

Our-Way, Inc./Our-Way Machine Shop, Inc.¹ and International Brotherhood of Firemen & Oilers, AFL-CIO-CLC and Albert Harp, and Rebecca Dunlap, and Maxey E. Cox

International Brotherhood of Firemen & Oilers, AFL-CIO-CLC and Our-Way, Inc./Our-Way Machine Shop, Inc. Cases 10-CA-12260, 10-CA-12325, 10-CA-12388, 10-CA-12432, 10-CA-12432-2, 10-RC-10825, 10-CA-12375, 10-CA-12398, 10-CA-13076, and 10-CB-2679

September 20, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On May 15, 1978, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, the Respondent-Employer filed exceptions and a supporting 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 brief and has decided to affirm the rulings, findings,² conclusions,³ and recommendations, as modified below,⁴

¹ The name of Respondent-Employer appears as amended at the hearing.

² The Respondent-Employer has 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, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

³ Chairman Fanning disavows the implication that a no-distribution rule prohibiting distribution of written materials during "working time" is necessarily a valid one. See his dissent in *Essex International, Inc.*, 211 NLRB 749 (1974). Member Truesdale has not yet expressed his view on this issue and does not now pass on it.

⁴ In adopting the Administrative Law Judge's overruling of the Employer's objections, Chairman Fanning does not rely on *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), but reaches the same result under the standards of *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1961). Member Truesdale concludes that, under any view of the applicable law, the matters raised by the objections do not warrant setting aside the election.

We agree with the Administrative Law Judge's recommendation that the challenged ballots of the discriminatees be opened and counted first and that the remaining challenges be unopened and uncounted unless they would affect the outcome of the election. In so doing, however, we note that the Administrative Law Judge confused certain challenged voters who were stipulated to be ineligible with those voters whose challenged ballots were, pursuant to stipulation, to remain unopened and uncounted. Thus, the parties stipulated that the following 10 voters were not employed on the date of the appropriate payroll period or the date of the election and were ineligible to vote: Crawford, Childress, Alger, Hill, McFarland, Brown (Brannan), Wallace, Laurens, and Stephen and Thomas Wreford. In addition, the parties stipulated that the following four voters were ineligible: Brown as supervisor, Speer and Smith as not employed during the appropriate payroll pe-

of the Administrative Law Judge and to adopt his recommended Order.

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 and hereby orders that the Respondent, Our-Way, Inc./Our-Way Machine Shop, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

IT IS FURTHER ORDERED that the objections to the election conducted on November 4, 1976, in Case 10-RC-10825, be, and they hereby are, overruled.

IT IS FURTHER ORDERED that Case 10-RC-10825 be remanded to the Regional Director for Region 10 for the opening and counting of the ballots of Virginia Huff, Jerry Williams, James Ellefsen, Larry Grier, Fred Langston, and Johnny Cole. Thereafter, if the revised tally of ballots indicates that the Petitioner was designated by a majority, the Regional Director shall issue a certification of representative. If the revised tally of ballots fails to disclose that the Petitioner has been designated by a majority, the Regional Director shall process the case further in accord with our Decision herein.

IT IS HEREBY FURTHER ORDERED that the complaint in Case 10-CB-2679 be dismissed in its entirety.

rod, and Savage as an office clerical. In addition Harp, who was lawfully fired, and Rollins, who was found to be a supervisor, were ineligible. The Administrative Law Judge also found that Jones and Chesser were ineligible office clericals.

The tally of ballots shows 109 votes for and 93 against the Union with 36 challenged ballots. Of the voters who were challenged, 18 were stipulated or found to be ineligible. Six of the remaining challenges involve the seven discriminatees, all leading union supporters, whose ballots are to be counted first. Thus, the other 12 challenges (to Bailey, Brown, Caldwell, Carter, Henry, Johnson, Klein, Roach, Lassiter, Stevens, and Upchurch, whose status is undetermined, and to Christian, who was stipulated to be eligible) are unlikely to affect the results of the election. Accordingly, we adopt the Administrative Law Judge's recommendation to open the discriminatees' ballots first.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge: This consolidated proceeding¹ was heard before me in Atlanta, Georgia.

¹ On September 13, 1976, the above Union filed a charge against Respondent-Employer in Case 10-CA-12260; that charge was amended on October 1, 1976. On October 14, 1976, the above Union filed a charge in Case 10-CA-12325. On November 24, 1976, the aforementioned cases were consolidated in a complaint which issued by the General Counsel through the Board's Regional Director for Region 10. On November 4, 1976, Albert Harp, an employee formerly employed by Respondent Employer filed a charge in

(Continued)

on various dates in February, March, April, and December, 1977. The General Counsel alleged that the Our-Way, Inc./ Our-Way Machine Shop, Inc.² engaged in various acts of interference violative of Section 8(a)(1) of the Act including (a) interrogation; (b) threats of loss of benefits, discharge, and plant closure; (c) promise of benefits; (d) soliciting employees to engage in surveillance, creating the impression of surveillance, and actually engaging in surveillance. Further, the General Counsel alleged that the Respondent-Employer³ violated Section 8(a)(3) of the Act by (a) changing working conditions including instituting a no talking rule and a rule requiring a doctor's excuse for 1 day's absence; (b) closing its plant on November 5, 1976,⁴ and November 8 through November 12, (c) laying off Maxey Cox on October 6, 7, and 12 and November 8, 10, 12 and 16; (d) discharging employees Benny Lee High, Fred Langston, Jerry Williams, Virginia Huff, Johnny Lee Cole, Jimmy Ellefsen, and Albert Harp; (e) transferring and imposing more onerous working conditions on its employees. Still further, the General Counsel alleged that Respondent-Employer violated Section 8(a)(3) and (4) of the Act respectively by issuing disciplinary warnings and suspending employees Joe

Case 10 CA-12375. On November 10, 1976, the above Union filed a charge against Respondent-Employer in case 10-CA-12388. On November 12, 1976, Rebecca Dunlap an employee of Respondent-Employer filed a charge in Case 10-CA-12398. On December 23, 1976, the consolidated complaint in Cases 10 CA-12260 and 10 CA-12325 was further consolidated with Cases 10-CA-12375 and 10 CA-12398. On November 24, 1976, the above Union filed a charge against the Respondent-Employer in Case 10-CA-12432; that charge was supplemented on December 20, 1976 (10-CA-12432-2) and amended on January 4, 1977 (10-CA-12432). The above Union is also the Petitioner in Case 10-RC-10825 (filed August 19, 1976) and on November 4, 1976, an election was conducted thereon which resulted in challenged ballots sufficient in number to affect the results of said election. On December 30, 1976, the consolidated complaint which previously issued on December 23, 1977, was further consolidated with the determinative challenges in Case 10-RC-10825. The consolidated complaint of December 30, 1976, was further consolidated with Cases 10-CA-12388, 10-CA-12432 and 10 CA-12432-2 on January 7, 1977. Still further, on January 18, 1977, the Regional Director consolidated objections to the election timely filed by the Employer on November 11, 1976, in Case 10-RC-10825 with all of the previously consolidated cases. The Employer also filed charges on January 25, 1977, against the above Union in Case 10-CB-2679 based on the conduct it previously alleged to be objectionable in Case 10-RC-10825. A complaint thereon issued April 20, 1977, but after the hearing on the previously noted consolidated cases had opened and said complaint was consolidated therewith. Following the close of the hearing on these consolidated cases, additional charges were filed by Maxey E. Cox an employee of Respondent-Employer on September 12, 1977, in Case 10-CA-13076. A complaint thereon issued on October 20, 1977, and on General Counsel's motion, the Administrative Law Judge herein reopened the record of the previously litigated cases and consolidated Case 10-CA-13076 therewith. The hearing on the most recent consolidated cases closed on December 9, 1977.

² The caption appears as amended at the hearing. The record discloses that Our-Way, Inc., and Our-Way Machine Shop, Inc. (collectively referred to herein as Respondent-Employer, Employer, Our-Way or Company) are Georgia Corporations engaged in the remanufacturing and sale of refrigeration compressors. Further, the employees of Our-Way are employed at the same Atlanta, Georgia, facilities, and share common supervision and working conditions. Still further, there are common officers and the labor relations policies for both companies are controlled by the same individual. The parties stipulated and I find, that Our-Way, Inc. and Our-Way Machine Shop, Inc. comprise a single employer within the meaning of Sec. 2(2) of the Act.

³ The law firm, William F. Ford, Esq., and Paul D. Jones, Esq. (Ford, Harrison, Sullivan & Lowry) appears as noted in the post-hearing letter dated March 17, 1978.

⁴ All dates hereinafter refer to 1976, unless otherwise indicated.

Lewis Smith and Maxey Cox. On the other hand the General Counsel also alleged that certain conduct engaged in by the above Union violated Section 8(b)(1)(A) of the Act. Thus, it is alleged that the above Union threatened employee Grady Owens with physical violence and actually assaulted him because he did not support said Union. It is also alleged that the above Union at a union meeting condoned a threat by an individual in the audience who stated that he would bust heads of employees who failed to support said union if the employees went on strike. Furthermore at the same meeting it is alleged that the Union threatened employees that they would lose their jobs if they failed to vote for said union. These allegations of union misconduct were also filed as objections to the election conducted in Case 10-RC-10825.⁵ As the Union's conduct alleged to be violative of Section 8(b)(1)(A) and the objections to the election are interrelated they will be treated together.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, Employer, and Union, I find as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent-Employer as noted previously is a Georgia corporation engaged in the remanufacturing and sale of refrigeration compressors at its plants which are located in Atlanta, Georgia. During the past 12 months, which period is representative of all times material herein, Respondent-Employer purchased and received goods valued in excess of \$50,000 directly from suppliers at points located outside the State of Georgia. The Respondent-Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The Respondent-Employer admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES (RESPONDENT-EMPLOYER)

The Union commenced organizing Respondent-Employer's employees during the summer months of 1976. On Au-

⁵ Pursuant to a Stipulation for Certification Upon Consent Election approved on October 4, an election in Case 10-RC-10825 was conducted on November 4, covering a unit of all production and maintenance employees, including truckdrivers and helpers employed by the Employer at its Bernina Street, Krog Street, and Elizabeth Street, Atlanta locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. The tally of ballots showed that of approximately 249 eligible voters, 109 cast valid votes for and 93 cast valid votes against the Petitioner, 36 cast challenged ballots and 1 cast a void ballot. The parties stipulated at the hearing, that challenges were not sufficient to affect the outcome of the election. The challenged ballots and the stipulation thereon will be treated more fully *infra*.

gust 19, the Union filed a representation petition in Case 10-RC-10825 seeking to represent Respondent's production and maintenance employees. The parties thereafter executed a Stipulation for Certification Upon Consent Election approved by the Board's Regional Director for Region 10 on October 4. The election was conducted on November 4, whereby challenges to the ballots cast were sufficient to affect the outcome. The Union had conducted a vigorous campaign including the holding of weekly meetings attended by large groups of Respondent-Employer's employees. These meetings were generally held on Tuesdays at the Mark Inn on Moreland Avenue in close proximity to Respondent-Employer's complex of buildings. Other popular union meeting places were Jack's Liquor store on Moreland Avenue and the Austin Avenue Cafe. Further, the Union established an in-plant union organizing committee consisting of the following employees: James Turner, Jerry Williams, Roger Hazelwood, Maxey Cox, Lucille Evans, Benny High, and Kenny Rozzelle. These employees distributed and obtained many of the Union authorization cards in and around Respondent-Employer's complex. In addition, Virginia Huff, Maxey Cox, Benny High, and some of the other unit employees wore a union patch approximately 4 inches in diameter which was conspicuously displayed. According to the General Counsel, Respondent-Employer on learning of the Union's organizational efforts embarked upon a carefully chartered course designed to thwart this effort. In this regard the General Counsel asserts that Respondent-Employer early in the campaign solicited several of its employees to engage in surveillance and relying on the information obtained from these employees, as well as information supplied by its supervisors, created the impression of surveillance by informing certain union adherents that it knew who were the leaders of the Union. The General Counsel contends that after Respondent-Employer learned the identity of the union supporters, its "union-busting" campaign entered a new stage. According to the General Counsel, interrogation, threats, and promises of benefits became the order of the day. In addition, Respondent-Employer allegedly instituted new rules with regard to talking and absences and imposed more onerous working conditions on certain union adherents. Finally, it allegedly laid off and discharged some of its most trusted and capable employees.

General Counsel asserts that notwithstanding the Respondent-Employer's alleged conduct as set forth above, its employees selected the Union as their exclusive representative.⁶ According to the General Counsel the Respondent-Employer was unable to accept the employees' preference and retaliated by closing its plant, on November 5 and thereafter from November 8 through November 12.

Respondent-Employer, on the other hand, by its answer denied all allegations of unfair labor practices. In its brief it candidly concedes that in the initial stages of the campaign that certain conduct which was committed by "foremen" was violative of Section 8(a)(1) of the Act. However, it asserts that such conduct was isolated and committed prior to

the education of the supervisors, many of whom were lower level foremen, and, after these persons had learned the legal boundaries of this portion of the Act, these violations ceased.

A. Alleged 8(a)(1) Conduct

1. Surveillance

The General Counsel contends that throughout the month of August Respondent-Employer solicited several employees to engage in surveillance in violation of Section 8(a)(1) of the Act. In support of this contention James Ellefsen credibly testified without contradiction that on August 10, the same morning that he signed a union card, he was approached by his supervisor Dot Brown⁷ who engaged him in a conversation about the Union. She asked him if he knew anything about the Union's attempt to organize to which he replied that he only heard rumors. Ellefsen testified that Brown instructed, "Well, let me know if you hear of anybody, anybody that's trying to get organized, tell me about it." I find that Brown's efforts to enlist Ellefsen to keep her informed of union activities constituted an attempt at surveillance in violation of Section 8(a)(1) of the Act.⁸

In addition to Ellefsen's uncontradicted testimony as set forth above, a substantial portion of Roger Hazelwood's testimony was uncontradicted. Hazelwood has been employed by Respondent-Employer for over 5 years. His current supervisor is Claude Rhea.⁹ Sometime prior thereto he was supervised by Charles Baine. On or about August 18 about 11 a.m. Baine approached Hazelwood in the yard outside the facility and directed Hazelwood to go with him into the carrier office. Baine noted that Hazelwood had been with the Company for a long time and was doing a good job. On the other hand Baine said that he didn't want to see him get messed up and injected the subject of the Union into the conversation. Baine asked Hazelwood whether he knew anything about the Union to which Hazelwood responded affirmatively. Baine then told Hazelwood that Charlie Askham, plant manager wanted to meet with him. At approximately 11:35 a.m. Baine came over to Hazelwood's work station and took him to Askham's office. Hazelwood credibly testified without contradiction that Askham asked Hazelwood where he intended to have lunch. When Hazelwood responded, across the street at

⁷ Ellefsen also testified without contradiction that at the time he was hired, approximately 2 years earlier, he was told by the personnel director, Pat O'Sullivan, that Dot Brown was his supervisor. O'Sullivan gave Ellefsen a business card which identified Brown as supervisor. (See G.C. Exh. 7.) Further, the parties stipulated that on the basis that Brown exercised supervisory indicia within the meaning of Sec. 2(11) of the Act her challenged ballot remain unopened and uncounted. In view of the foregoing and the record as a whole, I find that at all times material herein, Dot Brown was a supervisor within the meaning of Sec. 2(11) of the Act.

⁸ *Wadco Company*, 234 NLRB 207 (1978).

⁹ Respondent-Employer amended its answer at the hearing to admit, and I find that Charles Askham, Bobbi Bailey, Roy Bailey, Charles Baine, James Bauknight, Willard Robertson, Bill Hames, Louis Harris, and Claude Rhea are supervisors within the meaning of Sec. 2(11) of the Act. The supervisory and agency status of James Rollins is in dispute and will be treated fully below.

⁶ It is noted that while a majority of the ballots opened and counted were cast for the Union, 36 of the ballots cast were challenged and sufficient in number to be determinative of the outcome.

