

Albertson's, Inc.—Southco Division and Jeffrey A. Straub. Case 12-CA-9842

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER

On 3 September 1982 Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent filed cross-exceptions and a brief in response to the General Counsel's exceptions and in support of its cross-exceptions. The General Counsel then filed an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order, as modified herein.²

As found by the Administrative Law Judge, the record shows that on or about 11 August 1981 employees Jeffrey Straub and Edward Anderson observed Supervisor David Grice and employee Chester Wells listening to a tape recorder. Both

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

Member Hunter would reverse the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) by supervisor trainee Wells' statement to the employees that an audio tape contained a recording of the employees' break room conversations. In his opinion, the General Counsel has not met its burden of showing that the employees could reasonably believe that Wells was speaking for Respondent under the circumstances presented herein. He notes that there is no evidence that Wells had ever served as a conduit for any supervisor's instructions to the employees or in any other way had spoken in any authoritative manner for Respondent.

² In sec. II,C, of his Decision, the Administrative Law Judge at several points referred to events surrounding the discharge of Jeffrey A. Straub as having occurred on 16, 17, and 18 July. We herein correct this inadvertent error. The correct dates were 16, 17, and 18 August. Similarly in error was the Administrative Law Judge's reference in sec. II,B, to Straub's having asked Manager Sacco about the number of hours available to the day crew. Straub inquired about the night crew's hours.

The Administrative Law Judge's recommended remedy, which we adopt, includes a narrow injunctive order. He inadvertently failed to include such language in his recommended Order, although he did include it in his notice. We herein conform the recommended Order to the remedy. We shall also order an expunction remedy for the 8(a)(1) violation as to Straub's reprimand on 10 July 1981. *Sterling Sugars*, 261 NLRB 472 (1982).

Straub and Anderson subsequently asked Wells, in separate conversations, whether the recording was of employees' conversations in the break room. Both of them credibly testified that Wells replied in the affirmative. The Administrative Law Judge also was persuaded that Wells was not telling the whole truth in testifying that Grice never told him where the recording was made.

The Administrative Law Judge found that Respondent had knowledge that employees had been using the break room for conversations about working hours and conditions, and that it violated Section 8(a)(1) by permitting a tape recorder to be used in a manner that reasonably created the impression among employees that their protected activities were under surveillance. We agree and find, for the reason set forth below, that Respondent is to be charged with responsibility for Wells' having told two employees that the recording was of break room conversations.

In this regard, we note that, contrary to the finding of the Administrative Law Judge, the parties did not stipulate that Wells was a supervisor at the time of, or prior to, the tape recorder incident. Rather, the record reveals that Straub testified, without contradiction, that 1 month before the incident Grice told the employees that Wells and another employee were to be then designated as supervisor trainees and eligible for supervisory positions. Wells and his colleague then became more involved with office procedures and paperwork dealing with work schedules and assignments. While there is no record evidence that Wells possessed any Section 2(11) supervisory authority, Respondent did distinguish him from the rank-and-file employees and placed him in a position where they could reasonably believe that he was an agent of, and speaking for, Supervisor Grice, if only with respect to the purported contents of the tape recording. *Quality Drywall Co.*, 254 NLRB 617 (1981). The 8(a)(1) violation of creating the impression of surveillance is made irrespective of the true contents of the recording, itself not in evidence.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Albertson's, Inc.—Southco Division, Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(d):

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

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Expunge from its files any reference to the reprimand of Jeffrey A. Straub on 10 July 1981 and notify him in writing that this has been done and that the evidence of this unlawful reprimand will not be used as a basis for future personnel actions against him."

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

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT tell individual employees we know they are instigating the Union, that we are not happy that said employees went behind our back to fellow employees and discussed unionization without first coming to us.

WE WILL NOT create an impression among our employees that their concerted and/or union activities are under surveillance by us.

WE WILL NOT issue a reprimand to employees for expressing dissent with our work policies.

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

WE WILL expunge from our files any reference to the reprimand of Jeffrey A. Straub on 10 July 1981, and WE WILL notify him that this has been done and that evidence of this unlawful reprimand will not be used as a basis for future personnel actions against him.

All our employees are free to become, or remain, or refuse to become or remain, members of said Union, or any other labor organization, except to the extent that such rights may be affected by

lawful agreements in accord with Section 8(a)(3) of the Act.

