at the Gibson-Ricci residence in September 1994. There were about seven employees present at the September meeting, including Jill Ricci, Gretchen Grant, Elaine Gonzales, Greg Calvird, Brian Gibson, and server Sarkis Akmakjian. At this meeting, they all signed union authorization cards and became known as the union organizing committee at Tucci Milan. There were also three union representatives present at this meeting, including Maloney. In addition to attending union meetings, these committee members also spoke with other employees, at locations including the restaurant, about the Union, encouraged employees to attend union meetings, handed out authorization cards, and called employees at home.

About Saturday, October 8, there was a union meeting after 1 p.m. at Mother Hubbard's, a bar across the street from the Respondent's restaurant, at which the participants gathered in groups at several different tables. Gibson, Ricci, Gonzales, Sarkis Akmakjian, and Calvird had invited other Tucci employees to the meeting. During the meeting, Gibson distributed copies of "Constructive Criticism" to the attendees as evidence of why the Respondent's managers could not be trusted. Gibson could not recall whether he or someone else had made copies of the document. During the meeting, Gibson further urged the need for union representation and stated that they were conducting a union drive. An invited attendee also present was bartender Ken Schrader, to whom Gibson gave a copy of the pastiche and with whom Gibson engaged in a private dialogue, spilling over onto the street after the meeting.

⁴ Only Gibson clearly placed the log discussion at this meeting.

It is undisputed that Schrader became volubly upset and repeatedly characterized the log segments as stolen property.⁵

Schrader testified that he looked at the document and recognized it as pieces of the manager's logs and that he was upset to discover that several of the cut-and-paste segments referred to him as well as certain customers in an unflattering manner. Schrader then questioned Gibson as to the source of the logs. Gibson first told Schrader that "you don't want to know," but when pressed, replied "it's amazing what you can find in the garbage." Particularly upsetting to Schrader was Gibson's "sly smile" that accompanied his explanation. Gibson's version is that he responded to Schrader that he did not believe that the pastiche was stolen property because the reproduction itself was not stolen. He further testified that he argued to Schrader that someone else, such as a manager with office access, could have obtained the log segments and that "maybe someone threw it out in the garbage."⁶ Schrader was not assuaged. He concluded that the log segments "obviously was not found in the garbage," but had been stolen. The next day before shift start, Schrader spoke to Katz in Katz' office and related the preceding day's conversation with Gibson. He quoted Gibson's garbage discovery claim and said that some "people" at the bar meeting have copies of the log and they wanted to seek union representation. He told Katz that he thought that he deserved better than to be back-stabbed with stolen property. He testified that he considered the use of a stolen log by Gibson as an unfair sneak attack on Katz who had accommodated Gibson's school schedule in the past. Schrader did not have a copy of the pastiche when he met Katz.

A few hours later, Schrader made the same disclosure to Kozak. Schrader later gave Kozak his copy of the pastiche. Several days later, as requested, Gibson spoke with Jacqui Glasby, an employee relations specialist employed by LEYE who is headquartered in Las Vegas, Nevada, and who was visiting the Respondent's Chicago restaurant operation. She is known by the Respondent's employees as the Respondent's "Employee Advocate."⁷

At a regular employee meeting 3 days later on about Tuesday, October 11, 1994, Katz announced that it had come to management's attentions that parts of the manager's log had been stolen. He stated that two or three people had come forward who had received copies of the log, that the police had been contacted, and that the person responsible would be arrested. He also said that anyone with information about this should come forward or they would be considered accomplices. Katz then said that someone had contacted OSHA and that a visit from INS could be expected. He gave details of an INS raid that he said had taken place at one of the LEYE restaurants in Minneapolis, Minnesota.⁸ At the conclusion of the meeting,

⁵ It is disputed as to whether Schrader suggested that the real problem was manager Kozak and that problems could be resolved by physical violence instead of union representation, as testified to by Gibson and others.

⁶ Schrader did not recall whether or not Gibson suggested other sources for the log segments but claimed that Gibson offered no justification for its use.

⁷ Neither Katz nor Glasby testified. The testimony of the General Counsel's witnesses as to what they stated individually or at meetings was not effectively contradicted by any other witness.

⁸ A large proportion of "back of the house" employees, i.e., employees who do not have direct contact with customers, were Mexican.

two Chicago police officers arrived and went downstairs with Katz.

Brian Gibson was sick the following workday and did not work. However, while he was off work, he called Glasby in Las Vegas. Gibson told Glasby, whom he had never met, that the Respondent was threatening employees by telling what he considered to be unbelievable stories of INS immigration raids. Glasby told Gibson that she did not think that was the reason that he was calling. Gibson told her that he knew what his rights were. She responded that it sounded like he had been in touch with outside sources. Gibson did not respond. After speaking with Glasby, Gibson telephoned union agent Maloney and relayed his conversation with Glasby. In speaking with Maloney about the conversation with Glasby, Maloney concluded that the Respondent knew about Gibson's union involvement. Pursuant to Maloney's advice, Gibson prepared a written statement admitting his union organizing activities to present when he returned to work on October 15.

On Saturday, October 15, when Gibson was about to begin his 4 p.m. shift, General Manager Jeff Kozak told Gibson to follow him to the office. Gibson told Kozak that he wanted to have two witnesses with him. Kozak refused. Consequently, Gibson did not follow him. Several minutes later, Katz and Kozak came to Gibson and told him to come downstairs to the office. Gibson said that he was not refusing to go downstairs but that he wanted two witnesses. Katz then allowed Gibson to pick two witnesses. Gibson selected Greg Calvird and Gretchen Grant, and they went to the office.

Once in the downstairs office where Katz and Kozak were both present, Gibson read a written statement which he had prepared. The statement announced that a union organizing effort was taking place. At that moment, Katz said "that's fine and good," but that he was not aware of the union organizing and it had nothing to do with what they were to talk about. Katz then stated that Gibson had called in sick on Wednesday, October 13, and that he should have called in before 8 a.m. as indicated in the training manual. Katz then showed Gibson the tipping envelope from Tuesday, October 11, and said that Gibson had not tipped anyone and asked Gibson if he intended to tip out. Gibson responded that he had never failed to tip out in the past and that he did not believe that he had forgotten on October 11. Gibson said that the envelope does not go directly from his hands to the bookkeeper's and that in the past, there had been incidents where tips had been taken from envelopes.

Katz next read a statement that said Gibson had been seen passing out stolen documents the previous Saturday night, and that a police investigation was underway. Katz proceeded to ask if Gibson had stolen the manager's log. Gibson said he had not. Katz asked Gibson if the log was in his possession and if he had ever seen the document, and again Gibson said no.⁹ Gibson did not admit to Katz to possessing or passing out the cut-and-paste compilation of the logs. He neither explained to him how he had obtained a copy of the log nor even admitted to

⁹ Gibson was an evasive and unresponsive witness on the subject of the missing logs, but Kozak did not contradict his testimony. Gibson testified that he did not consider his responses to Katz as untruthful because he explained that the pastiche was "potentially copies of something that may or may not have been stolen—I don't know—so, I couldn't say yes to something like that [in the context of a police investigation]." After much evasion, he admitted he was aware Katz was referring to stolen documents. Gibson justified his responses to Katz by saying that he, Gibson, was referring to the original log segments.

having a copy. He also did not admit to having seen any parts of logs. Katz left the room to make a telephone call. He returned and told Gibson he was suspended, pending a police investigation into the disappearance of the logs by the police. Katz informed Gibson that if cleared of the charges, he would be reinstated with backpay. After his suspension, Gibson continued to distribute copies of the pastiche. Thereafter, in October, Katz terminated his employment with the Respondent.

b. The security announcement

Four General Counsel witnesses testified inconsistently and in varying generalized, cryptic terms as to an announcement by Kozak at regular employee meetings of the hiring of additional security personnel on some unspecified date, probably in October. The General Counsel's witness Carmolli was not questioned about the issue.