Joe's (also known as Austin Avenue Cafe), Askham indicated that he might buy Hazelwood his lunch. He asked Hazelwood to do him a favor and "watch, search out the people [at the Austin Avenue Cafe] who was [sic] meeting the Union man and signing the cards." Hazelwood said that he would and returned to his work station. Shortly thereafter he went to Joe's, had his lunch, and returned to work about 12:25 p.m. Baine asked him what he found out, to which Hazelwood responded that he did not learn anything. Later that evening, Baine approached Hazelwood again and told him that Bobbi Bailey¹⁰ wanted him to go to Jack's liquor store¹¹ to learn who was meeting with the Union and signing cards. Baine offered to buy him a six-pack of beer and gave Hazelwood a \$5 bill. He started to turn over his car keys to Hazelwood but after the latter told him that he did not have a license, Baine decided to drive. He dropped Hazelwood off about a quarter of a block from Jack's liquor store and waited for Hazelwood to return. Hazelwood bought a six-pack of beer and gave the change from the \$5 bill to Baine who asked him if he saw anyone. Hazelwood told him that he saw one employee from the Krog Street plant. I find that Askham and Baine attempted to enlist and did enlist Hazelwood to engage in unlawful surveillance in violation of Section 8(a)(1) of the Act.¹² On another occasion Baine told Hazelwood that he observed him talking to Union Supporter Virginia Huff and was very disappointed. When Hazelwood asked Baine to explain, the latter responded that he had spies all over the place. Further, Hazelwood credibly testified without contradiction that Supervisor Claude Rhea on September 10, told him that he heard that Jerry Williams was "raising hell" at a union meeting because he got fired. Still further, Hazelwood credibly testified that in September, about 1 week after Jerry Williams was discharged Roy Bailey (plant manager at the Krog Street location) called him (Hazelwood) into his office and told him that he had heard that he, Hazelwood, was having union cards signed inside the plant. I find that the remarks of Baine, Rhea, and Roy Bailey as set forth above created the impression of surveillance in violation of Section 8(a)(1) of the Act.¹³

Additional testimony tending to support the allegations that Respondent-Employer created the impression of surveillance and engaged in actual surveillance was adduced from Jerry Williams, and Maxey Cox. Thus, Jerry Williams credibly testified that at one union meeting at the Mark Inn he spotted employee Grady Owens with Supervisor Bill Hames. On that occasion Owens and Hames fled the building after realizing that they had been discovered by Williams. Hames concedes that he knew that union meetings were conducted at the Mark Inn, but he asserts that he merely drove Owens to the union meetings at the Mark Inn because Owens asked him to and it was on his (Hames') way home. Hames drove Owens to the Mark Inn on ap-

proximately three occasions. Hames testified that on one of these occasions he picked up Owens after the Union meeting somewhere between the plant and the Mark Inn. According to Hames, he was driving home when by accident, he came across Owens who was walking home, about 4 miles away. He concedes that Owens, on occasion, told him what was going on at the Union meetings and who attended. Hames further concedes that on another occasion he entered the Mark Inn lounge with Owens. In this regard it is noted that Hames who has been employed by Respondent-Employer for approximately 18 years, first set foot inside the Mark Inn in the summer or fall of 1976 and only after the Union commenced its organizing drive. In these circumstances, and noting the previously described conduct of the other supervisors who conveyed the impression of surveillance and engaged in actual surveillance I find that Hames' appearances at the Mark Inn was not for any legitimate purpose but rather in furtherance of Respondent-Employer's efforts to learn as much as it could about the Union and its supporters. This is further demonstrated by Hames' testimony in support of the Company's objections and allegations of union misconduct. In this regard, Hames testified that when on October 8, Owens told him that he didn't think the Union would allow him (Owens) to attend a union meeting, he (Hames) showed Owens a union leaflet which invited all employees. It appears that Hames would so encourage Owens to attend the Union meeting because he could rely on Owens to disclose the identity of those in attendance and what went on therein. On the basis of the foregoing and the entire record, I find that Respondent-Employer, by its Plant Superintendent Bill Hames, further conveyed the impression of surveillance and engaged in actual surveillance in violation of Section 8(a)(1) of the Act.¹⁴

As noted above Maxey Cox also testified on the subject of surveillance. This testimony involves a conversation between Cox and James Rollins. As the supervisory and agency status of Rollins is in dispute a discussion thereon is in order.

2. Supervisory and/or agency status of James Rollins

The General Counsel alleged and the Respondent-Employer denied the supervisory and agency status of James Rollins. With regard to the disputed supervisory issue the record reveals factors supporting and factors negating such a finding. Tommy White testified that he is one of five em-

¹⁴ Jerry Williams also testified that he saw Charles Baine drive through the parking lot of the Mark Inn Motel in early August. I find that this by itself falls far short of establishing a further violation of surveillance. Accordingly I shall dismiss this account of alleged surveillance. See *Grede Foundries, Inc. (Milwaukee)*, 205 NLRB 39, 47 (1973); *Atlanta Gas Light Company*, 162 NLRB 436, 438 (1966). The General Counsel urges an additional account of surveillance as testified to by Rebecca Dunlap that Bobbi Bailey on more than one occasion allegedly told her that she heard rumors that she, Dunlap was the leader of the Union. Bobbi Bailey on the other hand, describes these conversations in a different context. According to Bailey, she was told by another employee that Dunlap was spreading rumors about Bailey's personal affairs and she, Bailey, confronted Dunlap with this matter. Dunlap admitted telling Bailey that she mentioned to other people that she, Bailey gave a nice party but denied spreading any rumors. Dunlap attended a number of affairs given at Bailey's home, assisting with cleaning and cooking and performing related chores. In the circumstances of this case, noting an absence in the record of any union leadership role by Dunlap, I am not persuaded that Bailey made the aforementioned remarks ascribed to her by Dunlap. Accordingly, I shall dismiss this count of surveillance.

¹⁰ Bobbi Bailey is president, and principal owner of Our-Way, Inc.

¹¹ As noted previously, substantial union activity was engaged in at Jack's liquor store.

¹² *Wadco Company, supra*.

¹³ See, e.g., *Barnes and Noble Bookstores, Inc.* 233 NLRB 1326 (1977); *Commerce Concrete Company, Inc.*, 197 NLRB 658, 659 (1972).

ployees employed in the yard who receive instructions from Rollins. White is a forklift operator who is engaged principally in unloading trucks. If there are no trucks to unload White will check with Rollins for another assignment. On one occasion, White had to attend a funeral and phoned Rollins that he would be unable to work. In this regard the record discloses that Rollins' name is the only name listed in the receiving area (yard) in the in-plant telephone directory. White credibly testified that his hourly rate from the last annual wage increase was up to \$3.68 or \$3.88, whereas other employees in the yard were up to \$4. Rollins told White that he would try to get him also up to \$4. Approximately 1 week later Rollins declared, "Tommy, I got you your raise." The record further discloses that Rollins distributes paychecks, hands out warning slips, initials timecards, assigns overtime, and is entrusted with a key to the back gate leading to the yard area.

As noted above, the record also reveals a number of factors which militate against a finding of supervisory status. Thus Rollins punches a timecard, is hourly paid, and earns overtime pay. Approximately 90 percent of his time is spent doing physical chores such as unloading trucks and adding gas to the forklifts. Rollins reports directly to Plant Manager Askham. According to Rollins it is Askham who decides on overtime and issues warning slips, and he, Rollins, is merely a vehicle for transmission to the employees. With regard to the circumstances surrounding White's wage increase, Rollins concedes that he spoke to Plant Manager Askham about White. According to Rollins, White mentioned the subject of the wage increase often so that he told White that he would talk to Askham about the matter. Rollins testified that he told Askham that White is a good employee and does his job to which Rollins asserts Askham responded that he would take care of it. Rollins claims that he was not asked by Askham whether White should get the increase. Rollins' version is that he learned about the increase sometime later when White told him about it. Askham did not testify concerning this matter. On the basis of demeanor, I did not find Rollins a reliable witness and accordingly reject his version concerning the circumstances of the wage increase.

While the issue is a close one, I find the credited evidence revealing that Rollins effectively recommended a wage increase for White overriding.¹⁵ In this regard White testified without contradiction that Rollins told him "Tommy, I got you your pay increase." (Emphasis supplied) Accordingly, on the basis of the aforesaid wage increase and the record overall, I find that James Rollins possessed qualitative indicia of supervisory status and is a supervisor within the meaning of Section 2(11) of the Act.

With regard to the agency issue, the record reveals *inter alia*, as described above that Rollins distributes paychecks, assigns overtime, initials timecards, and gives out warning notices. Assuming *arguendo* as Respondent-Employer contends, that Rollins is merely a conduit from the plant manager to employees, such proximity to the plant manager lends credibility to his utterances as emanating from management. In this connection Rollins testified, "Well, everybody's got a certain job and if he [Askham] wants anything special done, he usually comes, tells me to tell them [em-

ployees]." I therefore find that the statements and conduct of Rollins are chargeable to Respondent-Employer for the additional reason that he had been placed in a strategic position whereby employees could reasonably believe that he speaks on its behalf.¹⁶

Having determined that Respondent-Employer is responsible for the acts and conduct of Rollins, the conversation between Cox and Rollins is deemed material. Cox testified credibly without contradiction that Rollins (supervisor and/or agent) told him approximately 3 weeks earlier (January 1977) that he was upset that he wasn't invited to the supervisors' Christmas party, particularly as he had done so much for the Company. He confessed to Cox that Audrey Morgan (Secretary-Treasurer) sent him, and employees Grady Owens, Curtis McCormick and wife, Tommy Wreford and Steven Wreford to a union meeting. He also complained that he would probably have to testify at the trial about certain people shaking a gate. Rollins in fact testified about 5 weeks after Cox testified about certain individuals shaking a gate on the day of the Board-conducted election. He also testified regarding his disputed supervisory status but did not deny the conversation as testified to by Cox.

Respondent-Employer in its brief, relying on *J. W. Mays, Inc.*,¹⁷ argues that Rollins' attendance at a union meeting cannot be found violative of the Act even if Rollins were to be considered a supervisor because he was invited by employees Ellefsen, Huff, and Cox. However, contrary to Respondent-Employer, I find that the instant case is distinguishable on its facts. For example, unlike *J. W. Mays, Inc.*, the Respondent-Employer herein and Rollins deny supervisory status. Thus, it cannot be said that Rollins was invited to attend the union meeting "with full and open knowledge of his status."¹⁸ Further it was noted in *J. W. Mays, Inc.*, unlike the instant case, that the General Counsel disclaimed any contention that the alleged wrongdoer attended the meeting for any purpose other than to determine what the Union could do for him.¹⁹ In these circumstances, and noting, *inter alia*, that the uncontroverted testimony reveals that Rollins admitted to Cox that he and other employees were sent to the Union meeting by Mrs. Morgan, secretary-treasurer, I find that Rollins' appearance therein was not for any legitimate purpose, but rather to engage in surveillance. Accordingly, I find that Respondent-Employer thereby violated Section 8(a)(1) of the Act.²⁰

3. Interrogation

The credited testimony of James Ellefsen and Roger Hazelwood previously set forth with regard to surveillance also

¹⁵ See *N.L.R.B. v. Broyhill Company*, 514 F.2d 655, 657, fn. 5 (C.A. 8, 1975), wherein the court commented:

Assuming *arguendo* that McWilliams was not a supervisor within the meaning of the Act, it is clear from the evidence that other employees felt that he was their "boss" and that the Company had placed him in a position where employees could reasonably believe that he spoke and acted on behalf of management.

See also *Helena Laboratories Corp v. N.L.R.B.*, 557 F.2d 1183, 1187 (C.A. 5, 1977); *Han-Dee Pak, Inc.*, 232 NLRB 454 (1977); *River Manor Related Facility*, 224 NLRB 227, 235 (1976).

¹⁷ 147 NLRB 942, 947-948 (1964).

¹⁸ Cf. *South Rambler Company*, 139 NLRB 1197, 1202 (1962).

¹⁹ *J. W. Mays, Inc.*, *supra* at 948, fn. 11.

²⁰ See *Thomas W. Moylan Company, Inc.*, 136 NLRB 262, 267, 271 (1962).

¹⁵ E.g., *Helena Laboratories Corporation*, 225 NLRB 257, 258, fn. 9 (1976).

serves to support the allegations of unlawful interrogation. Thus James Ellefsen credibly testified without contradiction that Supervisor Dot Brown questioned him on August 10 as to whether he knew anything about the Union's attempt to organize. Further, Roger Hazelwood testified without contradiction that Supervisor Charles Baine asked him whether he knew anything about the Union. With regard to other acts of unlawful interrogation the credited testimony²¹ reveals that in September Roy Bailey asked Hazelwood why he signed a union card. He also inquired as to how Hazelwood would vote in the Union election. Hazelwood also testified without contradiction that in mid-September Dot Brown asked him whether he was approached by the Union to sign a card. On still another occasion in mid-September Supervisor Jim Bauknight walked over to employee Larry Grier who was working at his station and told him that he wanted to see him in his office. Bauknight asked Grier in Bauknight's office what he knew about the Union and what his feelings were in this regard.²² I find that by the acts set forth above Respondent-Employer interrogated its employees about their union activities in violation of Section 8(a)(1) of the Act.²³

4. No solicitation and new work rules

The General Counsel contends that Respondent-Employer violated Section 8(a)(1) by its promulgation and enforcement of no-solicitation, no-distribution rules. He further contends that with the onset of the Union's organizing campaign, Respondent-Employer with knowledge of such campaign unlawfully changed its working conditions by instituting a new "no talking" rule and a new excused absence policy.

With regard to the no-solicitation, no-distribution rules, the record discloses that Respondent-Employer distributed to its employees a document entitled "PERSONNEL POLICY: WORK RULES."²⁴ In particular the General Counsel asserts that rules seven and eight of the aforementioned work rules are overly broad and invalid. The work rules prohibit in pertinent part:

7. Soliciting collecting or selling for any purpose during working hours.
8. Posting or removing notices from bulletin boards or elsewhere or distributing written or printed material.

Respondent-Employer in its brief contends that the rules set forth above do not establish a *prima facie* violation of Section 8(a)(1). Moreover, Respondent-Employer asserts

²¹ The facts as set forth herein appear as credited. In this connection I have relied on my observation of the witnesses and have noted that a substantial portion of the testimony is uncontroverted. With regard to the testimony given by Roger Hazelwood, it is further noted that he was still in the Respondent-Employer's employ at the time of the hearing. As such he testified adversely to his pecuniary interest, a matter not to be lightly disregarded. See, e.g., *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972); *Gateway Transportation, Inc.*, 193 NLRB 47, 48 (1971); *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961).

²² These incidents as well as other acts of unlawful interference will be set forth more fully as part of the discussion on the alleged discriminatees.

²³ See, e.g., *Didde Glasser, Inc.*, 233 NLRB 765 (1977); *Jim Bradley's Bucks Co. Country House*, 223 NLRB 1163, 1166 (1976); *Wadco Company*, *supra*.

²⁴ G.C. Exh. 6.

that no evidence was presented which indicated that these rules were enforced.

Most significantly, it is noted that disputed rule seven prohibits solicitation during "working hours" and is not limited to "working time." The distinction is significant because a rule which prohibits solicitation or distribution during "working time" is presumed to be valid on its face; whereas the rule is presumed to be invalid if the phrase used is "working hours." The Board's rationale is as follows:

A rule prohibiting solicitation during "work time" or "working time" is, in our opinion, sufficiently clear to employees to justify requiring the party attempting to invalidate the rule to show, by extrinsic evidence, that, in the context of a particular case, the rule was communicated or applied in such a way as to convey an intent to restrict or prohibit solicitation during break-time or other periods when employees are not actively at work. On the other hand, in our opinion, a rule prohibiting solicitation during "working hours" is *prima facie* susceptible of the interpretation that solicitation is prohibited during all business hours and, thus, invalid. *We would therefore require the employer to show by extrinsic evidence that, in the context of a particular case, the "working hours" rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.*²⁵ [Emphasis supplied.]

In the instant case and in accordance with the foregoing principles, I find that the disputed rule containing the phrase "working hours" is *prima facie* invalid. *A fortiori*, the burden shifts to Respondent-Employer to demonstrate that it conveyed to its employees that they could engage in solicitation or distribution during their nonworking time such as lunch or breaktime. The record however, is devoid of any extrinsic evidence tending to show that Respondent-Employer clarified the invalid rules. While testimony was adduced from Bobbie Bailey (principal owner) and Supervisors William Hames and Harvey Hazelrigs that employees were on their own time during lunch and breaktimes they did not testify how this was communicated to the employees or whether the employees understood that they could engage in solicitation or distribution during such periods. Indeed the evidence is to the contrary. Thus Virginia Huff credibly testified that she received the rules (G.C. Exh. 6) at the time she was hired from Personnel Director Patrick O'Sullivan but did not receive anything further in this regard. Another employee, Johnny Cole, who also received a copy of these rules from O'Sullivan credibly testified that he distributed union cards on lunch and breaktimes because Union Business Representative Jimmy Walker told him that he could be terminated if he engaged in such activities on company time. In these circumstances I find the disputed rules to be, at best ambiguous and therefore unduly restrictive of employees' rights under Section 7 of the Act to engage in union solicitation or distribution during their nonworking time.²⁶

²⁵ *Essex International, Inc.*, 211 NLRB 749, 750 (1974).

²⁶ See, e.g., *J. L. Hudson Company*, 198 NLRB 172 (1972); cf., *Essex International, Inc.*, *supra*.