ALBERTSON'S, INC.—SOUTHC0 DIVISION

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSEN, Administrative Law Judge: Upon a charge of unfair labor practices filed on September 10, 1981, by Jeffrey A. Straub, an individual, herein called the Charging Party, against Albertson's, Inc.—Southco Division, herein called Respondent, a complaint was issued by the Regional Director for Region 12 on behalf of the General Counsel on February 3, 1982.

In substance the complaint alleges that on a certain date Respondent, orally and in writing, reprimanded the Charging Party for engaging in concerted and/or union activity; and that on a subsequent date it created the impression among its employees that their union and/or concerted activity were under surveillance by Respondent, in violation of Section 8(a)(1) of the Act; and that Respondent subsequently discriminated against the Charging Party by discharging him because he engaged in protected union and/or concerted activity, in violation of Section 8(a)(1) and (3) of the Act.

In its answer to the complaint on February 12, 1982, Respondent denied that it has engaged in any unfair labor practices as alleged in the complaint.

A hearing in the above matter was held before me in Orlando, Florida, on May 4 and 5, 1982. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a Delaware corporation, with an office and place of business in Orlando, Florida, where it is engaged in the operation of a chain of retail grocery stores.

In the course and conduct of its business operations during the past 12 months, Respondent derived gross revenues in excess of \$500,000, and during the same period purchased and received at its Orlando, Florida, facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of Florida.

The complaint alleges, Respondent's amended answer admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Respondent, Albertson's—Southco is a division of Albertson's Incorporated of Boise, Idaho. The corporated headquarters of Albertson's—Southco is Orlando, Florida, which operates in Florida, Alabama, Louisiana, and Texas, in the distribution of groceries throughout a chain of retail stores and warehouses. The Orlando facilities supply 53 of 80 stores in Florida and Alabama with produce and liquor.

The following named persons occupied the positions set opposite their respective names, have been at all times material herein supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Chester (Chet) Wells—Selector, now night-shift supervisor
 David Grice—Night-shift supervisor
 Jim Sacco—Warehouse general manager
 Philip Nowling—Transportation manager and later distribution center manager

Of primary significance to the successful and profitable operation of Respondent's warehouse is the accurate and expeditious filling and delivery of produce orders for distribution to the several retail stores. One classified job description which is keyed to the success of achieving that objective is the "order selector." The order selector is furnished with "pick sheets" which list the quantity and quality of specified items of various produce to be delivered to particular ordering stores. The selector must select the specified items, and stack them neatly and firmly on pallets, with dimensions capable of being fitted into the trucks for delivery to the stores. Additionally, the selector, in the process of selecting or picking, must pick or select the produce on the basis of the oldest date first and the most recent date last, so as to cause a turnover in fresh soft produce within 3 days at the latest, and a turnover of solid produce within 3 weeks, at the latest.

After the selector has completed picking or selecting the list of produce specified thereon, he indicates whether certain items were not in stock or were damaged. The inventory clerk then checks the pick sheet against an inventory sheet to determine whether any stock outage has since come into the warehouse and, if so, informs the selector to that effect so that the item can be included on the order. The selection process must be performed as expeditiously as possible so as to have all orders ready for loading at a specified time, in order to enable the trucks to arrive at the designated stores at specific times in early morning.

The issues raised by the evidence in this proceeding involved only the employees on Respondent's night shift. The duties performed by these employees were classified as forklift operators, selectors, loaders, inventory clerks, transportation personnel, and some part-time help. At all times material herein the undisputed evidence established that employees who were "selectors" ranged in approxi-

mate age as set opposite their respective names as follows:

Ken Price—34
 Chet Wells until about July 18th—25-26
 Joe McClary—28-29
 Eddie Anderson—25
 Freddie Kears—29-30
 Kevin Coates—19-20 youngest
 Chuck Cohen—22-23
 Jeffrey Straub—22

The parties stipulated that Chester (Chet) Wells was a supervisor for 1 month at the time Straub was discharged on August 18, 1981.¹

The joint motion by both parties to correct some of the numerous errors and omissions in the transcript herein is accorded hereby granted. I have made some corrections and supplantations to the transcript of omitted testimony which he vividly recalls.

B. The Concerted Activities of Jeffrey Straub

Jeffrey Straub was employed by Respondent as an order selector from May 1980 until August 18, 1981, on the night-shift. He worked under the immediate supervision of David Grice, along with seven other selectors. From November to June 1981, selectors, for the most part, worked 32 hours per week. From June to August they worked 40 or 40 plus hours because the orders from stores are considerably heavier during that period. The testimonial evidence of record has essentially established that at various times during the period November through April, or May, Straub and other employees discussed the fact that they only worked 32 hours a week while the day crew worked a 40-hour week.