Kozak testified that prior to the union campaign, the Respondent hired the services of WBE Security, which provided the services of one off-duty Chicago police officer per shift on Friday and Saturday nights as a precaution against disruptive customers or thievery. The officer was stationed on a regular basis at the bar located at the front of the restaurant near the hostess station. Kozak testified that upon learning of the onset of the Union's organizing activities in October, he and Haskell had a conversation with Glenn Keefer, the manager of Ruth's Chris Restaurant, about Keefer's experiences with the Union's prior organizing activities at the restaurant which involved disruptive incidents by union agents in the restaurant before and after a Board-conducted election. Keefer corroborated Kozak and testified specifically as to the incidents, one of which involved a preelection episode of loud, abusive, disruptive public misconduct by Union Agent Terry Maloney, for which the police were summoned. Keefer also testified that the second incident involved the union president. Keefer was not contradicted. Kozak testified that he was warned to be prepared for such conduct and, consequently, the same limited security service of one security officer for each shift was extended to each night of the week.¹⁰

The General Counsel contends that a more extensive security force was employed during the organizing campaign. WBE Security invoices were produced at trial by the Respondent pursuant to the General Counsel's subpoenae duces tecum. None were adduced into evidence to contradict Kozak. The testimony of General Counsel witnesses as to a greater deployment of security persons is generalized, impressionistic, and inconclusive. Grant testified that previously, she had seen Davino in the restaurant once a month but that from October to January, he was there a "couple of times" a week. Calvird testified that "faces were surfacing" which the employees did not recognize. Ricci testified that "strangers" were observed in the front, inside, and outside the restaurant. Server Sarkis Akmajjian testified that "more security" was hired, who were present more frequently and who "hanged out" outside the restaurant more than four times a week. Server Elaine Gonzales testified that in October 1994, an unspecified number of security personnel were seen outside and around the restaurant, near the telephone, and at the front near the hostess stand. She then testified that they would drift back near the pay telephones behind the hostess stand when the telephones were being used

¹⁰ Respondent's managers had also read newspaper articles with respect to alleged union connections to violence and the "mob."

by persons she did not clearly identify as employees. Significantly, hostess Ricci did not corroborate her, as did no one else. No witness testified just how they could identify these strangers as off-duty plainclothes security officers. Because of the vagueness of the General Counsel witnesses' testimony, its generalization, lack of mutually consistency, and lack of corroboration, I credit Kozak.¹¹

At regular employee meetings, some employees asked about the increased security presence and, according to varying accounts of employee witnesses, Kozak explained that it was engaged to provide employee transportation home and to avoid employee harassment (according to Grant); for employee protection (Ricci, Calvird, and Akmajjian); the safety of the restaurant in general (Calvird); and to avoid hassling of employees by the Union by escorting employees to their cars after work (Akmajjian).¹² Kozak and Davino testified that no instructions were given to the security officers to engage in surveillance of employees, and there was in fact no such surveillance. Gibson testified that after he was terminated, some unidentified man followed him from the restaurant to the Mother Hubbard's bar after Gibson had distributed some union leaflets.

c. The alleged Davino threat

It is undisputed that on or about October 18, Davino, at Kozak's instruction and from Kozak's office, telephoned Gibson at the Gibson-Ricci residence and engaged in a conversation wherein Davino inquired whether Gibson possessed the missing manager log segments, told him that the Respondent considered the document important and wanted them returned, and did not care how it was done. It is undisputed that there was no reference to the Union or to union activities. There is a credibility conflict as to whether Davino went further and made threats, inter alia, to arrest Gibson and to plant incriminating evidence in his home. I find the testimony and demeanor of Davino more convincing and credible.¹³ Gibson was a contentious, evasive, calculating witness who lacked the spontaneity usually indicative of candor. His testimony was internally inconsistent, and inconsistent with or not corroborated by prior affidavit testimony. I therefore conclude that Davino did not make the threats testified to by Gibson.

d. The Glasby confrontation

Later in the evening of the day of Davino's telephone call to Gibson, and even despite being suspended for possible theft, Gibson was invited by the Respondent to the restaurant to attend a meeting conducted by Glasby, who explained her function as an employee advocate and to advise employees of their rights during a union organizing campaign. After the meeting, Glasby and Gibson sat at a table and Gibson told Glasby of the call from Davino, the Union, and the missing manager's log, as well as an alleged conversation with an OSHA investigator. Gibson asked Glasby what she intended to do about it as an employee advocate. She promised to investigate. She then told

¹¹ Although Respondent did not adduce into evidence the WBE invoices upon which Davino was examined when he testified in corroboration of Kozak, the General Counsel, who had the burden of proof, did not introduce any of the subpoenaed documents to contradict Kozak and Davino nor to corroborate the testimony of General Counsel witnesses.

¹² Gonzales was silent as to just how the announcement was expressed and whether the purpose was stated by Kozak.

¹³ He was corroborated by Kozak.

Gibson that he had not been honest with her and had not been “loyal to the Company,” and that he had not been forthcoming with information. She accused Gibson of lying to Katz when questioned about the log. Gibson explained to Glasby that he did not consider his responses to be lies because he was asked specifically by Katz about stolen property which he did not have, i.e., the logs, and that he merely did not volunteer additional information, particularly when he would feel more “comfortable” talking to the police rather than a Respondent manager whose place, Gibson felt, was not “to assume the role of a police investigator.” Thereupon, Glasby told Gibson that he was “the instigator of all the trouble” and that he “should have come to her and told her the truth when she had asked me . . . and look at what’s happened here now; there’s security officers here, people are frightened; you know look what you have done.” She again urged Gibson to tell her the truth but stated if he did not, “it is going to be in the hands of the police and there is nothing I will be able to do to help you.”

According to Gibson, Glasby then made some unspecified remarks about unions, stating that she did not know how much Gibson knew about unions, but that she “had a lot of experience” and was “worried for” Gibson. After some further reference to Davino’s call regarding Glasby’s surprise to how Gibson was aware that it came from the Respondent’s office (of which Gibson was not aware until then), Glasby invited the suspended Gibson to come to the restaurant to hear a speech to employees to be given by Melman.¹⁴

e. Gibson’s discharge

On November 4, Gibson received a telephone call from Ricci who was at work. Ricci told Gibson that she had heard that he had been fired. Gibson had not heard this information and decided to call Glasby in Las Vegas.

During Gibson’s telephone conversation with Glasby, she told him that he would be receiving a termination letter in the mail in response to his question as to whether he had been fired. When Gibson asked why he had been discharged, Glasby stated that he had told “too many stories” about the missing manager’s log and that she just could not believe Gibson any more, and that he was “not loyal to the Company.” Glasby then made some unspecified “stories” about unions. She stated that Gibson “started this” and she was concerned about his and Ricci’s safety. Glasby then referred to an experience she had in Las Vegas where she had exited a casino shortly before it exploded “because the mob had targeted it” and “that the mob was involved with the Union,” that the Union “wanted to take over, there was a union drive, and the Casino was blown up.”

Gibson testified that Glasby told him more “stories . . . times when people called in bomb threats and they had found bombs outside in vans in front of hotels and casinos that were being targeted by the unions.” She told Gibson that she worried about him. He asked her about “police presence” at the restaurant. She responded that Gibson’s opinion of Kozak was based upon incomplete facts and Kozak “owed his life” to the police, but that she could not explain further. She concluded by saying that she was worried and that “the unions would offer you the sun and the moon but when it’s all over, they won’t know who you are,” and once again stated that she was worried, “but there was nothing she could do any more for me.”

¹⁴ During the campaign, Melman and other nonresident managers of the Respondent increased the frequency of their visits to and presence in the restaurant.

Gibson received a letter dated November 3, 1994, signed by Kozak stating in pertinent part as follows:

This is to advise you that your suspension, which commenced October 15, 1994 has been converted to a termination effective as of this date. We have taken this action because we have concluded that your explanation concerning your role in the unauthorized removal of Company records is not credible.

A final paycheck was enclosed, and Gibson was referred to the Respondent’s attorney if he had any questions.

Kozak testified that upon hearing Schrader’s disclosure, he immediately assumed “that Gibson was guilty of theft,” and that he had never trusted Gibson based upon a “gut feeling.” However, neither Kozak nor any other Respondent witness testified as to who made the suspension and discharge decisions and precisely why they had been made.