Counsel for Respondent-Employer argues that assuming *arguendo* the rules are deemed presumptively invalid, there can be no basis for an 8(a)(1) finding because assertedly the evidence did not disclose that these rules were enforced. He relies principally on the Board decision in *The Lion Knitting Mills Company*.²⁷ I find however, that the facts in the instant case are materially distinguishable. In *Lion* there was voluminous evidence showing wide distribution and wearing of union novelties without any outward protests from the Company. The Board stated therein "we are satisfied that neither the Respondent nor its employees viewed the rule as prohibiting union campaign activities."²⁸ By contrast, in the instant case the key union supporters who wore union patches at work experienced various forms of discrimination because of their union activity. In particular it is noted that Bobbi Bailey discharged employees Fred Lanston, Larry Grier, and Johnny Cole soon after they wore their union patches for the asserted reason that they harassed other employees. The so-called harassment consisted of these employees urging a few fellow employees to take union cards and patches. It does not appear that the time involved in this "solicitation" amounted to more than a few minutes. Thus employee Asbury Miller, a witness on behalf of Respondent-Employer, testified that on one occasion while working in the stator department Larry Grier asked him to sign a union card. Miller responded that he wouldn't and Grier who was in the department to pick up a stator, did so and left immediately. According to Miller the entire time involved in the incident was less than a minute. Clarence Chayne testified that Johnny Cole gave him a union patch and told him that he (Cole) wanted him to wear it. Chayne took the patch and put it in his back pocket. On cross examination, Chayne testified that a second conversation with Cole about the patch took place on breaktime. Still later the same day a third conversation with Cole occurred in the bathroom. When Chayne went into the bathroom and saw Cole and Grier, one of them assertedly grabbed his collar and said "this (collar) is where you wear the patch" whereupon Chayne laughed and walked out. However, the same day he told his supervisor, Hazelrigs, about the bathroom incident. He did not report any further incidents to his supervisor. In these circumstances, I conclude that the evidence does not reveal that Cole, Grier, or Langston interfered with production or otherwise engaged in acts of harassment. Further, I find that the Respondent-Employer took reprisals against these employees because they were engaged in union solicitation in violation of the Company's rules rather than because they assertedly harassed employees. Based on the foregoing and the record as a whole I find that Respondent-Employer at all times material herein maintained and enforced invalid no-solicitation and distribution rules in violation of Section 8(a)(1) of the Act.²⁹

²⁷ 160 NLRB 801 (1966).

²⁸ *Id.* at 802, fn. 1.

²⁹ The General Counsel in his brief argues that said rules were also *promulgated* in violation of Sec. 8(a)(1). The complaint in this regard however refers only to "maintaining" and "enforcing" these rules. Further, the evidence reveals that these rules were disseminated to employees in January 1976, if not earlier. Therefore I find that the promulgation issue *inter alia* is barred by Sec. 10(b) of the Act, since it involves an event occurring more than 6 months prior to the filing of the charge.

As noted above, the General Counsel also asserts that the Respondent-Employer instituted both a new "no talking" rule and a new medical absence excuse rule. With regard to the "no talking" rule, Bobbi Bailey testified that employees are permitted to talk either at their work station or in another work area so long as doing so doesn't interfere with production and that such has always been the rule. There is substantial credited evidence tending to show that Respondent-Employer closely monitored union solicitation and related activities, and engaged in reprisals for such activities. However, I find that the evidence is insufficient to establish as the General Counsel argues that "Respondent instituted a new rule prohibiting talking at all times within the plant." There is no evidence tending to show that such a rule was published. Accordingly, I shall dismiss this allegation.

With regard to the alleged new rule on excused absences I find that the evidence in support thereof is persuasive. On September 30 at approximately one-half hour before starting time, Virginia Huff called in and advised her supervisor, Willard, (Robbi) Robertson that she was sick and would not be able to work that day. Robertson told her that he wanted her to bring in a doctor's excuse for the 1 day. The Company's policy and published rules in pertinent part require:

Absence From Work for *Three Consecutive Days* for Sickness Requires a Doctor's Statement [Emphasis supplied.]

According to Robertson he asked Huff to provide the doctor's statement for only *1 day's absence* because he heard a rumor passed on to him from employee Shirley Myers that she (Huff) was out the night before until 3 a.m.³⁰ He did not know whether Myers had seen Huff, nor did he investigate the matter further. Robertson concedes that Respondent-Employer was opposed to having a union and that he knew all about Huff's union activities. In addition the record discloses that for approximately 1 week prior to September 30 Huff wore a union patch. Further, Robertson concedes that he had not required Huff to provide a doctor's statement for 1 day's absence prior thereto. On October 1, Huff provided the doctor's statement demanded of her by Robertson so that she could return to work. She asked him how long the new rule had been in effect to which he responded "a couple of weeks ago." According to Robertson he told her that the rule was in effect for a "couple of weeks" to get her off his back. I find that the reasons set forth by Robertson for the action he took are not convincing. In these circumstances I find that the Respondent-Employer by instituting a new rule *vis-a-vis* excused absences violated Section 8(a)(1) of the Act.

³⁰ While Shirley Myers testified on behalf of Respondent-Employer, she did not offer corroborative testimony for Robertson regarding the rumor. Myers who has been employed by Respondent-Employer for 9 years testified that she has always been required to provide a doctor's note for 1 day's absence. Her testimony is not supported by the evidence. (See G.C. Exh. 5.) Thus it is noted that even Robertson testified that the Company required a doctor's statement for 3 or more absences. On the basis of demeanor, and consideration of what is reasonably plausible, I find that the testimony of both Robertson and Myers is unreliable.

B. *Alleged 8(a)(3) and (4) Conduct*

b. *October and November layoffs (Cox)*

1. Layoffs, suspensions, and onerous assignments

a. *Maxey Cox and Joe Lewis Smith*

It is alleged that Maxey Cox was discriminatorily laid off in violation of Section 8(a)(3) on October 6, 7, and 12 and November 8, 10, 12, and 16. It is further alleged that on November 23 Maxey Cox was unlawfully transferred permanently to the tear down department. Still further, it is alleged that subsequent to the close of the original hearing,³¹ Respondent-Employer issued disciplinary warnings and a 3-day suspension to Maxey Cox in violation of Section 8(a)(3) and (4). In connection with the aforementioned posted hearing conduct, it is also alleged that the Respondent-Employer issued disciplinary warnings and suspended employee Joe Lewis Smith in violation of Section 8(a)(3) of the Act.

Maxey Cox has been employed by the Company since August, 1969. Since August, 1976, he has been conspicuously involved in the Union's organizational efforts. He signed a union authorization card on August 11 and thereafter obtained union cards from other employees. He became a member of the in-plant union organizing committee and attended weekly committee meetings. He also attended approximately 20 regular union meetings. On October 1, he began wearing a shirt with a union patch during working hours. In addition, he served as a union observer during the Board conducted election November 4.

On September 28 at approximately 4:28 p.m., 2 minutes before the end of the work day Cox noticed Bobbi Bailey in the area. He and some other employees had completed whatever work there was, and were standing around but engaged in cleaning the area as they generally are at the end of the day. Cox heard the 4:30 p.m. buzzer and he walked over to the time-clock and punched out. When he turned around he saw Bobbi Bailey who said to him "Do you know I'll put you in the street. You've been here long enough to know that we don't huddle up on the job when we're supposed to be working." According to Bailey the afordescribed incident was related to a similar incident which occurred in early September. Bailey testified that in early September Cox and about four employees were grouped together and talking instead of working. She waited an unspecified time and when the employees did not disband she went over to the group and told Cox that he was supposed to be working. Respondent-Employer asserts that because of a lack of incoming work, makeshift work was created for these employees, i.e., cleaning light bulbs, and when such work was made available, they were expected to work. Bailey testified that several weeks later at about 4:15 p.m. Cox and three other employees were standing at the time clock. She admonished Cox, "This is the second time I've told you about grouping up when its work time. If I catch you again, you're through. Do you understand?"³²

³¹ The original hearing closed on April 28, 1977.

³² Respondent-Employer in its brief asserts that Cox was not credible because *inter alia* his testimony was inconsistent with an affidavit which he

The record discloses that Cox wore a union patch on his shirt commencing October 1. A few days later on October 6, he experienced the first of a number of layoffs. According to Respondent-Employer Cox was laid off for lack of work. The record reveals that from the inception of Cox's employment with the Company in August 1969 until his transfer to the tear-down department on November 23, 1976, Cox was a warranty inspector in the Copeland plant. The Copeland plant which services the Company's largest contract had a 10-percent decline in receipts in September 1976 from the level of the preceding year. Notwithstanding the decline in receipts the Company continued to employ employees whose regular assignments did not keep them busy the entire day in other work including the cleaning of light fixtures. Further, the Company purchased additional compressors to provide employees with work until the business conditions improved. Maxey Cox was assertedly one of these employees. As a warranty inspector his duties consisted principally of inspecting Copeland compressors returned to the Company within 12 months of their purchase. The receipts in October and November were also less than they were the previous year. Respondent-Employer claims that Cox was laid off in October as a result of the foregoing decline in business and because there were no in-warranty compressors for him to inspect. On the other hand the record discloses that prior to Cox's union activities whenever he did not have enough warranty work he was always given other work to do. For example, from time to time he performed almost every job in the tear-down department. Further on several occasions on returning to work after a layoff he discovered a substantial number of compressors already torn down and ready for his inspection. Thus when he returned to work from layoff status on November 13 there were 41 compressors backed up for his final inspection. In this regard it is significant to note that Cox was only required to inspect 25 compressors a day.

Respondent-Employer argues additionally that other employees besides Cox were laid off throughout this period because of lack of work. In support thereof Plant Superintendent Hames testified that other temporarily laid off employees besides Cox missed an entire day. However, on cross-examination Hames could not recall the name of any such employee. Further, the record reveals that of the 7 days that Cox was laid off, he missed at least an entire day on five such occasions. In contrast other employees laid off on those days missed only half days or less.³³ The record

presented to the Board. It appears that from the portion of the affidavit relied on by counsel for Respondent-Employer, the account therein indicates that Bailey spoke to Cox 2 minutes before, not after, he punched out. Cox apparently gave two affidavits, neither one is in evidence. Overall, I found Cox's demeanor was such that he was relating facts as best as he could recall, given the time lag and numerous other intervening events. Thus I found Cox to be a credible witness. In any event, in the circumstances of this case I do not deem that the apparent inconsistency is material. It appears more significant that there is no evidence tending to show that Bailey admonished any of the other employees with whom Cox was allegedly speaking. Thus noting that Cox had been employed by the Company for 8 years before this relatively minor incident occurred, his union activity, including membership on the in-plant union committee, and as the record discloses, a "very good" worker, I find that Bobbi Bailey threatened Cox with discharge in violation of Sec. 8(A)(1) of the Act.

³³ See Resp.-Empl. Exh. 24.

does not disclose any documentary or credible evidence tending to show that any employee other than Cox was temporarily laid off for an entire day during any time material herein. In these circumstances noting that Cox was first laid off within 5 days of his wearing a union patch³⁴ on his shirt; that no other employee in a voting unit consisting of approximately 250 employees was similarly laid off for at least 1 entire day; that in the past whenever there was a lack of warranty work, Cox was always assigned other duties, I find that these layoffs were discriminatory and violative of Section 8(a)(3) of the Act.

c. October 14 meeting with Cox

On October 14 Bobbi Bailey had Cox summoned to Hames' office. According to Bailey, she had been talking to Hames when employees Sarah Rumsey appeared at Hames' office and asked him whether he had informed Bailey that Cox wanted to see her. Hames told Rumsey that he hadn't and Rumsey thereupon left. Hames then assertedly told Bailey that Cox wanted to see her to which she (Bailey) responded, "Well, I'll think about it." Bailey testified that she called her attorney and informed him that Cox wanted to see her. Her attorney assertedly advised Bailey to have other people present because this might be a "set-up." However, Hames on cross-examination denied that he spoke to Bailey about meeting with Cox on the same day that the meeting took place. According to Hames, he told Bailey 1 or 2 days earlier that he had talked to Cox the night before and that he (Hames) believed that Cox had changed his mind about the Union. He claims that Bailey did not believe that Cox had changed his mind. When asked further on cross-examination whether he (Hames) had asked Bailey about having a meeting (with Cox), he, Hames, responded "I could have brought that up, yes."³⁵

Cox credibly testified that Hames got him at his work station and told him that Bobbi Bailey wanted to see him in the office. When Cox got to the office, Bailey told him to have a seat. In attendance were also William Hames and Supervisors Willard (Robbi) Robertson and Mike McGhee. Bailey told him that the Union had spread a lot of rumors and that she wanted Cox to get straight on some facts. She mentioned that the Union has spread the rumor that she (Bailey) has handled the union situation wrong and that the stockholders were going to fire her. Bailey told Cox "I want to tell you I own the Company and I am the stockholders." Bailey then looked at Cox's union patch and said "You know, a player wears the uniform of his team." Bailey corroborates Cox's testimony that she, Bailey, related her brother-in-law's union experience to him. Thus, Bailey testified:

My brother-in-law was a steel worker and followed the union all over the United States, building bridges

³⁴ On October 14 Bobbi Bailey had Cox summoned to Hames' office and commented regarding his union patch, "You don't wear the uniform of a team unless you expect to play ball." The October 14 incident which will be discussed more fully immediately below reveals most poignantly Bailey's hostility towards the Union.

³⁵ Noting the material inconsistencies in the testimony of Bailey and Hames and for reasons set forth below, I reject Respondent-Employer's contention that Cox requested this meeting.

everywhere they wanted him to go. He got hurt on the job. He didn't get workman's comp.; he didn't get any help from them. And later on, he got so depressed he ended up killing himself.

During the course of this meeting Bailey told Cox that she was disappointed in him, noting that he attended union meetings and commented on the fact that he was the third highest paid employee in the plant. She pointed out, however, that the Union did one good thing by getting him to work every day. In this connection Robertson pointed out that he worked in a union shop and they would not tolerate his attendance. Perhaps the most revealing statement Bobbi Bailey made with regard to her antiunion animus was that if she was to go out in a casket, there would be someone at the Company to carry on the same policies and just as determined [to keep the Union out] as she was. On cross-examination General Counsel questioned Bailey as to what she meant by the use of the term "determined" and the following verbal exchange transpired:

Q. What was it you were determined to do?

A. To carry out our business without being shut down—without them firing them stockholders—without them firing the supervisors like they stated they would.

Q. The Union firing the supervisors?

A. That's what the Union propaganda was that came through.

Q. You were determined to run the place without a union?

A. Yes.

Respondent-Employer argues in its brief that Cox requested the meeting and the atmosphere therein was designed to appease Cox, not to coerce him. As previously stated, I have rejected Respondent-Employer's assertion that Cox requested the meeting. In this regard the record discloses that Cox did the listening and not the talking. Thus, Robertson testified that Cox asked Bailey "Do you want to see me." and then Bobbi Bailey had most of the floor.³⁶ Further, McGhee testified that "there was a lot of dead time in there waiting on Maxey (Cox) to say something." Even Bailey testified that when she had Cox come to the office "he sat down in the chair and hung his head down and wouldn't say anything." The Respondent-Employer asserts that Cox wanted this meeting to tell Bailey that he changed his mind about the Union. However, this view is not supported by the credible evidence. In this connection it is noted that Cox was wearing his shirt with the union patch on it at the October 14 meeting. I do not credit the testimony of Respondent-Employer's witnesses that Cox claimed that by wearing the union patch it doesn't follow that he is in favor of the Union. With regard to Respondent-Employer's assertion that this meeting was held to appease Cox, I am unpersuaded that the Company would go to such great lengths when 2 weeks earlier, it

³⁶ Robertson's testimony that Cox admitted to Bailey that he asked Sarah Rumsey to set up the meeting is not credited. It is noted that McGhee testified that later that day to satisfy his own curiosity he sought out Cox to find out how Cox communicated to Bailey that he assertedly wanted the meeting.

threatened to discharge him for talking to other employees at the end of the workday.