In May 1981, during a gathering of night crew workers in the breakroom, Straub said he believed the Company could not work them without breaks and it would deal with the employees more justly if they had a union; and that his father was in a union and he is guaranteed a 40-hour week. However, the records do not show that anyone from management overheard Straub's statements or thereafter learned about them.

In May 1981, Straub asked Supervisor David Grice what could be done to assure the night crew a 40-hour workweek. Grice said perhaps Respondent could get other products but it never received enough other products to increase their hours of work.

Straub testified that he was called to the office in late June or early July 1981, and the in presence of fellow worker, inventory clerk Martin Thornberg, and Supervisor David Grice, Manager Sacco said he knew why the attitude in the warehouse was down, and he had proof Straub was the person instigating the Union. Straub asked Manager Sacco why the day crew getting 40 hours work. Mr. Sacco proceed to explain supply and demand, that the work was not there and the business was not there, and if they did not have the work the workers would not be there. He then asked Sacco why was the

¹ The facts set forth above are undisputed and are not in conflict in the record.

day crew was not getting 40 hours work per week and Sacco said he could not compare the two crews, that they were a different operation from the day crew. Sacco went on to state that *he was not happy that Straub would go behind his back to everyone in the warehouse about this without coming straight to him* (Sacco). He also told Straub that he was not going to discharge him, but wanted him to work harder and bring up his efficiency, because he considered him to be a spunky and valuable employee. Straub then asked Sacco did he need three reprimands to be terminated and Sacco said he did not need three reprimands to be terminated but he was not going to terminate him.²

Straub further testified that *later on the same day (later June or early July) he received a written reprimand* (G.C. Exh. 2) from Supervisor Grice which read as follows:

Insubordination, employee harassment via horseplay and has shown dissent against company policy. Jeff told his supervisor to "harass someone else." Jeff has had 3 verbal warnings, already concerning his conduct toward his supervisor. Jeff must conform to company policy and rules or to seek employment elsewhere. Since Jeff is a high spirited, energetic individual, Albertsons is withholding the right of termination until Jeff's behavior and conformity proves fruitless.

Straub said the above reprimand was read to him in the presence of Martin Thornberg, with whom he had previously held a conversation about unionization that day. He said he did not agree with the reprimand but signed it as having received it. After receipt of the reprimand dated *July 10, 1981*, Straub said he and his fellow employees continued their discussions in the break room about working hours. During their discussions they agreed if they had a union they could not be treated the way they were treated. Although the testimony of Straub and possibly other employees indicated that they continued their discussions about the working hours in the break room the evidence does not show that their discussions were overheard or subsequently learned by Respondent.

Straub also testified that about a week later he had a conversation with Manager Sacco as follows:

A. Mr. Sacco asked me had I planned to find employment elsewhere or did I decide to stay, and I said yes, I have decided to stay. Again, he said, well, I'm glad and that he considered me a valuable employee, worthwhile at working there. He wasn't going to terminate me but he would like to see me work to improve my efficiency.

² It is particularly observed that the above testimonial account of the conversation between Straub and Sacco, which occurred in the presence of Supervisor Grice and Inventory clerk was not categorically denied by Grice or Thornberg, Thornberg although both of them testified in this proceeding. To the extent they denied or implied a denial, I was not persuaded by their demeanor that they were telling the truth. Consequently, I credit Straub's testimonial account of the above conversation with Manager Sacco and Grice. Manager Sacco is no longer in the employ of Respondent and he did not appear and testify herein.

Supervisor Grice's Version of the July 10 Reprimand (G.C. Exh. 2)

Supervisor Grice testified that on July 9, 1981, he observed Straub visiting a specific area in the warehouse for the third time and he was approaching Straub in an effort to ascertain why he was returning to the same area so many times. When Straub saw him coming he yelled something to the effect, "Go harass somebody else" and drove away on his electric jack. Grice continued to testify as follows:

A. I asked him to stop that I wanted to talk to him, and I just wanted to find out what it was that was bothering him and find out something about his order, something that I might could help him with that would speed things up a little bit.

Q. What tone of voice were you using at this time?

A. Well, it was loud enough to be heard across the warehouse floor. I was approaching toward him over by the cooler so it was relatively loud to be heard above the noise level.