2. The solicitation discipline

The Respondent’s handbook of rules contains the following solicitation and distribution rules applicable in the restaurant¹⁵

SOLICITATION AND DISTRIBUTION OF MATERIALS

1. DISTRIBUTION BY EMPLOYEES AT WORK

No employee may distribute literature of any kind in work areas at any time before, during or after the work day. This rule does not apply to non-work areas.

No employee may solicit another employee to join or support any endeavor or project during his own work time anywhere on Company property; nor may any employee solicit another employee during that employee’s work time. This rule does not apply to non-work (free) time, such as breaks and meal breaks.

On about November 3, 1994, at the restaurant, Ricci spoke with three employees about an upcoming union meeting and solicited their attendance. The employees Ricci spoke with were busboy Modesto Castillo and servers Tim Vahle and David Magyer. Ricci told them the day, time and place of the next union meeting. Castillo, who does not speak much English, was on the clock at the time and stopped working to listen to Ricci. Ricci spoke with Vahle as he entered the restaurant. While it is unclear whether Magyer was on or off the clock when he spoke with Ricci, it is clear that each conversation lasted no more than 30 seconds and that each occurred before the restaurant opened for business.

The same day, at about 3 p.m., Kozak asked Ricci to join him at a table in the restaurant. Present with Ricci and Kozak, as a witness, was corporate employee Craig Hudson. When Ricci sat down, Kozak gave her a copy of a written warning. He said that two or three employees had approached him that Ricci had informed them of a union meeting, and they had felt harassed.¹⁶

Kozak then read the written warning and asked Ricci if she understood it and showed Ricci the Employer’s no-solicitation rule in the employee handbook. Ricci, who had never received a warning before, signed that part of the writeup acknowledging receipt of it.

¹⁵ The testimony of the General Counsel’s witnesses is uncontradicted with respect to this issue as to the essential details.

¹⁶ According to Kozak, they only told him that they felt “uncomfortable.”

Greg Calvird admittedly regularly solicited employees to support the Union, attempted to gauge their support of the Union, and urged their attendance at union meeting during his working time at the restaurant prior to November 4. On Friday, November 4, after Calvird punched in, Kozak asked to meet with him at one of the restaurant tables. Also present was Assistant Manager James Westphal. Kozak told Calvird that a couple of employees had come to him and complained about Calvird soliciting them about the Union at work. Kozak said that the solicitation had made them feel uncomfortable, and that Calvird was in violation of company policy. Calvird asked Kozak to identify the employees who had complained to him, stating that it was never his attention to harass, coerce, or intimidate anyone. Kozak refused to divulge the names of the alleged employees.

On about Monday, November 7, organizing committee member and server Gretchen Grant was scheduled to work the dinner shift. Shortly after arriving, Kozak asked to speak with her. Also present was Cheryl Baron, a management official who trained new employees. Kozak said that he was compelled to give Grant a disciplinary warning for solicitation. Like the other two union advocates to receive warnings, Grant's warning was already prepared. Kozak told Grant that employees had complained that she had harassed them about the Union. Grant did not deny the solicitation but objected that other employees had solicited employees on numerous occasions in the restaurant for various issues and had never received a written warning.

In the past, Grant, Ricci, and Calvird had all solicited employees, managers, and customers to support their outside interests. Pursuant to prior notice and approval of the manager, Ricci sold hand-painted bottles at the restaurant from the spring of 1994 until she left the restaurant in January 1995. She testified that if she was working when an employee or customer asked about the bottles, she was summoned to speak with that person about the bottles. Ricci did not punch out before discussions about her bottles, and she even sold a bottle to manager Westphal. She also testified that the money from bottle sales was collected by the Respondent's hostesses and managers.

Grant had similarly purchased theater tickets, raffle tickets, and Girl Scout cookies from other employees while folding napkins on worktime, when waiting for the first customer arrival; she had purchased Girl Scout cookies from Elaine Gonzales the previous spring. Katz himself was a frequent customer. In addition, Calvird, a glass blower, displayed and sold Christmas ornaments at the restaurant in December 1993, having received prior permission from Steve Schwartz, former manager of the restaurant. Calvird talked to employees and customers about the ornaments while on the clock waiting tables and on the restaurant floor.

3. The bomb threat attribution

a. The Melman meeting

About December 20, there was a Tucci Milan employee meeting at Shaw's Crab House, another Lettuce Entertain You restaurant. What transpired there is undisputed. Present for the Respondent were: Kozak, Haskell, and Melman. There were about 20 employees present. In front of each employee was a letter which had allegedly been sent by the Union to the Respondent's frequent diners, informing them of the union drive. The letter purported to be authored by the employees of Tucci Milan and warned the frequent diners that they might be asked

to rate server performance for management and might be subpoenaed to testify in a court proceeding. It was on purported union stationery with a union letterhead.¹⁷ Melman asked if anyone knew who had written the letter. Ricci raised her hand and said that she did not feel that employees had written the letter as the issues in the letter were not the issues that led the Respondent's employees to contact the Union. She also said the Union would not send out such literature without the approval of the employees and that she had never seen the letter before nor did she agree with it. Melman then made a reference to "the problem employee" who had been suspended. Ricci asked why Melman was referring to and accusing Brian Gibson. She received no response. Before the meeting ended, Melman told the employees that the restaurant would send out its own letter in response to the Union's frequent diner letter and read a proposed response to them for their approval.

After leaving Shaw's Crab House, Ricci walked back to Tucci Milan. There, Kozak asked Ricci what she thought of the meeting and the letter. Ricci testified that she told him that if the letter came from the Union, she would be very upset, and that she was going to try to call the Union that night before she left town the next day for the Christmas holidays at her family home in Rhode Island. Ricci testified that she went home without ever contacting the Union. Kozak did not contradict Ricci's testimony.

b. The telephone threat

Between 9 and 10 p.m. on the evening after Melman's speech, Ricci's roommate, Gibson, answered the telephone at their residence. The caller asked Gibson if he could "fry eggs on Jill's car," told him that he would see Brian in jail, and that the caller was going to sodomize him. Brian hung up and reported the substance of the call to Ricci who was present. Ricci returned the call by dialing "*69" on the telephone. She then said to the caller, "who is this," and he answered "who the f—k is this." Ricci told him that she was the person whose house he had just called, told him not to ever call there again, and hung up the telephone. Within several minutes, the same caller again called, and Gibson again answered the telephone. The caller threatened that he knew where they lived, would come to their house, and blow it up.

That night Gibson and/or Ricci called the police, and the call was automatically traced. The next morning before leaving for Christmas vacation in Rhode Island, Ricci spoke with coworker Manao DeMuth and Assistant Manager James Westphal and told them about the bomb threat. Westphal asked if Ricci had any idea where the call had come from; Ricci said she did not. He then asked if Ricci would mind if he told Charles Haskell what had happened; Ricci said she did not.¹⁸

c. The attribution

That evening or the following evening of December 22, there was a servers' meeting conducted by Kozak. After conducting the regular restaurant information portion of the meeting, Kozak told the employees that he had something to tell them about

¹⁷ The Frequent Diner Program rewards regular customers of LEYE restaurants for their patronage by giving them coupons, bonuses, and free meals based on the amount of money they spend over a given period of time, much like airline frequent flier programs. Ricci testified that they are considered to be very important customers. She also testified that she felt that the letter reflected adversely on the employees who heavily depend upon gratuities of frequent diners.

¹⁸ Neither Haskell nor Westphal testified.

Ricci.¹⁹ Kozak told the employees that the evening before, after meeting about the frequent diner letter, Ricci had gone to the union office to confront them about the letter and had had an argument with the union representatives, saying she did not want to be involved with them any more. Kozak told the employees the union people had threatened Ricci. Kozak said that Ricci had left the union office, gone home, and later the same evening, she had received a bomb threat. Kozak said that Ricci thought the call was from the Union and left town for fear of her life. He told the employees that the union does things like, that they are monsters and thugs, and that the employees ought to be really careful with the kind of people with whom they get involved. Gonzales spoke up at the meeting and stated that she did not believe what Kozak had said about Ricci because “the five of us” employee organizers were in contact with the Union and would have known about it.²⁰ She stated to the group that she was aware that Ricci was leaving town for a holiday, parental-home visit, and not for fear of her life.