In reviewing the setting of the October 14 meeting it is noted, *inter alia*, (1) that it was held in the plant superintendent's office, (2) that the owner and other top supervisors were the only active participants, (3) that Bobbi Bailey expressed her disappointment that Cox had attended union meetings and otherwise supported the Union, (4) that his attendance record was discussed in a context suggesting that he would not be permitted to work if the Company became unionized, and (5) that Bobbi Bailey attributed the death of her brother-in-law to a union. I find that by conducting the October 14 session as set forth above, Bobbi Bailey revealed severe hostility toward unions, and engaged in patently coercive acts in violation of Section 8(a)(1) of the Act.

d. October 25 incident

On October 25, Respondent-Employer threatened to discharge Cox once again. On that occasion Bobbi Bailey and William Hames discussed a final warning notice which Cox refused to sign. Cox complained that he did not think it was right for him to get a final warning notice when he had been late only once in over 2 months and told Bailey that he thought that she was trying to set him up for discharge. She responded, "Maxey, when I get ready to get rid of you, I'll just falsify your records." She had Cox' attendance records which erroneously listed Cox absent for October 6, 7 and 12, when on those days he had actually been laid off. After Hames confirmed that the attendance records were in error, Bailey told Cox that she would not tolerate his inability to get to work on time again. According to Bailey a supervisor had been covering up for Cox. Hames testified that before the Union campaign began Cox had averaged one lateness a week. It is undisputed that Cox had not received a final warning notice prior to this disputed incident. Hames also testified that Bailey acknowledged to Cox that since the Union came on the scene his attendance had improved 100 percent. It is noted that at the previous meeting in Hames' office on October 14, Bobbi Bailey acknowledged that Cox' attendance was improving. She repeated this observation on October 25. Notwithstanding the foregoing and after learning that Cox' attendance records erroneously signified absences, Bailey does not let the matter thereupon drop, but proceeds to threaten Cox not to let it happen again. I am not persuaded as Respondent-Employer asserts that this meeting was held to "mollify" Cox. In these circumstances, I find that the October 25 incident was tantamount to a threat to discharge and violative of Section 8(a)(1) of the Act.

e. Cox' alleged unlawful transfer

The General Counsel asserts, that in addition to Respondent-Employer subjecting Cox to numerous discriminatory layoffs, it discriminatorily transferred him on November 23 from his position as warranty inspector to the tear down department with a cut in pay from \$4.95 to \$4.16 an hour. As previously noted, Cox' duties as warranty inspector principally involved inspecting Copeland compressors returned to the Company within 12 months of their purchase.

Cox was trained in the position of warranty inspector by Jack Morgan, vice president and general manager of the Company. Morgan is a graduate mechanical engineer and his responsibilities include warranty administration. The record discloses that around the second week in November, Morgan attended a seminar given by the Copeland Corporation (herein Copeland) for all remanufacturing depots in this country and Canada. Respondent-Employer is the authorized remanufacturing depot for three manufacturers, Copeland, Carrier, and Dunham-Bush. With regard to Copeland, the Company is the depot for malfunctioning Copeland compressors in the southeast United States. The Copeland contract represents approximately half the dollar volume of the Company's business. At the aforementioned seminar, Copeland representatives urged the remanufacturing depots to analyze compressors as they are disassembled rather than as had been the practice prior thereto, from a written inspection report. For example Cox, as warranty inspector would examine Copeland compressors and record worn out or defective parts utilizing such instruments as a test panel and an ohmmeter. However, Morgan had the responsibility for determining the precise compressor failure, whether it be faulty workmanship or a problem in the field, based on the written inspection reports submitted by Cox. As a result of the emphasis placed by Copeland representatives on better analysis and in conformance with their recommendations,³⁷ Morgan decided to combine the warranty inspector's job with that of warranty analyst. Morgan testified that the knowledge Cox derived from his experience as a warranty inspector was too limited in refrigeration and quality control to handle the new job combining analysis and inspection. Morgan also testified that the job of analyst involved communicating with customers by correspondence and from time to time visits to various jobsites, which Cox was not required to do as warranty inspector. Charlie Baine became the new warranty inspector for Copeland compressors absorbing the job of inspection previously performed by Cox. The record discloses that Baine has considerable experience in refrigeration and quality control. He was hired by the Company 3 years ago as a warranty analyst assigned to inspect and analyze Dunham-Bush and Carrier defective compressors. I conclude that on the basis of experience and knowledge, that Baine was more qualified than Cox to handle the new job involving Copeland compressors. With regard to the substantial cut in pay and transfer to the tear-down department, the record reveals that from time to time Cox had performed every job in tear down, so that it does not appear unreasonable for the Company to assign him to that department.³⁸ Further, he was given the same hourly rate as the leadman, the highest in the department. In these circumstances I am not convinced that the General Counsel has established by a preponderance of the credible evidence that Cox was transferred to tear down with a cut in salary for reasons violative of Section 8(a)(1) and (3) of the Act. Accordingly, I shall dismiss this allegation.

³⁷ See Resp.-Empl. Exh. 9.

³⁸ While it is noted that in the past when Cox worked in tear down he received his inspector's rate of \$4.95 an hour, it was always on a temporary basis.

f. *Warnings and suspensions*

The General Counsel also asserts that Respondent-Employer issued disciplinary warnings and 3-day suspensions to Maxey Cox and fellow tear-down department employee Joe Lewis Smith in violation of Section 8(a)(3) and (4) of the Act. Respondent-Employer contends that it took the aforesaid action against Cox and Smith because they assertedly were chiefly responsible for the inability of the tear-down department to meet its quota of disassembling 120 compressors a day. As noted heretofore, Maxey Cox was transferred to the tear-down department on November 23. His first job therein involved removing internal parts of the compressor such as crankshafts and rods and setting the parts in a basket. Around the beginning of 1977 Don Lewallen, the immediate supervisor in tear down, assigned Cox to the most physically demanding job in the department, removing external parts. In the past, and prior to Cox's permanent transfer to tear down whenever he did not have sufficient work as a warranty inspector and was free to assist in tear down, the supervisors kept him away from external parts because he is slight of build³⁹ and they were afraid that he might hurt himself. Cox testified that Michael Couch who formerly removed external parts on a regular basis is about 6 feet 8 inches tall and over 200 pounds. In order to remove external parts such as valve plates and heads, the compressors, some of which weigh from 400 to 500 pounds have to be flipped over. Joe Smith, unlike Cox, had not been transferred into tear down, but has been employed therein since he first began working for the Company 5 years ago. Approximately 4 years ago Bill Hames made him the leadman which position he has maintained. On June 30, 1977, Cox and Smith, who had been working for months prior thereto on external and internal parts respectively, received warning letters⁴⁰ because the department was not meeting its quota. On that occasion, near the end of the day, Bill Hames had Cox and Smith brought to the office to see him. Mike McGhee was also present although the immediate supervisor Don Lewallen was not. Hames told them that they were getting warning letters because they were not reaching their quota. Cox and Smith wanted to know why they were the only employees⁴¹ in the tear-down department so penalized. Hames responded that he, McGhee, and Lewallen had been watching them, and all three couldn't be wrong. Cox explained that his air gun was not functioning properly, and that he had trouble getting tools. Both Cox and Smith complained that there were too many large compressors⁴² on the line and pointed out additionally that they had not recently been working with a full crew. Smith also noted that a portion of his time had been devoted to training another employee. Hames classified the explanations as excuses and asked them to sign the warning letters which they refused to do.

The next incident occurred on Saturday, September 10. Near the end of the day Cox and Smith were called into the

office where they met with Hames, McGhee and Lewallen. Hames told them that they would be getting a final warning letter and were suspended for 3 days because they had not attained the quota. Cox asked whether this was a new rule. Hames responded "Maxey (Cox) ain't no union in here, we make the rules the way we want them." Hames also complained that Cox and Smith were spending too much time near the water fountain. Smith asked Hames to put a water cooler in tear down as he had in the tank room. Cox who had a discussion earlier that day with Lewallen about the low air pressure also pointed this out to Hames.⁴³ Hames told them that he would have the final warning letters⁴⁴ for them on Monday or they could wait until Thursday, when they returned from the suspension. He added "You can go to the Labor Board or do whatever you want." Cox and Smith returned to work from their suspension on September 15. They discovered a brand new water cooler in the tear-down department. According to Hames, he installed the water cooler to eliminate excuses for not getting the job done. Cox also noticed that another air gun had been installed.

Supervisor Lewallen on cross-examination testified that Cox was the most outspoken visible union advocate in the plant. When asked whether Bobbi Bailey (owner) made it clear that she didn't want a union Lewallen responded "she made that clear to everyone including employees."⁴⁵ Lewallen knew that Cox testified in support of the Union, because Cox told him that he was going to the Labor Board and showed him the subpoena. In addition, at the time he assigned Cox to external parts, admittedly the most physically demanding job in the department,⁴⁶ Lewallen knew about Cox's union activities. Lewallen who had been the supervisor since February 1976 had never suspended anyone else in tear down. Further, Smith who has been employed in tear down for over 5 years testified without contradiction that he does not know of any tear down employee who had been suspended for even 1 day. The record also reveals that many of the complaints expressed by Cox as impacting on production appear to be valid and corroborated by Respondent-Employer's witnesses. Thus, Cox complained to Hames on June 30 that there were too many large compres-

³⁹ A further problem bearing on production that day involved a locked-up compressor. Smith was unable to remove a crankshaft therefrom. After a while, Grady Willis tried to help and finally Hames had to assist. The aforementioned individuals collectively worked on the compressor for about 45 minutes. Still further, tear down did not employ a full crew as Mike Morales did not work.

⁴⁰ See G.C. Exh. 4.

⁴¹ Respondent-Employer asserts that it was error to exclude testimony from Supervisor Lewallen, offered *solely* to prove that coemployees complained to him about the job performance of Cox and Smith. Thus, it is clear that the truth or falsity of what these employees assertedly told Lewallen is not in issue, but merely that complaints were made. As Lewallen testified that 3 or 4 employees complained to him about Cox and Smith, additional testimony by him in this regard would be essentially cumulative. Further, it is noted that Respondent-Employer did not offer to call any of these employees as witnesses to corroborate Lewallen's testimony regarding the alleged complaints. Moreover, on the basis of my observation of Lewallen, and noting that he was well schooled regarding the Company's strong antiunion posture, I do not credit his testimony that employees complained to him about Cox and Smith. In view of the foregoing, I find no cogent basis to depart from my original ruling and it is hereby reaffirmed.

⁴² While I am convinced that Respondent-Employer unlawfully assigned Cox to external parts, I find that it discriminatorily ignored the nature of that job when it held him largely responsible for the tear-down department's inability to reach the daily quota often enough.

³⁹ Cox is approximately 5 feet, 7 inches tall and weighs around 140 pounds.

⁴⁰ See G.C. Exh. 3 76.

⁴¹ There were approximately eight employees in the tear-down department including Cox and Smith.

⁴² The record reveals that the larger compressors take more time to disassemble than the smaller models.

sors on the line. It is noted that even Supervisor Lewallen complained to Hames about the "excessive number of large pumps (compressors)" on the days the department failed to reach the 120 daily quota. Further, McGhee testified that on June 21, 1977, when he assertedly had Cox and Smith in his office to give them a verbal warning about production, they complained to him about the air pressure problem and he agreed that it was a problem on hot days. While I do not credit that such a meeting occurred,⁴⁷ McGhee's admission that the lack of air pressure was a valid complaint tends to additionally corroborate Cox' testimony. Respondent-Employer concedes that Cox and Smith are competent employees, but argues that they did not perform as well as they should have.

In sum it is noted *inter alia* that Respondent-Employer's strong antiunion animus was widely known by management and employees; Cox was viewed by his immediate supervisor as the most outspoken visible union advocate, he was competent; he had never been suspended before; no one other than Cox and Smith in the department were held responsible for the failings of the department and he has established legitimate reasons for not attaining the quota every day. In these circumstances, and based on the entire record I find that Respondent-Employer by issuing warning notices on June 30 and September 10 and suspending Cox for 3 days violated Section 8(a)(3) and (4) of the Act.

The record discloses that Joe Smith attended two or three union meetings. Smith testified that he saw Grady Owens at one of the union meetings. As previously noted Hames testified that Owens told him what was going on at the union meetings and who attended. On or about November 5, the day after the election, at about 4:30 p.m. Smith was seated in the Austin Avenue Buffet when Owens entered with Hames. Smith credibly testified without contradiction that Owens came over to him and called him a union lover. The Respondent-Employer having at least knowledge of Smith's attendance at union meetings made him a suitable candidate to be linked with Cox, the major target for further reprisals. In this regard it is noted that there is no evidence tending to show that any other employee in tear down either supported the Union or attended union meetings. Further the record reveals that Smith, an admittedly competent employee, had never received a written warning prior to June 30 in apparently 5 stable years of employment with the Company. He has been a leadman for the past 4 years and even his immediate supervisor Lewallen who complained about his production⁴⁸ did not do anything to

⁴⁷ According to McGhee a "verbal warning" is memorialized and placed in the personnel files of the individual, and this was done in connection with the June 21, 1977, warning, against Cox and Smith. Yet, the warning notices were not produced. Further, their immediate supervisor, Lewallen, who was assertedly advised of all this did not attend, nor did he testify about it.

⁴⁸ The Respondent-Employer relies heavily on its documentary evidence tending to show that the production quota was not met on certain days. I do not find however, that these records establish that Cox or Smith either individually or collectively were responsible for the inability of the tear-down department to meet its quota. The record disclosed a number of other factors that would cause production to fall off. Thus Lewallen testified that there was an employee turnover problem during the summer months and new employees had to be trained. He also testified that he would wait from 1 to 2 hours before he would look for a replacement for an employee who did not report for work on a given day and on some days a replacement was not available. The record reveals other problems with tools and air pressure that would also appear to have an impact on production. See, e.g., *American Manufacturing Associates, Inc.*, 234 NLRB 675, fn. 5 (1978).

change Smith's leadman status. It is also noted that no one in the tear-down department prior to September 10 had ever been suspended. In these circumstances and based on the entire record I find that the warning notices and 3-day suspension given to Smith violated Section 8(a)(3) of the Act.

2. Rebecca Dunlap

Rebecca Dunlap has been working for the Company since February 1973. She was hired to clean offices, restrooms, and other areas as assigned. In addition she ran many personal errands for Bobbi Bailey and her sister Audrey Morgan including getting their lunch, going to the dry cleaner, taking the dog to the veterinarian, and purchasing groceries. Further, at times when Bailey's maid was unavailable, Dunlap would clean her home. Some of this cleaning work was at parties given by Bailey at her home after company hours. Prior to the union campaign, Dunlap did not do any production work. Around the latter part of September, Bailey told Dunlap that after she was finished with cleaning the restrooms and office she was to work with John Smith in the stator shop clipping papers off copper wires for the rest of the day. Thereafter she was assigned to do production work afternoons at the Carrier plant, while she continued to clean the restrooms in the morning. In the Carrier plant she separated bolts and worked on valve plates. Still later she was assigned to the parts room to make serial plates. On Monday, November 8, a few days after the Board-conducted election, Plant Manager Charlie Askham told her that he knew that she had been shifted around a lot, but that she was to see Irwin Fisk at the company Krog Street plant to do her regular cleaning and whatever else Fisk wanted her to do. After Dunlap finished her cleaning work Fisk instructed her to pick up some stators and put them on a pallet. After Dunlap lifted three stators she complained to Fisk that the stators were too heavy and requested a transfer. Later she was transferred back to the Elizabeth street plant to sand valve plates.

The General Counsel alleges that Rebecca Dunlap was assigned more onerous duties after the union campaign for reasons violative of Section 8(a)(3) of the Act. In this connection it is asserted that Bobbi Bailey accused Dunlap of being the leader of the Union on August 18 and September 1. On the other hand the Respondent-Employer in its brief argues that Dunlap was assigned these other tasks because she "simply did not have enough work to keep her busy."

For reasons stated previously⁴⁹ I have rejected the testimony asserting that Bailey told Dunlap that she heard that she was the leader of the Union. However, the record reveals that Dunlap engaged in some union activity including the signing of a union card on August 18. Further, references were made regarding the Union in discussions between Dunlap and Bailey. Thus Bailey testified that Dunlap told her on or about August 23 that she thought that her son Albert Harp was fired because of his union activities. Bailey also testified that Sarah Rumsey told her in September that Dunlap was spreading rumors about her all over the union hall. When Bailey confronted Dunlap about the rumors, Dunlap replied "somebody told you I had been

⁴⁹ See fn. 14 above.

messaging with the Union." As previously noted, later that month Bailey first assigned production work to Dunlap. Based on the foregoing and the record as a whole noting particularly that Dunlap performed essentially clean up work and was entrusted with a wide range of personal chores on behalf of the owner and her sister for approximately 3-1/2 years, I find that the change of assignments to more onerous production work only after the union campaign started was discriminatory and violative of Section 8(a)(3) of the Act.

a. *Plant closures*

November 5

Counsel for the General Counsel contends that Respondent-Employer, unable to accept that the Union won the election on November 4, "swiftly retaliated by closing its plant on November 5." On the other hand, Counsel for the Respondent-Employer contends that Bobbi Bailey, President of the Company, determined that in the interest of the safety of all concerned, the plant would be closed, the next day, Friday, to permit emotions to subside over the 3-day weekend. According to Respondent-Employer, a brief "cooling off" period was in order because there had been a multitude of threats of physical violence to employees and supervisors for several weeks up to and including the day of the election, culminating in a fight involving approximately 20 employees following the election. In contrast, the General Counsel describes the conditions which prevailed on election day as resembling a high school rally rather than a riot. While the credited evidence does not support the Respondent-Employer's contention that there were widespread threats of physical violence during the election period,⁵⁰ this by itself does not establish that the cessation of operations for so brief an interval (1 day) was discriminatorily motivated. It is noted that the election was hotly contested with active employee participation both on behalf of and against the Union. Further the record discloses that there was a good deal of commotion after the election including an election-related fist fight involving approximately 20 employees. In these circumstances I am not convinced that Bobbi Bailey's concern for the safety of all involved was frivolous. Moreover the election was close with determinative challenges producing an inconclusive result. In this regard, it is particularly significant to note that all employees including those who voted against the Union, with the exception of the deployment of a few individuals for security reasons, were laid off and not paid for the 1 day. This further militates against a finding that Bobbi Bailey closed the plant for discriminatory or anti-union reasons. In view of the foregoing and the entire record I am not persuaded that the General Counsel has established by a preponderance of the credible evidence that the asserted reason for the shutdown is pretextual. Accordingly, I shall dismiss this allegation.