Q. Were you irritated at this time?

A. Yes. I wanted the man to stop. I wanted to talk to him. That's why I approached him to began with.

Q. What did Mr. Straub say after you caught up with him again?

A. He was really defensive. He was hostile. I asked him, I say, Jeff, you don't have to buzz away from me every time I come toward you. And, he said, you just all the time want to harass me. It was getting louder during the whole conversation. He said, all you want to do is pick on me and harass me and everything just escalated there. My tone, his tone, and he said, you're just out here trying to fire me so just fire me if you want to fire me, go ahead and fire me.

Q. Who brought up the subject of discharge of firing first?

A. Jeff did.

Q. Did you contemplate discharging Mr. Straub at that time?

A. No.

Q. What did you do in response?

A. He kept on escalating about being fired and to find out what the hell the guy was so upset about, I said all right, you're fired.

Q. What occurred after you made this statement?

A. He turned around in a big exclamation and said, I don't believe it. I've just been fired

Straub proceeded across the warehouse floor exclaiming "I've just been fired" and Supervisor Grice followed him out of the plant. Grice continued to testify:

Q. Did you have an opportunity to discuss the problem with Mr. Straub at this point?

A. At that time inside the office he just seemed real depressed. He was angry, he was upset. I asked him, I said, Jeff what's wrong. Let's talk about this. He said, I don't want to talk about it here, and he

said I might as well go home, I've just been fired. I said, well, let's talk about it. If you don't want to talk about it here let's go outside. So, he and I both walked outside the warehouse to the front steps and we had a conversation for about an hour or an hour and a half, and he told me about his problems and things he didn't like. He just simmered down after a while and we had a reasonable talk.

During their discussion outside the plant, Straub mentioned the work hours again and about employees not having breaks; and that he felt over pressured to ship out the goods. Grice continued to testify as follows:

A. . . . He said he was going to go back home. I said, is this what you really want. He said, no. And, I said, come on back in and let's get back to work and get it all done and he came back in.

Q. Why did you change your decision to discharge Mr. Straub?

A. I didn't really want to terminate the man. Our work had increased since the end of July and we needed trained personnel.

Q. What was your purpose in discussing it with Mr. Sacco?

A. It was an incident of such a magnitude and the things that were said just had a bad effect on the total crew. They saw and heard the actions of what went on. They stopped and looked in awe because the shouting had occurred and I was off the floor for about an hour and a half and I thought I had better account to Mr. Sacco about it.

On the next day, July 10, Sacco called a meeting with Straub, himself, and Martin Thornberg during which time each of them told his version of what happened on the previous night. Straub complained about the hours, the pressure of the work, having to meet time schedules, etc. Grice continued to testify as follows:

A. Mr. Sacco tried to explain to Jeff that if we have the work here then we will have the hours. I believe he used the analogy of a bank savings account where if he had the money in the bank you can draw it out, but if you don't have it you can't draw more than what you have. He was trying to explain to Jeff that because of the stores, if they demanded heavy we have the work. If not, we don't.

At the conclusion of this meeting Grice said Straub was upset, hostile, and told him he thought he (Grice) was his friend. He was issued a written warning (G.C. Exh. 2) herein described, *supra*, for his hostile conduct toward Supervisor Grice on the previous day, July 9.³

³ I credit the testimonial account of Supervisor Grice with respect to Straub's attitude and other conduct in the warehouse on the night of July 9 for the following reasons: Straub testified the issuance of the subject reprimand occurred in late June or July, while the date (July 9) of Grice's account of the incident more reasonably coincides with the proximity of the date (July 10) on which the reprimand was indisputably issued. Grice's account is also consistent with the credited testimonial and documentary evidence of record of Straub's work performance and attitude. However, I credit Straub's account of the uncontroverted antiunion statements by Sacco, including the latter accusing Straub of being an in-

Based on the foregoing credited testimony, I conclude and find that during a meeting with Manager Sacco on July 10, 1981, Manager Sacco told selector Jeffrey Straub that he (Straub) was instigating the Union; that he (Sacco) was not happy about Straub going behind his back to the employees about unionization without coming straight to him; that Straub started complaining to Sacco about the work, working hours, and the time schedules employees had to meet; that Manager Sacco issued a written reprimand to Straub for, among other things, dissenting with company work policies; and that such statements and action by Manager Sacco had a coercive and restraining effect on the exercise of employees' protected Section 7 rights, in violation of Section 8(a)(1) of the Act.