On her return from her holiday vacation, Ricci met with Kozak and tendered her notice of resignation of employment. According to her testimony, she accused Kozak of falsely attributing the bomb threat to the Union and falsely describing a confrontation that she never had with the Union. Kozak denied that she made such admonishment. It is undisputed that she subsequently authored a letter to all her former coworkers wherein she denied Kozak’s statements about her, the Union, and the bomb threat. I credit Ricci as more certain and convincing on this issue.

4. The January 1995 coercion

a. The solicitation and remedying of grievances by Melman and Haskell

The following events are based on the uncontradicted testimony of General Counsel witness Akmakjian. A few days prior to the NLRB election of January 13, 1995, Akmakjian was instructed by Haskell that Melman wanted to speak with him. During their conversation, Melman asked Akmakjian how he felt about working at Tucci Milan. He replied that overall, he was happy but that there were some problems, and he raised the issue of the 1993 Anita Scott Christmas party in which he claimed employees did not get the entire tip left for them. Melman said that Haskell had spent a long time on the issue and, to the best of his knowledge, the matter was resolved but he would look into the matter again. Akmakjian also told Melman that there was disparity between the treatment of employees. As an example, he told Melman that he had arrived 5 minutes late for work and Kozak had reprimanded him and sent him home. Akmakjian also told him that employee Tim Vahle, who had arrived to work 50 minutes late and was chronically late, had never been disciplined at all.

¹⁹ There is a credibility conflict between Kozak and General Counsel witnesses Grant, Gonzales, and Akmakjian as to what Kozak told the employees. Although Kozak was no longer employed by the Respondent, I found that Akmakjian was the least disinterested and most spontaneous and convincing witness. He corroborated Gonzales and Grant. Kozak periodically amended his testimony with the observation that the events occurred several years ago, and he thus lacked certitude. I therefore find the General Counsel witnesses more credible on this point, and I based the fact finding upon their testimony as to what Kozak stated at the meeting.

²⁰ The five organizers consisted of Ricci, Gibson, Grant, Gonzales, and Calvird. Significantly not included was Carmolli.

Before the meeting ended, and since this was the first time that Akmakjian had met Melman, he asked what Melman had heard of him. Melman said that he had only heard good things. He also told Akmakjian that he was only one of two employees with whom Melman had spoken and who had raised specific issues and problems, and Melman thanked him for this. The meeting ended by Melman telling Akmakjian that should he have any problems, to contact him directly on his private telephone number.

Within one-half hour of speaking with Melman, Haskell approached Akmakjian and said that the warning Akmakjian had received for coming late to work had been purged from his employee file.

Despite his promise, Melman never did give Akmakjian the private telephone number. Kozak testified that the warning had not been removed from Akmakjian’s file and he had never been instructed to remove it.

b. The January 1995 threats, solicitation of grievances, and promises by Haskell

The following findings are based on the uncontradicted testimony of Gonzales.

Elaine Gonzales began working at the restaurant in about September 1989 when it first opened. She remained an employee with the Respondent until about August 1995. Gonzales, with Gibson, Ricci, Calvird, and Grant constituted the organizing committee.

The evening before the NLRB election, Haskell asked to speak with Gonzales at one of the tables. Haskell told her that a rumor was circulating that the Respondent would conduct a “cleaning of the house” the Monday after the election. He said that he wanted to respond to the rumor, but that since he would not speak with employees as a group 24 hours before the election, he would speak with employees individually. He told Gonzales that the Respondent could have terminated the union sympathizers and padded the payroll on a 42-day window before the election, but had chosen not to do that and would not retaliate against prounion employees. Haskell then talked about four issues—the Anita Scott gratuity issue; the manager’s log, and the fact that there were seven union restaurants and not four as the Respondent previously reported to employees, and the “open door” policy. With regard to the Anita Scott gratuity issue originally raised to management by Gibson and another server, Haskell offered to show Gonzales a document that had been composed relative to the gratuities calculation. Gonzales rebuffed him with the remark that she had worked the party and could explain it to him. He then referred to another document in his possession upon which were entered calculations. Gonzales told him he did not have the correct information because she had seen the contract for the party. Haskell attempted to justify the calculations which supported the original gratuity distribution, based on former Manager Schwartz’ documentation. Gonzales argued further, inter alia, pointing out that the employees who had served the party had previously confronted Schwartz, pointing out to him that the client had announced an intent to pay \$300 more in gratuities beyond the \$600 called for in the contract. Gonzales again pointed out that Haskell had not considered the original contract. The conversation ended on that issue when Haskell stated that he would “look into that and go down into the office and see if they had the original contract.”

With respect to the missing manager's logs, Haskell stated that the Respondent had erred by permitting managers to record "a lot of stupid things." Gonzales argued that the recordation was not merely wrong but was slanderous.

The third point raised by Haskell was a conversation of the number of restaurants he had identified in an earlier, pre-election campaign handout as being union-represented.

The final point raised by Haskell was his acknowledgment of the "breakdown in policies and other systems" the Respondent had utilized for soliciting and remedying employee grievances. He stated that he now realized that employees were afraid to fill out the grievance forms referred to as "MOTOs," were afraid to talk to managers in the step-by-step processing involved, were afraid to attend the breakfast meetings held for the reception of grievances, and were afraid to meet with managers such as himself and Glasby in the preexisting "open door" grievances process.

It is unclear exactly when Gonzales raised the point, but she referred to a reference in the log pastiche which alluded to her \$1000 medical bills for a fall she had sustained in the restaurant. Haskell asked her whether she had sustained \$1000 in medical bills. She answered that management should have asked her that question long ago, but instead had denigrated her as having caused her own injury until OSHA had investigated and cited the Respondent for using improper floor wax. She told Haskell that, thereafter, Kozak became attentive to her physical safety.

Haskell went on to discuss the breakdown in the open-door policy and suggested that the real reason employees vote for union representation is that they are voting against management. Gonzales suggested that another reason is that when the open-door policy is futile, an employee needs "outside sources," and she again alluded to her own situation regarding her fall injuries and that nothing was resolved about the Anita Scott party complaint raised by Gibson until the union drive, when management agreed to look into it. Gonzales also told him that the medical bills were paid by her own health insurer. Haskell related that he would investigate why the bills had not been paid by workers' compensation insurance. She asserted that going through Glasby to Melman had been futile and employees needed a "voice" and a "watch dog" and a "grievance procedure that wouldn't result in people just being fired for a variety of reasons that didn't seem to add up to the other employees."

The meeting ended by Haskell's narration of an unspecified anecdote reported to him by his wife regarding the Union's alleged connections with "the mob" and his assertion that Gonzales was "aware of these sorts of things." She responded that yes, she had seen Xerox-type reproductions of alleged union violence distributed by the Respondent during the campaign. She asserted to him that she and Calvird had done their homework and had visited the public library to learn that the Union was not related to the violence described in those articles. She argued, *inter alia*, "Until research proves that the people I'm associating with are involved with the mob, I would not believe hearsay, as well . . ."

The following day, Gonzales and Grant served as the Union's observers at the Board-conducted election which the Union lost.

5. The discharge of Joseph Carmolli

Server Joseph Carmolli began his employment with Tucci Milan in January 1993. Carmolli testified that he attended sev-

eral meetings during the course of the organizing drive, including the Mother Hubbard's bar meeting at which Ken Schrader was present. He also voted in the NLRB-conducted election on January 13, 1995. With respect to the meeting with Schrader, Carmolli testified that he talked with Gibson and Ricci "a bit," but he recalled no distribution of any kind at that meeting. No one identified him as an active union organizer or as an outspoken participant in any of the organizing meetings or at any of the Respondent-conducted employee meetings. Only Gibson identified Carmolli as a participant at the Mother Hubbard meeting. Ricci failed to do so when asked to identify participants. No witness identified Carmolli as a participant at any other union meeting.