⁵⁰ See discussion on alleged union misconduct and objections to the election *infra*.

b. *November 8 through November 12 (carrier plant)*

The counsel for the General Counsel alleges further that as a result of the Union's victory in the election, Respondent-Employer continued its act of retaliation by closing its Carrier plant from November 8 through 12. The record discloses that on Monday November 8, Bobbi Bailey looked at her mail for the past week and included therein was a quality audit report by the Carrier Corporation reflecting that company's findings of its recent inspection of Respondent-Employer's Carrier plant. As noted previously, the Carrier Corporation is one of three major refrigeration compressor manufacturers serviced by Respondent-Employer. Bobbi Bailey immediately inspected the Company's Carrier plant and verified that the conditions therein were unclean and unsafe as stated in the audit report. She summoned her brother, Roy Bailey and instructed him to shut down the Carrier plant and select as many employees as needed to get the plant cleaned up and operational by that Wednesday. The record discloses that the cleanup project took the entire week. While the record also discloses that none of the previous cleanups in the Carrier plant took an entire week, the uncontroverted testimony reveals that it took longer this time because the plant had never before been in such a state of disrepair.

The General Counsel argues that it is inconceivable that Bobbi Bailey as president of Respondent-Employer would ignore a letter from one of its major accounts (Carrier Corporation) for a period of a week. While in a normal setting the General Counsel's argument would not be without some appeal, I find that in the circumstances of this case, a 1-week lag in reading important company mail does not appear unreasonable. In this regard, it is noted that Bobbi Bailey was intimately involved at every stage of vigorous election campaign which was rapidly approaching its final lap. Thus the notion that Bobbi Bailey would put off reading mail and reshifting priorities temporarily to concentrate on electioneering for the final days of the election period does not appear implausible. In view of the foregoing and the entire record I find that a preponderance of the credible evidence does not support the allegation that the Carrier plant was shut down for discriminatory reasons in violation of Section 8(a)(3) of the Act. Accordingly, I shall dismiss this allegation.

c. *Discharges*

(1) *Virginia Huff*

Virginia Huff was first employed by the Company in November 1974 and left for personal reasons sometime around the summer of 1975. She was rehired on January 7, 1976, and her first job involved building valve plates. She worked on valve plates for a period of 4 to 6 months when she developed an allergy which resulted in her transfer to oil pumps. Her allergy did not clear up and after being examined by the company doctor and dermatologist she was assigned to "wire up on the back line" which did not involve as much oil or solution. On July 26 she signed a union card.⁵¹ Huff was a principal union supporter and obtained

⁵¹ G.C. Exh. 2(e).

approximately 20 signed union cards from other employees. She also became an active member of the in-plant union organizing committee and attended numerous union meetings. On or about August 25 she was assigned to wire up the big compressors with Sarah Rumsey who had already been working on that job. On September 7, Huff had her first conversation with Bobbi Bailey in the plant. Huff had gone over to another work station in the same department to borrow a squirt gun to oil gaskets when Bailey told Huff that she wanted her to stay in her work area. The next time Bailey spoke to Huff was on September 14, about 10 minutes after the 10 o'clock break. On that occasion Huff was in the process of preparing to resume her duties when Gloria Sinclair engaged her in a conversation about getting ready for Christmas. As Huff started to turn around she noticed Bobbi Bailey rapidly advancing in her direction and then stop immediately in front of her. Bailey exclaimed "If you talk again after break, you're gone." Bailey asserts that she did not say anything to Sinclair because Sinclair was working at that time. On September 23 Huff started wearing a union patch on her sweater at work. On September 30 she called in sick and told her immediate supervisor Robbi Robertson that she would not be able to work that day. Robertson, departing from the company policy of requiring a doctor's statement for an employee absent 3 or more days, demanded such doctor's statement after only 1 day's absence.⁵² Robertson testified that he was certain about Huff's union activities when she began to work with Sarah Rumsey, whereas prior thereto he merely suspected that she supported the Union. Sarah Rumsey, a company witness in the related objections case had the following relevant exchange with the Union's attorney:

Q. Isn't it true that your job duty in this election campaign was to go back and forth and try to find out as much as you could about this union and to take it back to Miss Bailey?

A. That wasn't my job, I did, but it wasn't my job. It was my responsibility to my company, to my employers, but I was not asked by no one to do it, I did it on my own.

Q. Once you learned about the Union, what made you report it to Miss Bailey?

A. Because I thought it was my duty as an employee to report it. I didn't only report it to Miss Bailey, I reported it to Mr. Hames, my supervisor, too. You don't have to report anything to Miss Bailey. She knows everything that's going on anyway.

Huff returned to work on October 1 and presented a doctor's statement as she had been asked to do. Around 1:30 p.m. Robertson told her that commencing Monday, October 4 she would be working on the K-model line. On October 4 Huff was experiencing difficulties working with the K-models because she first had training on that job that morning and some of the parts had not been ordered. Sometime between 1 p.m. and 2 p.m. Bobbi Bailey told Huff who had a cigarette in a glass ashtray on top of a compressor that she did not want her to put an ashtray on her compressor again. Bailey then threw the ashtray in the trash can. Ac-

⁵² For reasons previously discussed, I have found that Respondent-Employer by conditioning Huff's return to work on a doctor's statement after only 1 day's absence, violated Sec. 8(a)(1) of the Act.

ording to Bailey she took the glass ashtray into Bill Hames' office and replaced it with a metal ashtray and put it on the shelf near Huff. Bailey testified that she told Huff, "use this ashtray" and as she turned to walk through the plant, Huff assertedly said "bitch."⁵³ Bailey continued on her way out of the plant to the office and had Huff's termination check prepared. About 2 hours later Bailey had Huff brought to the office wherein she (Bailey) told Huff "I've taken a lot of things but I won't have any obscene remarks." Huff asked her what she was referring to. Bailey responded that she did not want to discuss it further and gave Huff her termination check.

The Respondent-Employer argues that Huff after having been reprimanded for violating a rule, to wit, not to put ashtrays on top of compressors, displayed blatant disrespect by assertedly calling the company president a "bitch" thereby furnishing good cause for the discharge. I conclude otherwise. The record reveals that Huff was at all times material a principal union supporter, and the Company had knowledge thereof. The record further reveals that the Respondent-Employer harassed Huff by requiring a doctor's note for 1 day's absence and reprimanding her for talking.⁵⁴ It is noted that Huff was told not to talk to other employees for the first time only after the union campaign began. On the other hand Supervisor Robertson testified that her co-worker Sarah Rumsey "is quite a talker and she will talk to anybody that will stand there." Yet there is no testimony tending to show that Bobbi Bailey ever cautioned Sarah Rumsey to stop interfering with other employees. With regard to the asserted use of the term "bitch," it appears that this term was rather commonplace among Respondent-Employer's employees. Thus Supervisor Robertson testified that it was not unusual in his area to hear such expression. In fact he testified that he's heard a lot more colorful expressions. It is well recognized that "[a]lthough an employer has a right to discharge an employee for profane and insubordinate conduct, the mere existence of a justifiable ground for discharge is no defense if it is a pretext and not the moving cause."⁵⁵ In the totality of the circumstances of the instant case, I find that Respondent-Employer discharged

⁵³ Gloria Sinclair testified on behalf of the Company that she witnessed the incident and heard Huff say in reference to Bailey "that bitch." Sinclair testified that she first revealed that she heard what Huff had called Bailey after the trial started. However, her account and the version provided by Bailey as to how Sinclair revealed this information to Bailey differ materially. According to Bailey, her sister, Mrs. Morgan, told Sinclair that Huff alleged that she (Sinclair) disrupted Huff rather than the reverse situation. At this point Bailey asserts that Sinclair responded "well, that's not true. Another thing, Miss Bailey, I don't know how you kept your cool that day when you fired her. . . . if she called me a bitch, I couldn't have been that cool." Bailey asserts that the above statement was made the day before Sinclair testified and that is when she, (Bailey) learned that Sinclair heard the remark. According to Sinclair, Bailey came over to her and asked whether she (Sinclair) recalled the incident involving the ashtray and whether she heard what Huff called her to which Sinclair responded affirmatively. On cross-examination, Sinclair appeared very evasive regarding her conversation with Bailey and it was necessary to instruct her to be more responsive. It is also noted that Sinclair, contrary to Bailey, testified that Huff used a metal ashtray. I do not credit her testimony in any material respect. Further, on the basis of my observation of the witnesses, I credit Huff's denial that she made the disputed remark.

⁵⁴ However, I am not convinced that a preponderance of the credible evidence has established that Huff was assigned more onerous jobs. Accordingly, this portion of the allegation shall be dismissed.

⁵⁵ *Gulf-Wandres Corp.*, 233 NLRB 772 (1977).

Huff for pretextual reasons in violation of Section 8(a)(3) of the Act.

(2) Jerry Williams

Jerry Williams had been employed by the Company in its Carrier tear-down department for approximately 3-1/2 years at the time of his discharge on September 10. The record reveals that Williams was an active union supporter and a member of its in-plant organizing committee. On July 26, he signed a union authorization card and obtained approximately 35 additional signed union cards from other employees. He also attended numerous union meetings and as noted previously on one such occasion in August, he observed Plant Superintendent Bill Hames and Grady Owens engaged in surveillance. Further, at two or three union meetings he observed James Rollins, previously determined herein to be a supervisor and/or agent of Respondent-Employer in attendance.⁵⁶ Williams credibly testified that around the 2nd or 3rd week in August, his Supervisor Charles Baine called him into his office for a talk. Baine complimented Williams, who is black on his work and stated that it would be a good policy to have a black leadman in the department. He then questioned Williams on his feelings regarding the Union. Williams responded that he was for anything that would be beneficial for him. Baine noted that Williams had good potential, was smart and could advance with the Company. Thus Baine stated "You listen to the right people instead of listening to an outsider and I'll put you in a position that you can make more money and move up also." Shortly thereafter Williams was assigned and trained on a wider range of jobs. Baine told Williams that he was doing a good job and for his further advancement promised to give him an opportunity to demonstrate whether he could operate a new machine called the large boring bar. On September 10, Williams learned from leadman Ronnie Henry that Baine was working in another area of the plant. Thereupon Williams related the promise Baine made about giving him the chance to work on the large boring machine. Henry looked into the matter and later the same day he told Williams that Bobbi Bailey wanted to see him in the office. Williams repeated for Bailey what he told Henry earlier in the day. Bailey remarked that there is "no way" that Baine could make such a decision. During the course of the conversation Bailey asked Williams how he felt toward the Company and why he told Henry to look for a replacement for him. Williams explained that as a family man, earning \$3.95 an hour and with no insurance or other benefits he wasn't going to make the Company his home. Bailey countered that if he would not make the Company his home, this day would be his last. It is undisputed that Williams responded that he wasn't quitting. Williams credibly testified that he asked Bailey, "You mean I'm fired?" and she answered, "Exactly." Bailey had Williams go to the personnel office with her for his termination check. The Respondent-Employer asserts that Williams quit, and was not discharged. It also denies knowledge that Williams engaged in union activity.

⁵⁶ It is noted that Maxey Cox credibly testified without contradiction that Rollins confessed to him that Audrey Morgan sent him and other employees to union meetings.

As noted above Williams was engaged in substantial union activity including membership on the in-plant organizing committee. Additionally, and for reasons previously discussed, I have found that Respondent-Employer engaged in widespread surveillance including Baine's efforts to enlist employee Hazelwood in such unlawful undertakings. In this connection, it is noted that I have previously rejected Baine's testimony and accordingly do not credit his denial that he discussed the Union with Williams or that he knew of Williams' union activities. With regard to whether Williams quit or was discharged, I find that when Bailey remarked to Williams that this would be his last day if he wouldn't make the Company his home it was tantamount to an implied, if not direct threat to fire him in violation of Section 8(a)(1) of the Act.⁵⁷ In any event when Williams asked her whether her statement meant that he was fired, she responded affirmatively. In these circumstances, noting additionally Bobbi Bailey's strong antiunion animus, I find that Respondent-Employer discharged Jerry Williams in violation of Section 8(a)(1) and (3) of the Act.

(3) James Ellefsen

James Ellefsen had worked for the Company just over 2 years at the time of his discharge on October 4. He worked as a shipping and receiving clerk under the immediate supervision of Dot Brown. On August 10, Ellefsen signed a union card. As discussed previously, the same morning Brown asked him if he knew anything about the Union's attempt to organize and instructed him to keep her informed of such union matters. In addition Ellefsen credibly testified without contradiction that on another occasion Brown told Ellefsen that "if they tried to bring the Union into Our Way that Miss Bailey would close the doors and there wouldn't be any place for anyone to work."⁵⁸ Further, Ellefsen credibly testified that James Rollins questioned him a few days before his discharge as to where he was the previous evening noting that Bill Hames and Roy Bailey spotted his car at the Mark Inn on Moreland Avenue, the union meeting place. Respondent-Employer contends that "[b]ecause Rollins had already seen Ellefsen's automobile at the Mark Inn, this 'interrogation' was meant to serve no useful purpose except to joke with Ellefsen." I find however that what occurred only a few days later strongly militates against Respondent-Employer's assertion that the "interrogation" amounted to no more than Rollins merely joking with a good friend. Thus 3 days after the disputed interrogation, Rollins disclosed to Bobbi Bailey that Ellefsen was assertedly bothering employee Ray Angeles about signing a union card. Bobbi Bailey testified that this event precipitated Ellefsen's discharge. Ellefsen credibly testified that on October 4 Bobbi Bailey came over while he was operating his forklift and remarked "you've been interfering with one of my employees. I pay him to work and you to work, I'm not paying you any more," and then handed him his termination check. Ellefsen asked "If you'll tell me what I did or who I interfered with." Bailey responded "no, I don't have

⁵⁷ See, e.g., *Barnes and Noble Bookstores, Inc.*, 233 NLRB 1326 (1977).

⁵⁸ I find that Brown's statement is an unlawful threat to close the plant and an additional violation of Sec. 8(a)(1) of the Act. See *Marsh Furniture Company, Inc.*, 230 NLRB 580 (1977).

to tell you that." According to Bailey, after Rollins informed her about Ellefsen she got confirmation thereon from Angeles. I deem it significant to note that Bobbi Bailey never gave Ellefsen an opportunity to give his version of what occurred. It appears that Bailey didn't want to be confused with the facts as she was determined to rid herself of still another union supporter. If she had, she would have learned that on the previous Friday, 3 days before the discharge, Angeles was at the water fountain in Ellefsen's area in the warehouse sometime during the 2:30 p.m. and 2:40 p.m. break. On that occasion Ellefsen asked Angeles what he thought about the Union and whether anyone asked him to sign a union card to which Angeles responded that he didn't think unions were any good and not worth signing up for. The entire conversation lasted about 45 seconds. Bobbi Bailey could not recall a single instance in the past few years where she personally had discharged an employee for interfering with other employees prior to the Union campaign, although she asserts that it had happened. However, as I have found Bailey not to be a reliable witness, and in the absence of any documentary evidence, I conclude that Ellefsen received disparate treatment. In view of the foregoing, and noting that Ellefsen engaged in union activity and Respondent-Employer had knowledge thereof combined with its strong antiunion animus, I find that on the basis of the credited evidence, James Ellefsen was discharged in violation of Section 8(a)(3).

(4) Albert Harp

Albert Harp worked for the Company for approximately 3-1/2 months from May 11, 1976, to August 24, 1976, at which time he was discharged. Rebecca Dunlap, previously found herein to have experienced discrimination in violation of Section 8(a)(3), is Albert Harp's mother. Sometime in early May 1976 Dunlap urged Bobbi Bailey to hire her son and notwithstanding Bailey's general misgivings about employing relatives, Harp was hired. The General Counsel contends that Harp's discharge was not only designed to rid Respondent-Employer of another union supporter but motivated by a desire to restrain Rebecca Dunlap, believed to be the leader of the Union, from exercising her Section 7 rights. Respondent-Employer contends that it discharged Harp because his attendance was poor, he was not receptive to training, and his work was otherwise unsatisfactory.