Tape Recorder Incident

The record shows that on or about August 11, 1981, Edward Andersen and Jeffrey Straub observed Supervisor Grice playing a tape recorder to which fellow employee (and supervisor-trainee) Wells was listening. Both Andersen and Straub subsequently asked Wells, in effect, if that was a recording of the employees break period. Andersen said wells told him it was a recording of "the employees in the break room laughing, talking and joking, and he thought it was humorous." Straub said Wells told him it was a recording of employees in the break room. However, Wells, now a supervisor as he testified herein, did not deny making the above statement to Andersen nor the above statement to Straub. Instead, Wells testified that Supervisor Grice never told him where or how the tape record was used, but simply allowed him to listen to the tape to see if he could understand its contents. Wells said, "all I could hear was background noises, forklifts, and a few men talking but you really couldn't distinguish what their voices were." He said he told Straub the same thing.

Dave Grice acknowledged he used the tape recorder to dictate his notes. He also testified that, on one occasion around the end of August, he placed the tape recorder just off the warehouse floor by a chalkboard about 70 feet from the break room to record the work activity of the employees, to prove that the crew was actually working, since Sacco had some question about the crew's working. All one could hear on the tape recorder he said was noise and the engines and work activity of the crew. The tape was no longer available for review.⁴

stigator of the Union. I was further persuaded to these two positions on the individual demeanor of Straub and Grice, respectively, as they testified.

⁴ I credit the testimonial accounts of Andersen and Straub because they corroborate each other, they are uncontradicted by Wells although he was asked did he make the aforementioned statements, and because I was persuaded by their demeanor that they were telling the truth. I was persuaded by the demeanor of Wells that he was not telling the whole truth. In fact, I was persuaded that it may be reasonably inferred from Wells' failure to deny the statements and his unrequested volunteer answer not in response to the statements, that the statements attributed to him by Andersen and Straub were true; and that Wells failed to admit the statements because he is now a supervisor for Respondent. I do not credit Supervisor Grice's explanation for the use of the recorder because not only was I not persuaded by his demeanor that he was not telling the truth or

Continued

Consequently, I conclude and find that Supervisor Grice knew that Straub and other employees were complaining about working hours and working conditions; that with such knowledge he permitted a tape recorder to be used in such a manner that it reasonably created the impression among employees Andersen, Straub, and possibly Wells, that their concerted and/or union activities were under surveillance by Respondent. Such conduct by Respondent had a coercive and restraining effect on the exercise of employees' protected rights, and, when considered in conjunction with Respondent's prior unlawful conduct on July 10, constituted a violation of Section 8(a)(1) of the Act.

C. The Work Performance and Discharge of Jeffrey Straub

On July 16, 1981, Supervisor Grice undisputedly caught Straub pulling the most recent dated potatoes. Since Straub continued to do this after repeatedly neglecting to comply with the procedures to pull the oldest items first and the newest items last, Supervisor Grice decided to issue a reprimand (G.C. Exh. 3) to Straub. Grice continued to testify as follows:

A. This pertains to an observation. I saw Jeff—the whole crew knew beforehand which product was new and which was old. I saw Jeff putting the newer date potatoes on his pallet. I approached Jeff and explained it to him. This has been several times I have done this. In this case, I told Jeff, I said, Jeff we've just gone over this thing many a time and I think you know that the last time I talked with you about it that it was going to result in a warning, and at that time I brought him into the office and sat down. He said he knew about it. He was very calm, very understanding. I handed him a warning form, and I said, Jeff, I said you know what you've done wrong and I said possibly if you'd like, if you want to fill this out yourself I think you know what words that would explain your actions and what you need to put down here to explain how to correct it. And, he did so.

Q. Did Mr. Straub protest this written warning, General Counsel's Exhibit Three?

A. No, he did not.

On the same date (July 16), the night crew had the volume of orders and conditions to have a very productive rate selection. They had the right product mix, all things appeared equal, and Grice expected close to the perfect night. However, Straub had a very low productive night as evidenced by analysis summary (Resp. Exh. 5) showing the group average as 157.45 and Straub's average as 139.68, the lowest of all selectors. Grice testified that this rate was inexcusable for an experienced man. Straub as a selector was also responsible for an empty watermelon bin being shipped to a store without the melons. He said it was obvious that Straub just did not

the whole truth, but I find the timing (a few weeks after Manager Sacco's unlawful conduct on July 10) of the occurrence of the incident, too close to Straub and the employees' complaints and discussions about organizing to attribute to coincidence.

care and he decided to issue a written reprimand to Straub, which he prepared on August 17, a date on which Straub did not work. However, the reprimand was presented to Sacco with Grice's recommendation to terminate Straub on August 18. When Straub reported to work on August 18, he was advised by Sacco of the reprimand and also that he was terminated.