On March 16, 1995, Carmolli was interviewed by Kozak in a private performance appraisal review at the restaurant. Carmolli testified that Kozak handed him a preprinted performance form and asked Carmolli to enter his own self-appraisal. Carmolli's self-entered check list entries reflected an excellent rating in ten categories, above average in six categories, and satisfactory in one category—"Tact/Courtesy"—with no "unsatisfactory" or "need to improve" entries. According to Carmolli, Kozak then entered his own handwritten comments in the space following each check mark. As to the "Tact/ Courtesy" entry, Kozak commented, "Watch tone when weeded."²¹ With respect to "attitude/cooperation," Kozak wrote "watch mood swings." Elsewhere, Kozak's comments appear to clearly endorse six of the excellent ratings. In other entries, Kozak wrote as Carmolli's strongest points: "(1) Gives great service consistently (2) Great interaction with/co-workers (3) Great initiative."

Carmolli testified that during the interview, Kozak asked how he felt about the union vote and the effects on the workplace, and he answered that he was glad that it was over, what is done is done, and that it was time to move on. Carmolli included the comments in the employee comment section of the review, "glad that what is done is done time to move on." Kozak denied saying anything about "the Union" during the interview. If that denial includes any reference to the Board-conducted election, which on its face it does not, I credit Carmolli. He was far more certain in his recollection of the interview, and there is no other explanation for his own entry: "what is done is done."

Further, Kozak testified that in every employee appraisal interview about that time, he asked for ideas as to how to "get the restaurant back to where it was before there was a drop in business around November of 1994," and that he said "a lot of things happened in the last six months and they're over; and they're history."

Kozak testified without contradictory rebuttal testimony that he observed Carmolli's job performance when Carmolli was "weeded" and in need of assistance when, instead of asking for help politely, he would yell and jump at his coworkers. He testified that Carmolli's job performance was directly related to whether he was subjected to problems in his personal life and when he was "happy in his personal life, as he was at this time, he was I think, a very good server, a great server and had a very positive attitude and [was someone] that I felt giving . . . cus-

²¹ A server is "weeded" if he or she gets too busy, and a manager determines that the server needed to be handling fewer tables. Kozak testified that Carmolli would get upset when things got busy, that he did not know how to ask for help, and would often snap at people unnecessarily. Kozak was not contradicted.

tomers too.” However, he testified further, again without contradiction, “On the other hand when he wasn’t feeling so good about his personal life, he was the other extreme. He was a very poor server. He complained constantly. He challenged management. It was also as though he were two people.”

The March 16 interview ended with a discussion of Carmolli’s commencement at a culinary school and an accommodation of his class schedule to a 3-night workweek.

On May 12, 1995, Carmolli was scheduled to work a private lunch party of 25 persons with another server. The other server was interested in leaving early, and the lunch party was a family style party which Carmolli concluded required less server involvement. Furthermore, he would not have to share the tips with another server. Carmolli asked Diaz, the manager, if he could work the party by himself. Diaz said it was possible but that he would have to check with Kozak. After checking with Kozak, Diaz told Carmolli that the party would remain a two-server party. Carmolli did not agree with the decision. He insisted to Diaz that he felt strongly about serving the party alone and “strongly urged” Diaz to go back to Kozak and get him to change his mind. Carmolli admitted that he was annoyed and upset with what he considered was a “very bad” decision by Kozak and that he had pressed Diaz to get the party. However, Diaz returned and stated that two servers must attend the party. Still upset, Carmolli worked the party without incident.

After the party was over, Carmolli was summoned to Kozak’s office where he received a written warning for insubordination from Kozak. The document was entitled a “Warning Notice of Rule Violations and Penalties.” Of the preprinted categories, “59—Refusal to follow instructions—insubordination,” was encircled. The following comment was entered by Kozak:

Insubordination: Challenging Management and Disrupting Fellow Employees With Negativity.

Under the “Remedy to Correct” section, Kozak wrote:

Stop Challenging Management and Start Maintaining a Positive Attitude While at Work.

The final entry by Kozak under the “Potential Consequence” category was:

Termination. This is a last and final warning.

It is undisputed that this warning was the first written warning Carmolli had received. The warning was in effect read to Carmolli. He testified that he apologized “for Kozak’s perception of my bad attitude,” promised to improve his attitude, and did not challenge the warning.

Thereafter, according to Carmolli, he spoke to Kozak only when spoken to. Carmolli, however, concluded that the reprimand had been unfair and had said as much to three or four coworkers to whom he had shown or discussed the reprimand, including servers Paul Adelstein and Mara Klein.

Kozak testified without contradiction to having verbally reprimanded Carmolli on October 12, before the final warning, about his insubordinate attitude, after which Carmolli merely explained that he was having a “bad day.”²² Kozak testified that he felt that by insisting on being assigned the sole server at the party, Carmolli was “challenging” him.

Carmolli worked May 17, 1995. At the end of the dinner shift, it is the custom of the servers to take care of their receipts and reports. Carmolli testified that the following events occurred. While going through receipts at a table, Carmolli was being teased by servers Paul Adelstein and Mara Klein for the earlier warning he had received. In addition to the verbal teasing and taunts and calling him “bad,” Adelstein drew an arrow pointing toward Carmolli and wrote, in 7-to-8 inch letters, the word “Bad” on butcher paper covering the table top. About the same time, manager Josh Mayo came around to sign the evening’s paperwork. Mayo, needing a pen, felt for one in his shirt pocket and did not have one. Carmolli, since Mayo did not have one, instinctively reached for one in his pocket and gave it to Mayo. Mayo took the pen, held it up and examined it. The pen read “H.E.R.E., Local 1, 55 W. Van Buren 4th F., Chicago, Illinois 60605 (312) 663-4373.” Nothing more was said.

The following afternoon, Carmolli reported to work as usual. He was immediately called to Kozak’s office. Kozak, Diaz, and another man unknown to Carmolli were present. Kozak said that they were letting Carmolli go because he was playing little games and his attitude had not changed. Carmolli asked for an explanation, but Kozak only told him that he had just given him his explanation. Carmolli was then escorted out of the building by the unknown person who was present at the meeting.

Mayo had been employed at the restaurant as a manager trainee on August 25, 1994, to the position of no. 3 manager until January 21, 1996, when he transferred to another LEYE restaurant. He testified differently to the events of May 17. As was his custom, he was checking the sales entries on the computer terminal at the north end of the restaurant by table 70 near the kitchen. He observed Adelstein and Klein seated at table 70. He testified he observed Carmolli drawing on the table covering in circular-like motion while the others watched, and they all laughed and giggled as they observed Mayo looking at them. Later in the evening, Mayo walked over to table 70 and observed drawn a large circle around the words “Bad Attitude” in 5-inch letters, with an arrow pointed at the seat where Carmolli had sat. He had observed no other person drawing at that table with a pen in hand. The next morning Mayo reported by telephone and a log memorandum what he had observed to Kozak.²³ Mayo reported back to Kozak that he felt “like we were being mocked as a management team,” and that Mayo felt “they were mocking us because of the fact that Joe [Carmolli] had previously been written up for having a bad attitude for similar circumstances.” He further testified, “And I felt that they weren’t taking it—he wasn’t taking it seriously and they were made a joke of it basically.”

Mayo testified that he took no pen from Carmolli that night nor did he observe that night a HERE logo pen. He admitted to having seen such pens before and after October 1994 in the restaurant in use by servers, including Carmolli, several weeks prior to May 17. Mayo testified that he did not speak to Carmolli about the pen, but instead asked Glasby and Kozak what they thought about it. He testified that Glasby told him that there is nothing that could be done about it because it was the employees’ right to use whatever pen they liked.

Mayo testified that he had been concerned that such use of pens by servers who have customers sign card charge receipts

²² Kozak’s corroborating contemporaneous notes of the incident were received into evidence.

²³ The corroborating contemporaneous notes were received into evidence.

with them would unnecessarily involve customers “into instances involving the Union,” such as the frequent diners’ letter which was shown to him by a customer. He explained that the use of the pens had made him feel “uncomfortable” because it could get into the hands of a customer. Thus, he raised the issue with Glasby.