The credited evidence discloses that Harp showed little interest in learning, and was a slow worker. He was moved by Roy Bailey, plant manager at the Krog street location from job to job to find work suitable for him. His first job involved cleaning tanks. Roy Bailey testified that "Harp wouldn't apply himself and didn't try to keep production up and do his job; [h]e wandered off too many times." Harp was taken off the tank job after 2 weeks, and then trained by Roy Bailey on buffing valve plates. Roy Bailey, again not satisfied with Harp's lack of production, took him off valve plates and assigned him to a job involving compressor reconditioning under the tutelage of long-time employee Willie Caldwell. According to Caldwell, Harp was inattentive, and characterized his work as unsatisfactory. Harp's lack of initiative and other deficiencies in part were recorded in the Company's 30- and 60-day review forms cus-

tomarily used for probationary employees.⁵⁹ Harp's work continued to deteriorate and in his 90-day review report, completed by Roy Bailey on August 9, he was evaluated as unsatisfactory in such categories as quantity, quality, and initiative.⁶⁰ Roy Bailey had determined to terminate Harp but was persuaded by his sister, Bobbi Bailey, to give him another chance because he was only 18 years old.

In addition to Roy Bailey talking to Harp from time to time about his inability to maintain production, he also spoke to him about his poor attendance. On August 22 Roy Bailey again spoke to Harp about his attendance and poor work. Harp did not report for work the next day and on August 24, the end of the pay period he was discharged.⁶¹ Roy Bailey completed Harp's termination of employment form and specified unsatisfactory work and attendance as the reasons for the discharge.⁶²

The record reveals that Harp signed a union authorization card in the Company restroom after the close of the workday, about 1 week before he was discharged. There is no evidence tending to show that he attended union meetings or otherwise engaged in union activity. Further there is no evidence tending to show that Respondent-Employer had knowledge that Harp supported the Union. With regard to General Counsel's assertion that Respondent-Employer's primary target was Harp's mother, Rebecca Dunlap, I have previously rejected the notion that Respondent-Employer believed that Rebecca Dunlap was the leader of the Union. Thus I am not persuaded that Harp was discharged to restrain his mother from exercising her Section 7 rights. In sum, I find that Harp was not discharged in violation of Section 8(a)(3) of the Act but rather for legitimate reasons, to wit, poor work and attendance. Accordingly, I shall dismiss this allegation.

(5) Benny High

Benny High worked for the Company in its Carrier department from the commencement of his employment on January 14, 1976, until his discharge on December 17, 1976. During the first few months of his employment he worked as a buffer and then was transferred to work on the tanks. The big tank contained a solution that removed rust, paint, dirt, and grease from compressors and the small tank contained acid. Respondent-Employer asserts that it has always been mandatory for employees in the tank area to wear face shields properly and it discharged High for assertedly disregarding said safety rule. The General Counsel on the other hand contends that Respondent-Employer's asserted reason for the discharge is pretextual and that the real reason was his active and visible support for the Union.

⁵⁹ See Resp. Exhs. 18 and 19.

⁶⁰ See Resp. Exh. 10. Plant Manager Bailey added thereon "after discussing his work, his [Harp's] attitude hasn't changed."

⁶¹ While Harp concedes that he received a written warning for lateness about 1 month before he was discharged, he denies that anyone complained about his work. I do not credit his denial. In another area reflecting on credibility, Harp testified that Bailey delivered a speech to the entire plant and assertedly told the employees that she would fire anyone involved with the Union. It is noted that the General Counsel paraded a score of witnesses, and no one offered corroborative testimony. On the basis of the foregoing and my observation of Harp as a witness, I find that his testimony is unreliable.

⁶² See Resp. Exh. 11.

In this regard the record reveals that High signed a union card, attended union meetings, and was a member of the in-plant union committee. Further, on or about September 1, approximately 2 months before the Board-conducted election, High began wearing a union patch at work and the Company had knowledge thereof. Thus Charles Baine, who discharged High, admitted that he observed High wearing his union patch before the election.

On or about November 8, and 4 days after the Board-conducted election Bobbi Bailey questioned High on where he had his safety equipment. He told her that for months he had been trying to get safety equipment without success and stopped asking for it. She then asked Tom Nesbitt, the next man on the line about the safety equipment and he gave the same response as High. Bobbi Bailey then got and distributed face shields to the tank men, and goggles to some of the other employees. Early on the morning of December 17, the day High was discharged, he was summoned to the office and was told by Claude Rhea, his supervisor, that he, Rhea, was not satisfied with the amount of production put forth by High. High testified without contradiction that his work had never been criticized for lack of production prior thereto and he had received only one written warning for tardiness. High denied that he had not been "putting out" on the job and told Rhea that if he didn't believe him to put him somewhere else or to fire him. Rhea also noted that a lot of the employees weren't wearing face masks. Charles Baine, High's previous supervisor was also in the office at that time and added something about OSHA requirements and fines for not wearing face shields. High told them that he hadn't gotten over his severe cold which forced him to miss work the previous Tuesday and asked for goggles rather than a face mask, because he had difficulty breathing. He was not given the goggles and told to go back to work. Sometime before noon, that day, Bobbi Bailey told Baine that the employees on the tanks either did not have their face shields on, or were not wearing them properly. Baine told her that he and Claude Rhea earlier that morning spoke to Benny High about not keeping on his face shield. Bailey then related that she had just talked to High "in particular" about the face shield and instructed Baine "if he [High] does it one more time today, get him off my payroll." (Emphasis added). About 2 p.m. that day Baine had High go with him to the personnel office and told him that he had already been warned that morning about wearing his face shield and that he had observed him with his shield off for over 10 minutes. High claims that he had the mask (shield) on but that he flipped his mask up in order to determine whether there was any rust on the compressor heads. He repeated what he said earlier that morning about the need for him to be permitted to wear goggles but Baine would not accept any explanation and handed High a termination check. Baine testified that he did not have cause for doubting that High had difficulty breathing because of his cold when wearing the face mask but did not take it into consideration. The General Counsel contends that High was not allowed to wear goggles in the hope that, at some time during the day, he would lift his face mask to enable him to breathe more easily and thereby enable Respondent-Employer to discharge him. With regard to whether employees on the tanks had worn goggles in the past Baine testified that the previous June he had issued

goggles to employees because the Company had a problem getting face shields from the vendor. Further, when Bobbi Bailey was asked whether employees working on the tanks had worn goggles in the past she responded "There might have been occasions when they didn't have a face shield." In further support of General Counsel's position that Respondent-Employer was looking to rid itself of High, he argues that the discharge of High could have been avoided by simply allowing the buffer operator to work the tanks and allowing High to work the buffer. As previously noted, High had worked as a buffer, and the record discloses that the buffer had worked on the tanks. On the other hand as noted above Respondent-Employer argues that employees have always been required to wear face shields. In this regard Bobbi Bailey testified that she would permit goggles only in a dire emergency, and she would not include High's breathing problem in that category. Respondent-Employer in its brief contends that "[t]his requirement [wearing face shields] has been consistently applied and *uniformly enforced for many years.*" (Emphasis supplied.) While the record discloses that the Company has for many years promulgated and maintained rules regarding safety equipment,⁶³ it does not tend to support the assertion that said rules have been uniformly enforced. Thus there is no evidence tending to show that any other employee had been discharged for violating these safety rules or otherwise disciplined. In this regard it is noted that Bobbi Bailey testified that on the same day that High was discharged she observed four of five employees in the tank area either not wearing a face shield or wearing it improperly. While Bailey asserts that she spoke to each of these employees individually, there is no evidence tending to show that any of them got as much as a written reprimand. Further Baine concedes that he told Nathaniel Hogan, High's coemployee on the tanks on more than one occasion about not wearing his shield properly. Bailey also spoke to Hogan about the same problem the day High was discharged. Still further, High credibly testified without contradiction that Hogan seldom wore his face shield and when he did he did not wear his shield properly. Notwithstanding the foregoing, there is no evidence tending to show that Hogan was disciplined or ever received a written reprimand. In these circumstances, the record is quite convincing that High suffered disparate treatment.⁶⁴

The Respondent-Employer argues that it was justified in insisting that High wear his face shield for the additional reason that he had previously injured himself on the job on five occasions and at times he received medical attention. While this is worthy of consideration, it is also noted that at the time of the discharge, High was working on the small tank and none of his injuries resulted from working on the small tank. It appears that only the large tank contained a solution capable of causing burns. Further, the nature of

⁶³ See Resp.-Empl. Exh. 20.

⁶⁴ Respondent-Employer asserts in its brief that High did not suffer any disparity in treatment because Hogan also assertedly filed a charge the same time as High alleging a discriminatory layoff (G.C. Exh. 1 (x)). It is noted that Respondent-Employer erroneously asserts that Hogan filed the charge when the exhibit discloses that it was the Union. Further, the charge discloses that Hogan is but one of twelve individuals named therein. Still further, and most important is that the record discloses that High, unlike Hogan was a principal union supporter.

the injuries that High suffered did not involve the face but other parts of the body including a contusion to the small finger of his right hand. Thus a face shield would not have prevented any of the aforementioned injuries. However, the importance of wearing a face shield or other appropriate safety equipment is not herein challenged, but rather whether Respondent-Employer would have discharged High at the time that it did, had he not actively and overtly supported the Union. With due consideration to the factors supporting a justifiable discharge, and those militating against it, on balance, I am persuaded by a preponderance of the credible evidence that High would not have been discharged but for his union activity. Accordingly, I find that Benny High was discharged in violation of Section 8(a)(3) of the Act.

(6) Larry Grier, Fred Langston, and Johnny Cole

The discharges of Larry Grier, Fred Langston, and Johnny Cole occurred under similar circumstances and will be treated together. Grier and Langston were discharged at the same time on October 12 and Cole, 1 day later. Each of them had been terminated by Bobbi Bailey for assertedly harassing employees and interfering with production.⁶⁵

The record discloses that each of these alleged discriminatees actively and overtly supported the Union. Each of them had signed a union card, obtained union cards from other employees, attended union meetings and wore union patches at work. Grier wore his union patch regularly for about 2 weeks, Langston for 1 week, and Cole for 2 days before they were terminated.

Grier was employed by the Company from October 5, 1973, until his discharge on October 12, 1976, and for that period was under the supervision of James Bauknight.

On an occasion in September 1976, Bauknight called Grier into his office and asked him what he knew about the Union and questioned him about his feelings toward the Union. Bauknight concedes that he called Grier away from his work station to talk to him about the Union in his office. Thus Bauknight testified, "Well, I called Mr. Grier in and I asked him, I said 'Larry, I understand they are trying to organize a union out here,' and I said 'I wonder what benefits they're looking for.'" Bauknight further testified that he pointed out to Grier that he had been with the Company for 18 years, that the Company had always given at least one annual wage increase, had more holidays than other companies and a good insurance program. Still further, he pointed out that in the 18 years that he has worked for the Company, there has been only one layoff, whereas the Union causes strikes which only cost employees time and money.⁶⁶

Langston was employed by the Company for just over 2 years and he was also supervised by Bauknight. Grier and Langston credibly testified that they had never received either a verbal or written warning for interfering with other

⁶⁵ For reasons noted in connection with the discussion on the no-solicitation rule, I have previously rejected Respondent-Employer's contention that Grier, Langston or Cole interfered with production or otherwise engaged in acts of harassment.

⁶⁶ This meeting clearly amounted to unlawful interference with Grier's Sec. 7 rights. I have previously noted that Bauknight interrogated Grier in violation of Sec. 8(a)(1).

employees.⁶⁷ Bauknight testified that on October 12 at approximately 4:15 p.m. Bobbi Bailey told him to get Grier and Langston and have them come to the office. Bailey told Grier and Langston that they were fired for interfering with other employees. Grier asked her to explain what she meant by "interfering" with other employees and she refused to give any explanation.

According to Bauknight, Bailey did not tell him nor did he know what was going to happen. The fact that Bailey failed to consult Supervisor Bauknight on her decision to fire Grier and Langston lends support to General Counsel's contention that the Respondent-Employer's asserted reasons are pretextual. The record tends to indicate that Bailey had not previously bypassed Bauknight. Thus the following exchange with Bauknight on cross examination is pertinent:

Q. Before this time, did Miss Bailey fire anybody in your department?

A. Not that I can recall.

Q. Okay, how about anybody else? Did anybody else ever fire anybody out of your department?⁶⁸

A. No

According to Bobbi Bailey Johnny Cole would have been discharged at the same time as Grier and Langston, but he left work early on October 12. Cole worked for the Company from January 1976 to October 13, 1976, under the immediate supervision of Louis Harris. Harris testified that Audrey Morgan, Bobbi Bailey's sister, told him on October 12 to terminate Cole for interfering with other employees. Harris could not recall any occasion after the Union campaign began whereby he cautioned Cole about talking to other employees. Further, he had never given Cole a written warning. In this regard it is noted that Harris has been a supervisor since January 1975 and in that time he had discharged two employees, one for poor attendance and the other for low production. In both cases he had given the employees involved two written warnings. At the time Harris informed Cole that he was discharged, he Harris did not know the identity of the employees who Cole assertedly interfered with. Thus, the record discloses that Bauknight and Harris were both bypassed regarding the decision to terminate employees under their supervision. Further, the record discloses that Respondent-Employer did not issue written warnings to Cole as had been the practice in the Dunham-Bush department before employees were terminated therein.

Having determined that Respondent-Employer's asserted reason for the discharges is pretextual and noting *inter alia* that Grier, Langston, and Cole actively and openly supported the Union, combined with numerous other acts of

⁶⁷ According to Bauknight, when he gives a *verbal* warning he makes a point of telling the employee that he is getting a *verbal* warning and that the next warning will be a *written* warning. It is noted however, that with regard to Grier and Langston, Bauknight concedes he never got around to telling them that they were getting a *verbal* warning to be followed by a *written* warning and he did not give them *written* warnings.

⁶⁸ Bauknight has been a company supervisor for 16 years. Since 1971 he has been in charge of the Dunham-Bush department wherein approximately 20 employees are employed. It appears that employees who were discharged prior to the Union campaign had poor attendance and had been given two written warnings before they were terminated. In any event there is no credible evidence tending to show that any employee was discharged prior to the Union campaign for interfering with other employees.

unlawful interference and a profound antiunion animus, I find that Respondent-Employer discharged Larry Grier, Fred Langston, and Johnny Cole in violation of Section 8(a)(3) of the Act.⁶⁹

IV. OBJECTIONS AND ALLEGED UNION MISCONDUCT IN VIOLATION OF SECTION 8(b)(1)(A)

As the objections to the conduct of the election⁷⁰ (attached hereto as Appendix A [omitted from publication]) which are couched in general terms and the allegations of union misconduct in violation of Section 8(b)(1)(A) raise substantially the same issues they will be considered herein together.⁷¹

The General Counsel alleges that on or about October 5 and 19, 1976, at union meetings, Union Business Agent Lee Hicks threatened to throw employee Grady Owens into a swimming pool because he didn't support the Union, and on October 19, further threatened Owens that if anything happened to other employees who attended union meetings that he (Hicks) would take it "personally." General Counsel alleges additionally that Hicks threatened Owens on October 29 at the Austin Avenue Cafe with physical violence because he did not support the Union. Further, the General Counsel alleges that on October 29 at the aforementioned Austin Avenue Cafe, Union Business Agent James Walker physically assaulted Owens because he did not support Respondent-Union. Still further, General Counsel alleges that Local Union President Culpepper on November 3, at a union meeting threatened employees with loss of jobs if they failed to vote or support Respondent-Union and further, that he condoned a threat by a member of the audience who stated that he would bust heads of employees of the employer who failed to support Respondent-Union if the employees went on strike.

⁶⁹ Respondent-Employer argues in its brief that assuming *arguendo* that the discharges were violative of the Act, their postdischarge misconduct bars any remedy. According to Bauknight the day after Grier and Langston were terminated they came back to the plant, accused him of firing them, and asked him to get their checks. Bailey responded "I didn't fire you, Miss Bailey fired you." Bauknight then went to see if he could obtain their checks. When Bauknight returned, he told them that the checks had already been mailed, and asked them to leave the Company premises. Bauknight testified that Grier responded "You'll have to come out on the street some time. You can't stay in there all the time." Bobbi Bailey testified that thereafter Grier and Langston sent word to Bauknight through another employee that they would get him. Grier denies threatening Bauknight, and the credited account given by Langston does not suggest that he made a threat. On the basis of my observation of Bauknight as a witness, and noting his antiunion animus as conveyed to Grier in a meeting in Bauknight's office I reject Bauknight's testimony. With regard to Bobbi Bailey's testimony it is noted that I have previously found her testimony to be unreliable. On the basis of the foregoing and the entire record, I find that there is no credible evidence justifying a conclusion that Grier and Langston forfeited their right to reinstatement.