At the conclusion of the direct and cross-examination of Grice by counsel for the General Counsel and counsel for Respondent, respectively, the bench asked the following question:

Q. (By Judge Gadsden) Did you recommend discharge of Mr. Straub?

A. Yes, I did.

Q. You did? I was a bit curious as to why you recommended his discharge for one reason and that is immediately after the incident, and I don't recall the date, when he more or less exploded emotionally you said, telling everybody he was fired. I think you followed him out of the plant; carried on a discussion of, I think you said, an hour and a half.

A. Approximately an hour and a half.

Q. During that discussion, at the conclusion of that discussion you seem to have indicated in your testimony that you were more or less amenable to giving him another chance and said let's talk it over. You were apparently trying to save his job.

A. I didn't—I didn't—May I be excused?

The bench supplied some of the following testimony and a description of the following incident from vivid memory, some of which was not recorded and transcribed.

At this juncture, witness Grice proceeded to cry hysterically and was excused from the courtroom. As he was leaving the courtroom, Straub, who was sitting at the table with counsel for the General Counsel with his arms folded, looking witness Grice straight in the face, shouted, "He is very emotional, you know." The bench requested counsel for Respondent to go to Grice to ascertain whether he had any physiological or medical problem. Counsel for Respondent returned to the courtroom and informed the bench that Grice did not have such a problem to his knowledge. After about 10 minutes Grice returned to the stand still crying hysterically and apologizing. The bench tried to console witness Grice, assured him there was no need to be embarrassed or to apologize, and encouraged him to relax. While crying and testifying, Supervisor Grice pleadingly said he did not want to fire Straub, "that he made me do it, he just wouldn't do right, he made me do it."

Still crying moderately, Grice continued to testify as follows:

Judge Gadsden: Do you want to make a statement of your own at this time?

A. Yes. I tried—This is the hard part. I tried the whole time to get him to work out because he's got the energy to do it. The way things were going, he just went the wrong way. It finally had to end.

There was nothing I could do except to recommend it

Q. So, that brought us to the end of that meeting, issuing the reprimand. All right. Now, leading up to the time that you recommended that he be discharged. You came to that conclusion yourself.

A. I recommended it, yes, sir.

Q. And, that was after what happened?

A. Well, things seemed to be going pretty smooth. Jeff was the way he had been but I tried to work with him and keep him going and try to get him to do the things right. It seemed like all of a sudden he just didn't give a damn.

Q. The incident you wrote him up for was what?

A. The one that triggered it for me, I couldn't see how he could ship out a product and he already says he has to be aware, how can you ship out an empty bin.

The record shows that Respondent prepared a written reprimand for Straub dated July 17, 1981, but which was not read to him until July 18, 1981. Since Straub did not work July 17, the subject warning (G.C. Exh. 6) was read to him in conjunction with the issuance of the reprimand dated July 17 (G.C. Exh. 4). The reprimand (G.C. Exh. 6) reads as follows:

Failure to maintain the standard minimum product selection rate of 150 items per hour when Jeff selects items at the rate of 139.68 items per hour on 8/16/81.

The following specific improvements have been outlined to correct the above stated areas of deficiency:

Jeff must limit his conversation with other employees to the subject of work and to topics that will help Jeff to improve his work efficiency.

Date set forth to implement the above stated improvements:

Immediate.⁵

Grice said he thereupon recommended termination for Straub, Sacco agreed with him, and Straub was terminated on August 18, 1981.

The substance of the reprimand dated July 16, 1981 (G.C. Exh. 4), read as follows:

Not being aware of the product that Jeff is handling. In this case, Jeff shipped an empty bin to store #4327 and had a liquor pallet on top of the bin and continued stacking other produce on top.

The following specific improvements have been outlined to correct the above-stated areas of deficiency:

Jeff has been warned to be aware of the produce that Jeff is to select from and work with. Three people at store #4327 had verified the fact that no melons were shipped. Termination is recommended.