Carmolli’s testimony was uncorroborated, as none of the servers at the table 70 incident were called to testify. Kozak testified that Mayo reported having had difficulty with Carmolli, did not know how to handle it, and related the May 17 incident as testified to by Mayo. Kozak testified that Mayo had not referred to the use of any HERE pen in the incident. In any event, Kozak testified without controversy that the servers had freely used such pens in the restaurant without restraint. Kozak testified that he terminated Carmolli because of his continuing bad attitude which was manifested by a “disruptive” challenging of Mayo after the final written warning.

Kozak testified without controversy that employees had previously been disciplined and discharged for insubordinate attitudes.

B. Analysis

1. The 8(a)(3) allegations involving Gibson (complaint pars. VI(a), (b), and IX)

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer’s adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The *Wright Line* burden of proof imposed on the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of circumstances, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent’s proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey’s Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

The General Counsel in this case has established that Gibson had engaged in protected concerted and union activities, and that the Respondent was aware of it prior to the suspension which occurred immediately thereafter.²⁴ The General Counsel has established that the Respondent was hostile to the union representation of its employees by the intense manner in which it campaigned against it. The General Counsel has established that the Respondent was hostile to Gibson’s involvement in it, as evidenced by Glasby’s admonishments to Gibson as an insti-

gator of the problems attendant upon organizing and that hostility was independent of the alleged log thievery.

The General Counsel has adduced evidence that the Respondent took no overt action about the alleged log thievery until after the disclosure of the use of the log in the union organizing drive. The evidence adduced establishes that Gibson denied the thievery to Katz. Despite his casuistic explanations of his conduct, the fact remains that Katz assured Gibson that he would be reinstated with backpay if the police investigation exonerated him of the thievery of the actual logs. There was no evidence that any investigation in any way implicated Gibson in the original alleged thievery. There is no conclusive evidence that thievery in fact had occurred, nor that the logs were not intentionally propagated by a spiteful manager, the chef, or past managers, all of whom had access to them, nor that the propagation had not somehow been accidental. The Respondent’s sole basis for Gibson’s culpability was Schrader’s accusation and Kozak’s “gut feeling,” which were known prior to the suspension notification and promise of reinstatement. No investigation took place thereafter, apart from what appears to be the perfunctory inquiry of the Chicago City police. There is no explanation as to why it was decided that Gibson was guilty of thievery. The Respondent does not take the position that Gibson was terminated for any other reason, e.g., the propagation of the pastiche as part of protected concerted and union organizing activities. Accordingly, it is unnecessary to deal with the issue of whether the Respondent, in good faith, believed that Gibson engaged in misconduct in the course of protected activities and whether the General Counsel proved in fact that Gibson did not engage in such conduct.²⁵

I find that the General Counsel has adduced sufficient facts to establish that Gibson’s suspension and discharge were at least in part motivated by his concerted protected and union activities.

The Respondent, nevertheless, argues that it possessed a justifiable reason for suspending and discharging Gibson despite the partial unlawful motivation. However, as the record stands, that the Respondent had at best only demonstrated that a justifiable reason may have existed for Gibson’s discipline and discharge. However, I conclude that the facts do not even demonstrate anything more than a thinly premised suspicion that Gibson may have been somehow involved in the use, if not the acquisition, of confidential documents. But even if the Respondent had proven the existence of a lawful motivation based on misconduct, which it has not, the Respondent has failed to adduce any evidence that the person who made the adverse employment decisions was in fact motivated by that misconduct. No Respondent witness testified that he made those decisions nor why he made them. It is not enough to demonstrate that a lawful reason may have existed; it must be proven that the lawful reason actually motivated the adverse action. *Pace Industries*, 320 NLRB 661, 662, 709 (1996), *enfd.* 118 F.3d 585 (8th Cir. 1997).

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging Brian Gibson as alleged in the complaint.

²⁴ Indeed, the suspension was announced to Gibson after Katz had made a telephone call, thus raising an inference that the suspension decision itself had not been made before the stolen log interview but after Gibson announced his union activities. Further, Schrader already disclosed union organizing activities on the context of Gibson’s pastiche distribution. Moreover, Respondent was aware of Gibson’s concerted protest of the Anita Scott tip distribution.

²⁵ Compare: *Burnup & Simms, Inc.*, 379 U.S. 21, 23 (1964).

2. The preelection threats, promises, and solicitations (complaint par. V)

a. *The threats by Glasby (complaint par. V(a))*

Complaint paragraph V(a) alleges that the Respondent's agent, Jacqui Glasby, on about November 4, 1994, "impliedly threatened its employees with unspecified reprisals because of their activities on behalf of the Union." The General Counsel bases the allegation on the November 4, 1994 telephone conversation between Glasby and Gibson, initiated by Gibson. Cited by the General Counsel in her brief as coercive is Glasby's statement to Gibson, as testified to by him, that "she was worried, that unions could offer you the sun and the moon but when it's all over, they won't know who you are and once again, she was worried but there was nothing she could do any more for me" The General Counsel characterizes Glasby's remark as "extremely threatening" and suggests that "adverse consequence could result from Gibson's and Ricci's union activity." She argues further that the statement is "suggestive of reprisal."

I conclude that there is nothing in Glasby's remarks suggestive of a reprisal by the Respondent against Gibson and Ricci. The threat of Glasby's remarks constituted a disparagement of unions in general and unions which attempted to organize Law Vegas hotels and casinos as "mob" related, i.e., organized crime and violence prone, as she had done elsewhere in her speech to employees which is not alleged as violative of the Act. Her remarks are suggestive that Gibson would be ill-served by the Union and, at most, that she worried about Gibson's and Ricci's involvement with a union which may be violence prone and "mob" related. Strictly speaking, the complaint does not allege that Glasby violated the Act by disparaging the Union or by predicting unions caused violence, nor that Glasby misrepresented the past conduct of the Union, nor does the General Counsel argue so in the brief. The Charging Party argues that Glasby's statements, including her references at employee meetings to newspaper articles reporting union violence, are unlawful misrepresentation. However, the accuracy of Glasby's representation was not litigated. The authenticity of the news articles she made available to employees at meetings, if they chose to read them, was not challenged. Mere disparagement of a union alone is not violative of the Act. *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). In *NLRB v. Gissel*, 395 U.S. 575, 615 (1969), the Supreme Court stated that an employer is free to communicate its views about unionism or a particular union "so long as the communications do not contain a 'threat of reprisal or force or promise of benefits.'"

I find nothing in Glasby's vague remarks to Gibson during the telephone call upon which to conclude that she even impliedly predicted that Gibson's and Ricci's physical well-beings were in immediate and real danger because of union violence. Accordingly, I find her conduct on November 4, 1994, not to have violated Section 8(a)(1) of the Act. Cf. *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 287-289 (1995), and cases discussed therein. See also *Salvation Army Residence*, 293 NLRB 944, 963 (1987). Accordingly, I find no merit to complaint paragraph V(a).

b. *The threats by Haskell (complaint par. V(b))*

The evidence relied on to support this allegation in the Haskell-Gonzales conversation on the day of the election, during which Haskell told Gonzales that because the Union had with-

drawn its petition, a 42-day window had existed during which the Respondent could have replaced prounion employees with prospective antiunion voting employees but chose not to do so. The General Counsel does not allege nor argue that Haskell violated the Act by falsely implying to Gonzales that it could have lawfully terminated prounion employees. The General Counsel alleges and argues that Haskell's comments, in which he explicitly assured Gonzales that the Respondent would not retaliate by discharging prounion employees as had been rumored, somehow contained an implicit threat. It is argued that Haskell's implication was that "just because the employer did not fire union sympathizers previously that they could still be fired." I do not agree. Regardless of whether Haskell did or did not mischaracterize the Respondent's rights, he explicitly assured Gonzales that the rumors of retaliation were false and there would be no retaliation. I find no merit to this allegation.

c. *The grievance solicitation, and promises, and granted benefits by Haskell (complaint paragraph V(c), d, and (e))*

The complaint alleges that on about January 8, 1995, Haskell solicited employee grievances which he impliedly promised to remedy. It also alleged that in early January 1995, Melman solicited employee grievances and Haskell granted benefits to employees, i.e., the removal of disciplinary writeups of employees.