⁷⁰ The Regional Director by Order dated January 18, 1977, *inter alia*, approved withdrawal of that portion of the objections "predicated upon the alleged denial of opportunity to cast challenged ballots or alleged loss of a ballot and that portion of the objections predicated upon impermissible promises having been made." See G.C. Exh. 1 (gg) fn. 1.

⁷¹ The petition in Case 10 RC 10825 was filed on August 19, 1976, and pursuant to a Stipulation for Certification Upon Consent Election, the election thereon was conducted on November 4, 1976. It is noted that the objections and alleged 8(b)(1)(A) conduct relate to conduct occurring during the critical period which begins with the filing of a petition and ends with the election. See *Goodyear Tire and Rubber Company* 138 NLRB 453 (1962).

In addition to the foregoing allegations of union misconduct in violation of Section 8(b)(1)(A), the Employer asserts that the Union (also referred to herein as Respondent-Union or Petitioner) made certain threats and material misrepresentations on the evening preceding the election and engaged in other misconduct throughout the day of the election which warrants setting aside the election. In short, the matters raised by the General Counsel and Employer involve (a) Grady Owens at the Mark Inn, (b) Austin Avenue Cafe, (c) the events of November 3, and (d) alleged election day misconduct. These matters are treated below *seriatim*.⁷²

A. Grady Owens at the Mark Inn

As previously indicated, the first alleged threat occurred on or about October 5 at the Mark Inn. Grady Owens testified that he was driven to this union meeting by his friend Bill Hames (Plant Superintendent) and the first thing Owens did at the Mark Inn was have a few beers. According to Owens, after drinking for about 30 minutes, he left the bar because he wanted to get a better look at the swimming pool which he noticed from the window of the bar. After viewing the pool from up close, Owens started to leave and got to the end of the walkway when he assertedly came upon Lee Hicks. Owens testified that Hicks asked him what he was doing there and Owens replied that he was looking at the swimming pool. Hicks then assertedly asked, "Do you like swimming pools" to which Owens responded affirmatively. Owens claims that Hicks then asked him whether he would like to attend the union meeting and when Owens replied that he would, Hicks thereupon said, "if you'll sign a card, you can." Owens testified that he told Hicks, "I'm not signing a damn card" and left. Owens asserts that this was the first time that he met Hicks. Hicks on the other hand, provided a strikingly different version regarding his first encounter with Owens. According to Hicks, the only occasion that he spoke to Owens at the Mark Inn was in mid-September. On that occasion Hicks was in a room with Maxey Cox and a laid off employee identified as "York" when Owens came in and started to discuss the Union with them. Except for the time frame, it appears that the circumstances as described by Hicks more closely parallel Owens' account of an alleged subsequent threat made by Hicks to Owens which will be treated separately below. I find it unnecessary to consider further Hicks' version relative to the first alleged threat because I am not persuaded that the remarks attributed to Hicks by Owens could reasonably be construed as a threat. In this regard it is noted that according to Owens this was the first time that he met Hicks. There is no evidence tending to show that Hicks identified himself or that Owens had reason to believe that Hicks was a union business agent. Owens concedes that all Hicks asked him was, "Do you like swimming pools?" Even by Owens' account Hicks made reference to the swimming

⁷² The same attorney served as Counsel for the General Counsel and Counsel for the Regional Director for the entire consolidated proceeding. The Company's contention that it was denied due process by the refusal to sever and/or assign a different attorney was made for the first time to the Administrative Law Judge herein in its post-hearing brief and is hereby rejected as not supported by the record and untimely. See, e.g., *Rockwell International Corp.*, 226 NLRB 871, 872, fn. 5 (1976); and *Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel*, 173 NLRB 1349, 1350 (1968).

pool before anything was said about the Union. Thus, there is no evidence tending to show that Hicks had any motive to threaten or coerce Owens at the time the so-called threat was made. In these circumstances, I find that the remarks attributed to Hicks do not constitute a threat to throw Owens into the swimming pool or otherwise constitute a threat in violation of Section 8(b)(1)(A) of the Act. Accordingly, I shall dismiss this allegation.

As noted above, Owens testified that he was threatened a second time by Hicks at the Mark Inn. According to Owens after his first encounter with Hicks, he was again driven by his friend Hames, to a union meeting at the Mark Inn and was left there by Hames, who then assertedly departed. Owens testified that he had about three or four beers and then proceeded to the Union meeting. However, at some point between the bar and the meeting place Owens decided not to go because he remembered his earlier encounter with Hicks. Owens had noticed Maxey Cox and other "union people" earlier and looked for him (Cox) to ask for a ride back to the plant. Owens ran into Hicks who assertedly asked him what he was doing there. Owens testified that he (Owens) identified himself and then asked Hicks why he wasn't invited to union meetings to which Hicks assertedly replied, "These people don't trust you." Owens and Hicks then discussed the relative merits of the Company and Union. Owens told Hicks how well the Company treated him and mentioned that he had 11-1/2 years of steady employment, and Hicks countered by telling Owens that he would have better benefits with a union. Owens claims that he started to leave when a man named "York" asked him why he (York) had been fired. Owens testified York called him a dirty name and he in turn told York "You shouldn't have done that, you made a mistake." Hicks assertedly intervened and said "You [Owens] like swimming pools, don't you?" and Owens responded, "Yes, I do." Then Hicks assertedly pointed to the swimming pool at the Mark Inn and asked him if he liked that one and when Owens said that he did, Hicks assertedly added, "You might better like it because I'm going to put you in it." Owens testified that he told Hicks, "One of us will go in, maybe both of us" and pointed out to Hicks that he was in dress clothes whereas he, Owens, was in work clothes. Owens testified that Hicks told him that if anything happens to the employees at the union meeting because of Owens' attendance, he [Hicks] would "take it personal, very personal." According to Owens, he turned and left because he was scared. As noted previously, Hicks' version of the encounter with Owens is quite different. According to Hicks' account, he was in a room with employee Cox and former employee York, waiting for the union meeting to start when Owens entered the room holding a can of beer and began a conversation with Hicks about the Union. On cross-examination Hicks was asked about the employees and testified that, "the other employees came around and said, 'Grady's (Owens) here with the supervisor (Hames) again.'" Later, Hicks testified, "Once they (employees) seen Bill Hames drop Grady off down there they did not want to assemble for a meeting." Hicks asserts that he tried to treat Owens as "cordially" as he could with Owens denigrating and Hicks promoting unions. However, when Owens and York got into a "cussing match" and "they seemed like they were ready to get into it," he asked Owens to leave before

there was any trouble. Hicks denies that he threatened to throw Owens into the swimming pool. According to Hicks, Owens told him to mind his own business or they'll both end up in the swimming pool and pointed out that it would hurt him (Hicks) more than Owens because Hicks was better dressed. On the basis of my observation of the demeanor of the witnesses and noting, *inter alia*, the factors mentioned below, I credit Hicks' account over that provided by Owens.⁷³ First off, the record discloses that at all times material herein Owens strongly opposed the Union and conveyed this sentiment to union representatives and fellow employees. Further, the record discloses that each time Owens wanted to attend a union meeting at the Mark Inn he asked his friend, Plant Superintendent Hames to drive him there. In this regard, I have previously determined that Hames, with the help of Owens conveyed the impression of surveillance and also engaged in actual surveillance in violation of Section 8(a)(1) of the Act. Thus, the legitimacy of Owens' appearance at the Mark Inn is at best highly suspect. Still further, the record discloses that Owens drinks a high amount of beer and sometimes whiskey every day and according to his friend Hames gets obnoxious or unruly, depending on how much he has had to drink. Owens testified that he had about four beers in 30 minutes before they left the bar to go to the union meeting. Hicks testified that when Owens came into the room, he had a can of beer in his hand.⁷⁴ This further tends to indicate that Owens appeared at the Union meeting place in a capacity whereby he could create a disturbance. With regard to Owens' assertion that Hicks would take it "personal" if anything happened to employees who attended the union meeting because of Owens' appearance, I credit Hicks' denial that he made such a statement. In any event, the statement without more, is at most, ambiguous and does not constitute a threat in violation of Section 8(b)(1)(A). On the basis of the foregoing and the record as a whole, I find that the General Counsel has not established by a preponderance of the credited evidence that Hicks threatened Owens in violation of Section 8(b)(1)(A) of the Act or otherwise engaged in objectionable conduct at the Mark Inn that would require setting the election aside.

B. Austin Avenue Cafe

The General Counsel alleges that on or about October 29 at the Austin Avenue Cafe, Union Business Agent Hicks further threatened Owens with physical violence and on the same occasion Union Business Agent James Walker actually assaulted Owens because he did not support Respondent-Union. A resolution of these allegations depends largely on credibility and a discussion thereon is in order. At the outset, it is noted that testimony adduced from the Respondent-Union's witnesses was not uniformly consis-

⁷³ As noted above Owens asserts that he left the union meeting because he was "scared." However, this does not comport with Owens' response when Hicks assertedly threatened to throw him in the pool. Owens testified that he told Hicks that if he attempted to put him (Owens) in the pool, they would both end up in the pool and it would hurt Hicks more than Owens. This does not sound like the reaction of a "scared" person.

⁷⁴ Union Business Agent James Walker also credibly testified that on one occasion in mid-September, at the Mark Inn, he refused to permit Owens to attend a union meeting because Owens appeared drunk to him.

tent. However, overall, on the basis of my observation of the demeanor of the witnesses for the respective parties and for reasons discussed below, I have resolved the material credibility conflicts in favor of the Respondent-Union.

In support of these allegations the General Counsel and Charging-Employer provided Grady Owens, Bill Hames, Steven and Thomas Wreford, Marchelle Carlisle, and Sarah Rumsey as witnesses. For reasons previously noted, I have determined that the testimony of Grady Owens and Bill Hames was unreliable. I further reject the testimony of Steven and Thomas Wreford, and Marchelle Carlisle. It is noted that Steven and Thomas are brothers, and Marchelle is their sister and all three, *inter alia*, demonstrated a bias toward the Union. Thus, Steven Wreford testified that Bill Hames⁷⁵ tried to dissuade him from going to union meetings because, "We had already been talking to people you know, about the Union, and they knowed [sic] how we felt." According to Steven Wreford, Hames was concerned that since it was known that he, Wreford, was not for the Union, and as Owens had assertedly experienced difficulty, he too, might encounter trouble. Steven Wreford further disclosed his antiunion sentiments when he pointed out to Union Business Agent James Walker at the Austin Avenue Cafe, *inter alia*, "that the Union didn't help me none, it never has before. . . ." Then Steven Wreford pulled out an old check stub to show Walker that his hourly wage rate was substantially less under a previous employer who assertedly had to deal with a union. However, when asked by the Administrative Law Judge herein whether the Company referred to actually had a union, he responded negatively. According to Wreford, he told Walker that he worked under a union shop because he wanted to make a point that Walker really wasn't interested in what he had to say. Wreford asserts that Walker refused to discuss the pay stub. I find that Wreford's explanation does not smack of candor but, rather, further reflects on his antiunion bias. Marchelle Carlisle supported her brothers' opposition to the Union and told Walker on the same occasion that her husband was discharged unfairly by another company and the Union did not try to get him his job back. According to Carlisle she, and the others conversing with Walker were "rude" to him and didn't want to be in his company. With regard to Thomas Wreford, his testimony at times was marked by hesitation. On two occasions he responded, "I'm drawing a blank." On another occasion I deemed it necessary to grant a short recess because he stated "I'm getting very dizzy." He explained that he had suffered a collapsed lung 6 weeks earlier and more recently had a relapse. The General Counsel then noted that Wreford complained to him earlier of shortness of breath and that he gets dizzy if he talks a lot. With no objection thereto, I excused the witness before his examination was completed. While I draw no negative inference from the fact that the parties waived further examination, I find that his testimony is unreliable.

The credited testimony discloses that on or about October 8 at about 5:30 p.m. at the Austin Avenue Cafe, Union Representatives James Walker and Lee Hicks were seated at a table near the door (herein, the union table) with Virginia Huff, James Tucker and one or two other individuals.

⁷⁵ The record discloses that Bill Hames socializes frequently at the Austin Cafe with Thomas and Steven Wreford, Sarah Rumsey, and Grady Owens.

Seated at a table, near the rear of the cafe (herein, Hames' table) were Steven and Thomas Wreford, Sarah Rumsey, and Bill Hames. Grady Owens entered the cafe at approximately 6 p.m. and immediately came upon the union table and asked for a "god-damn handbill" and uttered something about the kind of shit that the Union was putting out today. As Owens started to leave the union table to meet with his friends at Hames' table Virginia Huff asked him whether he was going around telling other employees that she called Bobbi Bailey a bitch. Owens responded that he heard the rumor, but, denied that he had anything to do with it. Hicks told Owens that if he had anything to do with her discharge he should be ashamed of himself. Owens bent over toward Hicks and said, "I'm getting sick of your shit." Hicks stood up and told Owens that he was getting tired of his shit. At this point, Walker intervened and told Owens to leave the union table. Walker then told the others at the table, "It's obvious that this guy (Owens) is trying to start trouble. Everytime I see him, he's drunk, and its obvious what he's trying to do. Leave him alone." Ms. Nell, the owner of the cafe, was asked by someone at the union table whether they had to put up with Owens' disturbance. Nell said that she would talk to him and noted that once before she had to bar him from the cafe for his actions.⁷⁶

At approximately 7 p.m., Walker got up and started for the restroom which was located in the rear of the cafe and within a few feet of Hames' table. Owens reached out and slapped at Walker's hand, stopped him, and asked why Hicks wouldn't let him attend any more union meetings. Walker responded, ". . . I think Lee (Hicks) might have told you not to come anymore when you were drunk, but, I'll invite you personally to come to a union meeting." Walker noted that Hames, a supervisor, was seated at the time and asked what he was doing with the group. Thomas Wreford testified that he "spoke up and said that he (Hames) was a friend of ours." By this time Marchelle Carlisle and her husband had joined Hames' table. The Wreford brothers and their sister Marchelle Carlisle engaged Walker in a discussion as to what the Union could do for them. Walker traced the history of the labor movement from about 1930 and discussed the advantages of a union shop. The Wreford brothers, their sister Marchelle and Grady Owens defended the Company's policies and gave expression to their anti-union sentiments. Steven Wreford pulled out a check stub from a previous employer and said, "The damn union didn't do nothing [sic] for me. I worked in a union shop and I got \$2.50 an hour."⁷⁷ He also declared, "I've got a chance to go places here (Our Way). They don't go by seniority like they do in union shops. I got a chance to advance here." Marchelle told Walker that a different company fired her husband unfairly and she complained that the Union did not try to get him his job back. Owens told Walker that he was once a union member in Wisconsin and "they'd [Union] screwed him." The people at the table interrupted Walker and he interrupted them to make pro- and anti-union statements. Walker was standing facing the group

⁷⁶ Owens admitted that years earlier he was persona non grata at Austin Avenue Cafe for fighting.

⁷⁷ As noted earlier, Wrefords' representation to Walker that he worked in a union shop was admittedly false.

with one foot resting on a chair and in close proximity to Owens. He interrupted Owens and touched him with his finger and said, "Wait a minute, Grady, it's my time to talk." After a while it became clear that neither the group nor Walker were making headway convincing the other and Walker started to leave when Owens called out, "Wait, wait a minute. Wait a minute." Walker credibly testified that he had an exchange with Owens as follows:

"Grady, look you've got your position, and these two fellows here, the Wrefords, came to work just the other day. And they're not even eligible to vote.⁷⁸ There's no use for me talking to you. You've already got your position . . . You're here with the supervisors." He [Owens] said to me, "Are you calling me an ass kisser?", and I said, "I'm not calling you anything." He said, "I'm sick and tired of you, calling me names." And he said, "Now, you heard him." He turned to the group. He said, "He's calling me an ass-kisser." And I got annoyed, and I said, "If the shoe fits, wear it."

Walker returned to the union table but after a few minutes he went back to Owens and told him that he was sorry that he lost his temper. Walker then went back to the Union table and did not talk to Owens again.