⁵ The above reprimand was not signed by management or by Straub.

Date set forth to implement the above stated improvements: Termination 1.⁶

Straub admitted he received several verbal warnings prior to his discharge about pulling the latest dated products in preference to the older dated products. He said he did not know he was doing it although he knew that was the rule. In rebuttal testimony, Straub said he did not pull the empty watermelon bin to be shipped and when he tried to explain this to Sacco during his discharge meeting, he was cut off by Sacco who said he did not want to discuss it. However, the record shows that Straub, as a selector, caused the bin to be placed where it was placed, and was officially responsible for it having been shipped.

The record also shows that Supervisor Grice issued other reprimands and warnings (Resp. 9-A through 9-D) to other selectors and crewmen in September 1980 and December 1980. The record (Resp. Exh. 10(ee)) shows the "pick sheets" of Straub, which shows how Straub missed items more frequently than any other selector, while Respondent's Exhibit 11 shows the numerous "outs" by Straub.

Martin Thornberg, inventory clerk for Respondent, testified that he discussed the problems of errors by Straub with Supervisor Grice. Steven Ferrell, a forklift operator with Respondent, testified that Straub's performance was below average in building pallets and in selecting items. He gave no statement to the Board and was not investigated by the Board with respect to this proceeding. Nor was Supervisor Grice investigated by the Board with respect to the matters herein involved.⁷

Analysis and Conclusions

It is well established upon the uncontroverted evidence that during the months January through August 18, 1981, Straub was a chief complainer among other employees on the night shift about working conditions. It is also well established that Straub made such complaints specifically to Supervisor Grice in May and to Manager Sacco during a meeting in his office on July 10. During that meeting, Manager Sacco told Straub he knew why the attitude in the warehouse was down; that he had proof he (Straub) was the instigator of the Union; and that he (Sacco) was not happy that Straub went behind his back to all of the employees about unionization without coming straight to him. Sacco nevertheless told Straub he was not going to discharge him. Thereupon, Sacco issued a written reprimand to Straub for, among other things, dissenting with company policies.

Although Manager Sacco verbally assured Straub he was not going to discharge him, it is particularly noted that management nevertheless issued a written reprimand (G.C. Exh. 2) to Straub which stated that the Company was withholding the right to terminate him until Straub's behavior and conformity prove *fruitless*. I find such written language constituted a conditional or qualified assur-

⁶ The above reprimand was signed by Manager Sacco.

⁷ I credit the undisputed testimony of Thornberg and Ferrell not only because they corroborated the account of Supervisor Grice, but also because I was persuaded by their demeanor that they were testifying truthfully.

ance not to discharge Straub, and as much was not an unconditional assurance against company reprisal against Straub for dissenting with company policy, or because the Company believed Straub instigated the Union. Additionally, it is further observed that Manager Sacco did not unconditionally assure Straub against the further company reprimands or other forms or reprisal. Consequently, I find that Manager Sacco's above statements to Straub, including his issuance of the reprimand (G.C. Exh. 2), had a coercive and restraining effect on the exercise of employees protected Section 7 rights, in violation of Section 8(a)(1) of the Act. *U.S. Steel Corp.*, 252 NLRB 1273 (1980).

Although Straub received the reprimand for other reasons which appear to have been valid, the reprimand nevertheless caused a coercive and restraining effect on employees protected activities because it included Straub's protected right to dissent with company policy and/or discuss unionization. *Major Cab Co.*, 255 NLRB 1383 (1981).

The Discharge of Jeffrey Straub

A composite of the essentially undisputed and credited evidence of record demonstrates that throughout his working tenure with Respondent, although more so during the months of July and August 1981, Jeffrey Straub had considerable difficulty performing his work, due in part to his small physical stature, weighing from 20 to 50 pounds less than the other selectors and being among the three youngest employees. Straub was not only a slow, less serious and below average selector, but his performance was the poorest among the seven selectors on the night crew. Straub made frequent omissions and mistakes in selecting items. He frequently did not build his stock on pallets properly to enable them to fit into the trucks without adjustments. He wasted considerable time retracing his routes through the warehouse in selecting items he should have selected on his first or second trip through a particular area of the warehouse. The essentially corroborated evidence also established that Straub frequently demonstrated a defensive and sometimes arrogant attitude toward Supervisor Grice when the latter ordered, or attempted to order, him to do something.