Despite the complaint reference to "employees," the allegations are based upon two separate episodes, each of which involves only one employee. The first incident relied upon by the General Counsel is the conversation between Akmakjian and Melman in the restaurant within days of the election which Melman initiated by asking if the server was happy, the consequence of which was Melman's promise to "look into" what he had considered already resolved, i.e., the tip distribution of the Anita Scott party issue raised by Akmakjian, and Haskell's subsequent notification to Akmakjian of the purgation of a disciplinary memorandum from his file, also raised by Akmakjian.²⁶

The second episode is based on Haskell's conversation with Gonzales on the election eve wherein Haskell talked about four subjects which he (not Gonzales) raised, including the Anita Scott party gratuity, of which the original determination Haskell attempted to justify but finally agreed to look at the original contract. Haskell also stated that he would try to determine why Gonzales' private health insurer had paid for her medical expense rather than the workers' compensation insurance. He promised thus to obtain information but not to take any action.

He agreed with Haskell about the impropriety of the recording of certain subjects in the managers' log and that the existing grievance processing system was faulty. He made no explicit promise to either take corrective action or to look into the subjects.

In *Uarco, Inc.*, 216 NLRB 1, 1-2 (1974), the Board stated:

[T]he solicitation of grievances at preelection meetings, carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the sollicita-

²⁶ The fact that Haskell apparently did not keep his promise is irrelevant to the issue as to whether an unlawful promise was made.

tion of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

In *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), the Board said:

Where, as here, an employer who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

In *Lasco Industries*, 217 NLRB 527, 531 (1975), and *Carbonneau Industries*, 228 NLRB 597, 598 (1977), it was found that despite past practice, interference with employees' right occurred where, in the first case, the union activities, not the past practice, precipitated the grievance solicitation meeting, and, in the second case, where the manner and method of soliciting grievances differed extensively from past practice.

In this case, there is evidence that the Respondent had practiced a multifaceted ongoing grievance solicitation and remedy procedures under the title "open door policy," which involved the solicitation of grievances at routine meetings, preprinted M.O.T.O forms, and individual informal confrontation between employee and manager. Despite some employees' dissatisfaction with the results, it did exist and was used, e.g., by Gibson other employees with respect to the Anita Scott party gratuity issue. Despite the fact that Melman and Haskell were on the scene, I cannot conclude that their reception of employee complaints by Akmakjian and Gonzales constituted such a significant departure from an ongoing past practice to render their conduct unlawful. Accordingly, I find these complaint allegations to be without merit. I find that since the promise to Akmakjian was made pursuant to a lawful ongoing grievance remedying procedure, it also was not unlawful.

3. The security personnel, surveillance and coercion, and bomb threat (complaint par. VIII(a), (b), and (c))

With respect to the allegation concerning the conduct of police officer Davino, the facts fail to support the allegation, and it is without merit.

With respect to the allegation that security personnel were hired for the purpose of and did engage in acts of surveillance, the facts fail to disclose any acts of actual surveillance by identifiable hired security persons. With respect to the allegation that they were engaged for the purpose to "stifle the union activities of employees," the facts show only that the Respondent extended the same preexisting security deployment of Friday and Saturday night to every night of the week. Kozak and Keefer's uncontroverted testimony is evidence that a reasonable business motivation existed for additional security.

With respect to the objective tendency of the added security personnel to coerce employees, an implied issue is whether their presence created an implied surveillance. The Board has held that conduct which reasonably tends to lead employees to believe that their protected activities are under surveillance constitutes unlawful coercion. *Waste Stream Management*, 315 NLRB 1099, 1124 (1994). There is no clear, convincing, conclusive evidence that any identifiably security officer did anything that would be suggestive of surveillance of employees as

they engaged in any attempted union activities, which witnesses claimed were done not during customer service hours but during pre-service preparation or outside on the street. Even if such observation of open organizing activities occurred, there is no evidence that the single on-duty security officer's conduct went beyond the ordinary behavior, or that he insinuated himself into union discussions, stood intimidatingly nearby, or otherwise hindered any union or protected activities. Mere observation of open union activities in or near the Respondent's premises is not unlawful. *Roadway Package System*, 302 NLRB 961 (1991); *Emenee Accessories*, 267 NLRB 1344 (1983). However, again, there is no conclusive evidence that union activities were observed by the plainclothes security officer on duty. In fact, there is no clear, convincing, credible evidence that the security officer was even present during the noncustomer service preparatory times when union solicitation occurred.

The General Counsel cites in support of its argument that the hiring and deployment of a security officer were unlawfully coercive, *Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993). The Board majority found that the employer "disparaged and undermined the Union in the eyes of the employees" and thus violated Section 8(a)(1) of the Act by hiring and deploying a 24-hour police guard. The employer in that case seized on an incident wherein a union agent who, on being rebuffed for solicited support in the home of an employee, allegedly obliquely implied injury to the employee's home and family, i.e., "it would be a shame if something happened" to the employee's house. The employer, being informed of the incident, accused the Union of widespread threats and acts of intimidation in a speech to employees. He also arranged for the 24-hour patrolling of the place of employment, i.e., a hotel, by police officers. The judge found as fact no documented threat to the hotel, and he held further that the employer used the incident to make a "dramatic, inflammatory, and largely unfounded attack on the union's credibility," *Sheraton Hotel Waterbury*, supra at 338. Neither the judge nor the Board discussed the *Sears* or *Optica Lee* decisions, nor Section 8(c) of the Act. The employer in that case made it clear to employees that they were in imminent danger of union violence, which was clearly unfounded. The announcement by Kozak of added security was prompted by employee questions. As noted above, employee testimony is inconsistent, but it appears that employees were told that it was for their protection and insulation from union harassment during the union campaign, as well as for the general protection of the restaurant. I find nothing in the cryptic accounts of employee witness of Kozak's explanation to suggest that constituted the same type of unfounded, inflammatory, emotional accusations and suggesting of imminent peril made by the employer in the Sheraton Hotel Waterbury case. Furthermore, the extended deployment of one plainclothes security officer from weekends to weekdays in a public restaurant, of which there is no credible evidence of obtrusiveness, differs drastically from the 24-hour a day uniformed police patrol of the Sheraton Hotel parking lot.

The General Counsel also cites *Parsippany Hotel Management Co.*, 319 NLRB 114, 117 (1995). That case, however, involved extensive overt surveillance by stalking and direct observation of individual employees by security officers. The only evidence of any kind of stalking in this case is the one

rather brief incident described by Gibson involving a person not identified adequately as the Respondent's security officers.²⁷

I conclude that Kozak's deployment and remarks about the purpose of security deployment (as Glasby's comments to employees about union violence are not alleged to be violative of the Act) fall within the Respondent's free speech rights. *Sears*, supra, and *Mediplex of Connecticut, Inc.*, supra. I conclude that Kozak's conduct consists of that type of propaganda that can be best left to the commonsense evaluation of the employees for what it was, i.e., campaign tactics. Gonzales clearly recognized that in her rebuff to Haskell and to the Respondent's news articles handouts when Haskell alluded to some unspecified anecdote of union violence.

However, with respect to Kozak's public accusation of a union bomb threat against Ricci, a factual situation exists which is very close to the facts in *Sheraton Hotel Waterbury*, supra. In fact, Kozak's conduct was more aggravated than that of the employer in that case. There, an actual threat was blown out of proportion in a manner calculated to create an impression that employees were in immediate danger of union violence. In this case, Kozak's statement that Ricci fled the city because she had been threatened by the Union was so completely unfounded that if it did not constitute an intentional lie, it was so reckless and irresponsible as to warrant the same sanction. I find that Kozak's remarks patently conveyed to the employees that they were in a real and immediate danger from union violence. I find that the objective tendency of such remarks was to cause fear, confusion and dissension in the ranks of possible pronoun voters and solidify antiunion voters in the upcoming election. It was, as the Charging Parties' argued in the brief an extremely clever preelection stratagem. It is appropriately described therein.

It was a stunning maneuver in every sense. In one blow, Respondent 1) appropriated the credibility and leadership of Jill Ricci by claiming she had herself turned against the union, knowing that she was to be out of town for a significant time and not able to do much to counter its lies, 2) graphically portrayed the union not only as a hypothetically dangerous bed-fellow, but as an active, present, serious threat to the security and well-being of those who might associate with it, 3) isolated the leadership of the union drive by making them appear to be in a danger zone, 4) portrayed itself as a provider of safety, and 5) created such uncertainty, confusion and fear among employees that they could not vote in the election with a free mind. In the eddy of confusion and fear, they clung, as if to a raft, to the apparently safe arms of their employer.

I agree, and I conclude, therefore, that Kozak's bomb threat comments fall within the rationale of *Sheraton Hotel Waterbury* case and are distinguished from *Mediplex of Connecticut, Inc.*, supra. I find that his conduct crossed the line and exceeded the zone of privileged free speech and constituted coercive conduct violative of Section 8(a)(1) of the Act as alleged in the complaint, as amended.

4. The Union solicitation discipline (complaint par. VII(a)-(d))

As found above, and it is undisputed, Ricci, Calvird, and Grant were disciplined in early November 1994 because they

solicited support for the Union in the restaurant during their non-serving working time and/or that of employees whom they solicited. The complaint alleges, and the General Counsel argues, that they were disciplined as a result of a disparate application of an otherwise valid but previously unused no-solicitation rule.

The generalized testimony of the General Counsel's witnesses, to the effect that the no-solicitation rule was never enforced, was not rebutted by any evidence that it had ever been enforced against anyone known to have violated it. Undisputed evidence reveals that a variety of sales and solicitations were permitted during non-serving time and, on occasion, even during serving time. The Respondent does not dispute that a disparate enforcement or an initial enforcement of a valid no-solicitation rule during a union campaign in absence of business justification is discriminatory and unlawful.

The Respondent's counsel, however, argues in the brief:

Respondent's warnings to three servers about soliciting during work time was a direct and exclusive result of complaints from employees that the servers were harassing them, and interrupting their work. No-solicitation rules in general are not unlawful as long as they are not so overbroad as to interfere with employee's legal rights to unionize at their place of employment. *Restaurant Corporation of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987) (explaining that a ban on solicitation on working time and in working areas is presumptively valid). Neither Counsel for the General Counsel nor Counsel for the Charging Parties alleges that LEYE's no-solicitation rule was invalid on its face.

Promulgation of a valid no-solicitation rule, even in a seemingly disparate manner, is lawful if the employer has valid business reasons for its actions. *NLRB v. John Rooney*, 677 F.2d 44 (9th Cir. 1982) (holding that employer's promulgation of a no-solicitation rule for the first time at the onset of a union campaign was lawful where it was shown that this was the first time an employee had created a disturbance by soliciting; *Brigadier Industries Corp.*, 271 NLRB 656 (1984). In *Brigadier Industries*, the Board found that employer acted for legitimate business reasons when it promulgated a no-solicitation because 1) union solicitation was interrupting production, which had never occurred before, and 2) in giving the warning, the employer emphasized that solicitation was permitted on the employee's own time. Because the employer assured the employee that he could pursue his union activities when not working, the Board found no suggestion of an unlawful motive for the warning. Both of the above cases dealt with whether it was lawful for an employer to institute and apply a no-solicitation rule for the first time against union activity, clearly holding that seemingly discriminatory actions could be justified by a sufficient showing that the solicitations at issue interrupted [the] employer's business for the first time.

The Respondent cites various case precedent involving disruptive solicitations and argues that the conduct of Ricci, Grant, and Calvird was actually disruptive as well as potentially disruptive. I do not agree. The record does not contain probative, competent evidence that any of those employees' solicitations were disruptive, or in fact constituted any real harassment. The Respondent adduced hearsay testimony of Kozak consisting of

²⁷ It should be noted that there had been some independent involvement by the Chicago City police labor unit of an unclear nature. It cannot be certain that they may have had officers assigned for observation purposes.

employee reports to him. No other evidence or testimony supported the Respondent's argument. Moreover, Kozak's own testimony fails to support the Respondent's argument. First, in direct examination, he cryptically testified that several employees told him that they had "felt uncomfortable" about being solicited. He failed to testify as to any specifics, nor did he say they felt harassed. In cross-examination, he testified that one employee complained that he was "bothered" by the repeated solicitations of the English-speaking Grant, Ricci, and Calvird to attend union meetings despite that employee's own limited use of the English language. Again, no more details were disclosed as to when, where, and how these solicitations occurred.

The solicitations, as described by the more competent and probative testimony of Ricci, Grant, and Calvird, fail to disclose any evidence of conduct that in fact did or might tend to disrupt the Respondent's business. Evidence of the public manner in which the warnings were issued give rise to an inference that Kozak had an agenda other than the comfort level of the complaining employees and tranquillity of the guests, i.e., public admonishment and embarrassment of prounion employees. His own conduct was far more disruptive than any solicitations.

I conclude that by the issuance of disciplinary warnings to Grant, Ricci, and Calvird in early November 1994, the Respondent enforced its no-solicitation rule, for the first time, in consequence of a union organizing campaign and did so in a manner which was disparate from past practice, and thus violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

5. The discharge of Carmolli (complaint par. VI)

The complaint alleges that the Respondent discriminatorily discharged Carmolli on May 18, 1995, because he assisted the Union and had engaged in concerted activities.

I find Carmolli's largely uncorroborated testimony of his "involvement" in union activity to be unconvincing, largely uncorroborated, self-serving exaggeration. But even if he did attend union meetings, the Respondent was not shown to be aware of it. There is no dispute that despite a favorable written, i.e., preprinted form, self-evaluation on March 16, 1995, he was warned therein about attitude problems. It is argued that Carmolli's response to Kozak's inquiry about how he felt about the 2-month old Board-conducted election disclosed his prounion attitude. I disagree; I think such response is vague, noncommittal, and hardly signifies any depth of prounion partisanship.

It is undisputed that Carmolli was verbally warned by Kozak about attitude problems and thereafter, on May 13, was issued a written disciplinary warning which threatened discharge for future misconduct. That warning is not alleged in the complaint to have been discriminatorily motivated. In the absence of evidence of any real knowledge or even suspicion by the Respondent that Carmolli in fact manifested a prounion stance, such allegation is untenable.

Carmolli was discharged in consequence of an incident which, even if Carmolli is credited, would constitute evidence that he viewed his prior discipline with an insubordinate flippancy. However, I found Mayo to have been the more spontaneous, certain, and convincing witness, and I conclude that

Carmolli's aggravated flippancy gave Mayo even more justifiable concern as Carmolli appeared to be the leader in conduct Mayo, with reason, concluded was mockery in the wake of recent discipline, which seemed to flaunt the warning therein. I conclude that Respondent did have a nonunion-related motivation for discharging Carmolli. I conclude that the General Counsel has failed to adduce sufficient evidence to sustain the burden of proof under Wright Line that the Respondent was partly motivated by union activity of Carmolli. Mayo, whom I credit, did not observe Carmolli using a HERE logo pen on the night of the incident. He did observe Carmolli use such pen previously, but he also observed another employee do so. It is undisputed that many employees used such pens in the restaurant without restraint. It is undisputed that other employees were discharged or disciplined for poor attitudes. The issue before me is not whether Respondent's discharge of Carmolli was humane or fair; it is whether Respondent was partly motivated by his union or protected activities, real or suspected. The evidence fails to support such conclusion. Accordingly, I find the complaint allegation to be without merit.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent has violated Section 8(a)(1) and (3) of the Act, and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlawfully, in the enforcement of its access, solicitation, and distribution rules, counseled and issued written warnings to employees Gretchen Grant, Jill Ricci, and Greg Calvird in November 1994, I shall recommend that it expunge all records of such personnel actions wherever located in any of its files. Having found that the Respondent unlawfully discharged Brian Gibson, I recommend that it be ordered to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits computed on a quarterly basis from the date of refusal of reinstatement to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]