The evidence of record shows that Straub received a written reprimand or warning, as did all other selectors in December 1980. Straub admitted that, in July and August 1981, Sacco had told him he would like to see him improve his productivity and that Grice was working with him to improve it. He acknowledged that he and Grice had a "fantastic" friendship and that they socialized outside of work hours. During his last 2 months of employment, Straub said he and Grice had problems getting along mostly on the job, but after work they got along fine. He admitted he has pulled produce from the sides of the racks instead of from the top of the racks as he was ordered to do on several occasions, and that he was corrected when he was caught. He stated that he repeatedly did this to save time.

Straub also acknowledged that he pulled new items instead of old items and would get caught doing so once or twice a month, although the evidence shows he was

caught with greater frequency. Not a single witness testified on behalf of Straub that he was a competent worker with a cooperative attitude toward management. Rather, invoice clerk Martin Thornberg frequently complained to Straub and to Grice about Straub's mistakes and omissions. Other complaints about Straub's performance came from fellow worker Steven Ferrell and Chester Wells. Finally, after receiving two warnings on August 16, 1981, one for again pulling the most recently dated produce (potatoes) when older dated potatoes were in the warehouse, Straub turned in another night of poor performance, by having had the lowest production record of all of the selectors on the night crew. Respondent issued another reprimand to Straub dated August 17, 1981, for such low production which was given to him on August 18, 1981, at which time Respondent also terminated his employment.

The record is replete with evidence showing that, irrespective of Straub's chronic complaints about the work, working hours, and time schedules, Respondent practically bent over backwards, so to speak, to retain Straub in its employ in spite of his repeated violations of produce selection procedures, below average performance, and eventually his decidedly low production. Although Respondent (Supervisor Grice) stated that it retained Straub in its employ because it did not want to lose an experienced worker, it may be reasonably inferred from the evidence that another reason Respondent tolerated Straub in its employ as long as it did was due to the "fantastic" social relationship between Straub and Supervisor Grice. It may be further inferred that one of the reasons Straub's work attitude and performance did not consistently improve was because Straub was taking advantage of his personal relationship with Supervisor Grice. Perhaps this is why Straub expressed great surprise when Grice honored his repeated challenge to fire him on July 9. However, even after Grice fired Straub, he (Grice) nevertheless reversed his decision on the same night and gave Straub another opportunity to return to work.

Under the above circumstances, I conclude and find that Respondent's discharge of Jeffrey Straub was not motivated by an illegal purpose or intent (Jeffrey Straub's union and/or concerted activities). *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). However, assuming, *arguendo*, that the General Counsel made a *prima facie* showing that Respondent's discharge of Straub was motivated by his union and/or concerted activity, I further conclude and find that, even though Straub was engaged in union and/or concerted activity (chronically complaining about work, work hours, and time schedules), the Respondent herein has amply established that Straub would have been discharged even if he were not engaged in such protected union and/or concerted activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

Accordingly, the allegation that Respondent discharged Jeffrey Straub on August 18, 1981, because he joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargain-

ing or other mutual aid and protection is hereby dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES
UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by telling an employee it knew he was instigating the Union; and that Respondent was not happy that said employee went behind its back to other employees about unionization, without coming straight to Respondent; and by creating the impression among employees that their concerted and/or union activities were under surveillance by Respondent, in violation of Section 8(a)(1) of the Act, the recommended Order will provide that Respondent cease and desist from engaging in such conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or 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. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Upon the basis of the above findings of facts and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Albertsons, Inc.—Southco Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By telling an employee it knew he was instigating the Union; that it was unhappy that an employee went behind its back to the employees about the unionization without coming straight to it, Respondent restrained and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

3. By issuing a warning to said employees for dissenting with its policies, Respondent restrained and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

4. By creating the impression among employees that their concerted and/or union activities were under surveillance by Respondent, Respondent restrained and coerced its employees in the exercise of their Section 7 rights, in violation Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER⁸

The Respondent, Albertsons, Inc.—Southco Division, Orlando, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees it knows which individuals are instigating the Union, and that it is unhappy with an employee who goes behind its back and discusses unionization with fellow employees before coming straight to it.

(b) Creating the impression among employees that their concerted and/or union activities are under surveillance by Respondent.

(c) Issuing a reprimand to employees because said employees express dissent with company policies.

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

(a) Post at Respondent's Orlando, Florida, facility, copies of the attached notice marked "Appendix."⁹ Copies of said notice on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁹ In the event that 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."