As noted above, the General Counsel alleges that Hicks and Walker engaged in certain misconduct at the Austin Avenue Cafe in violation of Section 8(b)(1)(A). With regard to Hicks, General Counsel asserts that he threatened to take Owens outside the Cafe to beat him up. As described more fully above, Huff had asked Owens about his role in the rumor that she called Bobbi Bailey a "bitch" and Owens denied having anything to do with it. Hicks then remarked to Owens that if he had anything to do with it he ought to be ashamed of himself. Owens drew close to Hicks' face and told him that he was "tired of his shit" and Hicks got up and responded in kind. While Hicks and Owens might have become combatants, the matter quickly abated as Walker asked Owens to leave the table and cautioned Hicks that Owens was trying to provoke him. It is noted that Owens was more than a willing participant. I do not ascribe any of Hicks' remarks to Owens for nonsupport of the Union but, rather, addressed to Huff's discharge and to Owens' provocative remarks to him. In these circumstances, I find that Hicks did not threaten Owens in violation of Section 8(b)(1)(A). Accordingly, I shall dismiss this allegation.

The General Counsel also alleges that Hicks threatened Owens at Hames' table in the Austin Avenue Cafe with bodily harm if he tried to attend anymore union meetings and invited him outside the cafe to settle their differences if Owens wanted to argue about it. According to Hames, Owens told him that he wasn't invited to the union meeting and Hames showed him a union flyer which indicated that all the employees were invited. Owens asked Hicks, who had to pass Hames' table to go to the bathroom, why he wasn't invited to the union meeting. Hicks assertedly responded that he did not want Owens at the meeting. Hames testified that Owens thereon, pointed to the union flyer and

repeated that all the employees were invited. Hicks assertedly responded, "Grady, (Owens) you're an agitator and I don't want you over there." Owens again noted that the union flyer invited all the employees, to which Hicks assertedly remarked, "Well, if you don't like it, we'll go outside and settle it now." Hicks then went to the bathroom and as he came out, Owens asked him another time, why he wasn't invited to the union meeting. Hames testified that Hicks replied "Grady, I don't want you there and I better not catch you over there." Hicks denies that he threatened Owens. In analyzing the foregoing, Owens' previous conduct is significant. Thus, it is noted that Hames knowingly transported Owens to union meetings and that employees so observed Owens in Hames' presence. For reasons stated previously, I had determined that this conduct was violative of Section 8(a)(1). In this regard, I had also determined that Owens had no legitimate purpose in attending union meetings. Further, it is noted that when Owens assertedly questioned Hicks at the Austin Avenue Cafe as to why he was not invited to the union meeting, it was done, if not with the encouragement of Hames, at least in Hames' presence. This further tends to support the conclusion that Owens and Plant Superintendent Hames were working in tandem. In these circumstances and noting that Owens is a heavy drinker, who gets obnoxious or unruly, I find that no Section 7 right was violated declaring him persona non grata at union meetings. I further find, that Hicks did not threaten Owens with bodily harm in violation of Section 8(b)(1)(A).

With regard to Walker's actions at the Austin Avenue Cafe, the General Counsel asserts that Walker appeared at Hames' table without invitation, subjected employees *inter alia*, to abusive language, and punched Owens. First off, General Counsel ignores the fact that Walker was at Hames' table only because Owens initiated the discussion. In this regard, Owens reached out and slapped at Walker's hand to get his attention while Walker was going to the bathroom and asked him why he was not invited to the union meeting. While Walker might not have comported himself with dignity, it is noted as testified to by Carlisle, that the employees at Hames' table were rude to him. It does not appear that Walker intimidated or even restrained anyone at Hames' table. Rather, it appears that what Walker did was to attempt to gain the attention of the others seated at the table in a match of prounion antiunion hyperbole. I find that the credited evidence does not support the General Counsel who asserts that Walker punched Owens. Rather, whatever physical contact was involved was slight and amounted to Walker's tapping of Owens with a finger to gain attention or to stress a point. Thus, it appears that no more force was used than the force used by Owens who reached out earlier and slapped Walker's hand to get his attention to initiate the discussion. In these circumstances, I am not persuaded that Walker's conduct amounted to a physical assault in violation of Section 8(b)(1)(A) of the Act. Accordingly, I shall dismiss this allegation. In sum, I find that the General Counsel did not establish by a preponderance of the credited evidence that the conduct engaged in by Hicks and Walker at the Austin Avenue Cafe violated Section 8(b)(1)(A) of the Act or otherwise warrants setting aside the election.

⁷⁸ The ballots cast by Steven and Thomas Wreford, were challenged on the basis that they were employed after September 7, the eligibility date. Marchelle Carlisle testified that she was hired after September 7. Steven and Thomas Wreford were also hired in September.

C. *The Events of November 3*

The Respondent-Union conducted a meeting on November 3, the night before the election, at the Mark Inn Hotel on Moreland Avenue. There were approximately 30 employees at the meeting and they heard speeches from Business Representatives Lee Hicks and James Walker and Local Union President James Culpepper. The General Counsel's allegations relative to the union meeting relate only to Culpepper. According to the General Counsel, Culpepper threatened employees with loss of jobs if they failed to vote or support Respondent-Union and further, that he condoned a threat by a member of the audience who stated that he would bust heads of employees who failed to support Respondent-Union if the employees went on strike. In addition, the Employer asserts that Hicks also threatened employees with loss of jobs and that Walker made certain material misrepresentations which warrant setting aside the election. In support of the alleged union misconduct and the objections, the General Counsel and the Employer adduced testimony from Thomas and Steven Wreford, Sharon and Curtis McCormick and Nazalean Dye. On the basis of my observation of the demeanor of these witnesses, and the entire record, I find that their testimony in all material instances is not reliable. In previously rejecting the testimony of Thomas and Steven Wreford, I noted, *inter alia*, that they expressed strong antiunion sentiments. The record discloses that Sharon McCormick is a sister of Thomas and Steven Wreford and that she, her husband Curtis, and her brothers drove to the union meeting together. Further, as discussed previously, Maxey Cox credibly testified without contradiction, that supervisor and/or agent James Rollins confessed to him that Audrey Morgan (Secretary-Treasurer) sent Sharon and Curtis McCormick, and Thomas and Steven Wreford to a union meeting. Thus, the legitimacy of their attendance at this union meeting is highly suspect, and further, reflects adversely on their credibility. The Wrefords and McCormicks were joined at the union meeting by Nazalean Dye and they all sat together in the last row. Dye's antiunion animus was surfaced on cross-examination when she testified, "I am very bitter towards the Union. . . ." According to Dye she was fired from a previous job for insubordination and that a union (not Respondent-Union) let it happen even though she paid her dues and was "very faithful" to the Union. In addition to the antiunion predisposition of these witnesses, as set forth in part above, it is noted that the testimony of these witnesses is in conflict regarding which union official was responsible for making certain alleged statements and threats. Thus, according to the Wrefords and McCormick, Culpepper looked directly at them when he mentioned Company pets and pimps and added that if the Union got in, the Company's pets would change. Dye, on the other hand, asserts that Walker made these remarks and not Culpepper. The Wrefords and McCormicks, on one hand, and Dye on the other also disagree as to which union official assertedly condoned a threat by a member of the audience, that he would "bust heads" to make effective, a union strike, if the

Union became the bargaining agent and called a strike.⁷⁹ According to Dye, Walker's comment was "that's the way it would have to be" whereas, other witnesses on behalf of the General Counsel attribute the remark to Culpepper.

The record discloses that Hicks, Walker, and Culpepper respectively, spoke for about 10 minutes and then answered questions from the audience. Hicks spoke mainly about insurance benefits. He also exhorted the employees to go all out and campaign for the following day's election. According to Sharon McCormick, Hicks told the employees that if the Union lost, the Company would fire those employees who supported the Union. However, Sharon McCormick also testified that when Rebecca Dunlap asked Hicks whether Bobbi Bailey could fire her if she learned that Dunlap supported the Union, he answered no, that it was against the law. The assertion that Hicks on one hand would assure the employees that they could not get fired for union activity, that it was against the law, and then conclude that they better go all out and campaign or they would lose their jobs for supporting the Union is illogical and not worthy of belief. In these circumstances, and noting that Sharon McCormick was not otherwise a credible witness, I am not persuaded that Hicks threatened employees with loss of jobs.

Jimmy Walker spoke next and highlighted the advantages that a union would bring to the employees of Our-Way. Walker represented that union employees had greater benefits and earned more money than nonunion employees. He also answered questions on the subject of strikes utilizing an employer campaign handbill⁸⁰ which had been disseminated to employees 1 day earlier, as a frame of reference. He explained the difference between unfair labor practice strikes and economic strikes and discussed the status of strikers and replacements. He then introduced Culpepper as the next speaker, and left the union meeting to attend to other matters.

The Employer attributes to Walker a material misrepresentation that the Company's employees were paid \$1.18 less per hour than other people doing the same work. Further, the Employer asserts that Walker misrepresented to employees that some janitors under union contracts earn more than \$4 an hour. The record discloses that earlier that day, (1 day before the election) the Union distributed to employees, a handbill containing, *inter alia*, the \$1.18 hourly rate differential.⁸¹ The Company, relying on the testimony of Audrey Morgan, asserts that this was the first specific mention of wage differentials. Thus, it argues that it was denied an opportunity to make an effective reply. Ac-

⁷⁹ Sharon McCormick took the stand a second time to identify former employee Jerry Williams as the individual responsible for the remark "I'll bust heads." She asserts that after she testified the first time she spotted Jerry Williams poke his head in the hearing room. She claims that she pointed him out to Sarah Rumsey as the one who made the threat at the Union meeting and Rumsey named him as Jerry Williams. Rumsey denies this conversation with McCormick. According to Rumsey, when she got back to the plant, Mrs. Morgan asked her whether she saw Jerry Williams open the door to the hearing room and she responded affirmatively. As no other witness identified Jerry Williams as the one who made the threat, I find that the evidence is unpersuasive that the threat may be attributable to Jerry Williams. Further, the fact that Rumsey denied that she named Jerry Williams to McCormick tends to militate against McCormick's credibility.

⁸⁰ See Resp.-Union Exh. 3.

⁸¹ See C.P. Our-Way Exh. 2.

ording to Morgan, she first learned from the Union's leaflet dated November 3 (C.P. Our-Way Exh. 2) of the Union's representation that Our-Way's employees earn \$1.18 below union wages. Morgan was asked whether any wage differential had been mentioned in flyers prior to November 3 and she responded, "That's a hard question. As far as, you know, a specific amount, I do not recall it being said as a specific dollar eighteen below the Union rate." She was then asked without reference to flyers, whether the fact that Our-Way⁸² employees were making less than union employees was discussed, to which she responded, "I don't recall that being in a flyer either." Ms. Morgan's testimony tends to show only that she does not recall seeing any reference to wage differentials in union flyers prior to November 3. While wage differentials may not have been referred to, prior to November 3 in union campaign literature, the record discloses that it was a subject of discussion long before that date. Thus, Plant Superintendent Bill Hames testified that Walker told employees in his presence on October 8, nearly 1 month before the election that Our-Way employees were earning "\$1.18 under the hourly scale." In these circumstances, the Employer's contention that it was denied an opportunity to make an effective reply is rejected.

As noted above, the Employer asserts that the Union made a material misrepresentation regarding wage differentials. The Employer also contends that because the Administrative Law Judge herein revoked a subpoena directing production of union contracts, it was precluded from presenting evidence regarding the scope of the misrepresentation. According to the Employer, union representatives distributed to the audience "contracts" with other companies and proof that the employees were underpaid by \$1.18 per hour. Thus, it asserts that it was denied the opportunity to develop exceptions to the general rule established by the Board in *Shopping Kart Food Market, Inc.*,⁸³ that the contracts were potential forgeries and the misrepresentations amounted to egregious mistakes. In support of its contention that union representatives distributed "contracts" at the November 3 union meeting, the Company, in its brief, cites the testimony of Steven and Thomas Wreford and Sharon and Curtis McCormick. The Company also relies on these individuals to support an additional contention that Walker misrepresented that some of the janitors earn more than \$4 an hour in their union shops. For reasons discussed heretofore, I have already rejected the testimony of these witnesses. Moreover, none of these witnesses testified that the Union passed around "contracts", but, rather, referred to "papers" that were passed around to the audience. Further, none of these witnesses examined the material that was passed around. Thus, Steven Wreford testified that Walker passed around a *paper* to prove that employees were \$1.18 underpaid. He admits that he never saw the paper. Curtis McCormick testified that, "He [Walker] passed a paper and that, but, I never saw the paper. It never

came back to me." The testimony of Thomas Wreford and Sharon McCormick, in this regard, was substantially the same. On the other hand, Walker credibly testified that he told the audience about an incident involving unfair labor practice strikers in the Atlanta area and passed around an article on this subject that appeared in the Atlanta Labor Journal. The other documents in his possession were campaign handbills. (C.P. Our-Way Exh. 2, Resp.-Union Exh. 3). The Employer had a full opportunity to cross-examine Walker on these documents and adduced nothing therefrom, suggesting that Walker referred to contracts. In view of the foregoing, I find that the Employer's assertion that union contracts were passed around the audience is not supported by the credible evidence.⁸⁴

In support of the Employer's further contention that the \$1.18 wage differential amounts to an egregious misrepresentation within the meaning of *Shopping Kart*, reference is made to the *Industry Wage Survey*⁸⁵ in Atlanta, Georgia. The Company, in its brief, compares, *inter alia*, the hourly rate of its laborers, who earn between \$3.35 and \$3.55 per hour,⁸⁶ and average earnings of their counterparts doing the same work elsewhere in the Atlanta area which according to survey is \$3.26 per hour. Thus, it asserts that the misrepresentation varies from \$1.27 to \$1.47 per hour in this classification. However, a comparison of the average earnings of the Employer's employees classified as internal Assembler 'A' who earn between \$3.73 and \$4.03 per hour (C.P. Our-Way, Exh. 4) and the average hourly rate of \$4.68 for Assemblers, Class A, as reported in the survey show a significantly different result.⁸⁷ In any event, I find that the survey herein, is of little probative value. The survey represents the winter, 1974-75, whereas, the asserted misrepresentations were made in November 1976. Further, the classification and rates of Our-Way's employees (C.P. Our-Way Exh. 4) is for April 1976. Thus, the survey and other documents relied on do not reflect any relevant time frame. Moreover, the survey admittedly does not delineate union from non-union wages. In contrast, a distinction is made in the union leaflet (C.P. Our-Way, Exh. 2), wherein the asserted misrepresentation appears and in pertinent part, reads:

One Thing Bobbi Bailey Does Not Like To Mention is Your Wages and Fringe Benefits. She Knows *Your Wages are Approximately \$1.18 Below Union Wages for the Same Work.* [Emphasis supplied.]

In these circumstances, I find that the Employer's assertion that the Union made an egregious misrepresentation within the meaning of *Shopping Kart*, is not supported by the record.⁸⁸ Accordingly, it is recommended that this objection be overruled.⁸⁹

⁸⁴ With regard to the Employer's position that the union contracts might turn up "potential forgeries" it is noted that no independent evidence was proffered to justify such expectations. In these circumstances, the subpoena directing the production of union contracts for "potential forgeries" is tantamount to a fishing expedition, and I reaffirm my previous ruling revoking said subpoena. See also petition to revoke subpoena (Resp.-Union Exh. 1).

⁸⁵ See C.P. Our-Way Exh. 3, p. 8, table 1.

⁸⁶ See C.P. Our-Way, Exh. 4.

⁸⁷ The average hourly wage rate for Assemblers, Class A, is substantially higher in other cities as reported in the survey.

⁸⁸ E.g., *Thomas E. Gates & Sons, Inc.*, 229 NLRB 705 (1977).

⁸⁹ *Shopping Kart Food Market, Inc.*, *supra*; *Thomas E. Gates & Sons, Inc.*, *supra*.

⁸² The transcript herein, at p. 2141, l. 17, is hereby corrected by changing the word "hourly" to "Our-Way."

⁸³ 228 NLRB 1311 (1977), wherein the Board announced "that we will no longer set elections aside on the basis of misleading statements. However, Board intervention will continue to occur in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes or the use of forged documents. . . ."

Local Union President James Culpepper addressed the audience next. He spoke mainly on the procedures for calling a strike. He explained that the Union is a democratic organization and could not call a strike without a majority of the employees voting in favor of it.⁹⁰ At some point during his speech he heard someone in the audience remark, "If someone crossed the picket line, we'll bust heads." Culpepper told the audience that the Union doesn't do things that way.

As noted above, the General Counsel alleges that Culpepper condoned the threat of violence and further threatened employees with loss of jobs if they failed to support the Union. Culpepper denied that he threatened employees with loss of jobs. His testimony was substantially corroborated by Virginia Huff, James Turner, and Thomas Hicks. As noted earlier, Walker introduced Culpepper, left the room and was not present during Culpepper's speech. In this regard, and further reflecting adversely on the credibility of General Counsel's witnesses, is the testimony of Nazalean Dye who insists that Jimmy Walker and not Culpepper responded to the "bust heads" remark. While there were some inconsistencies in the testimony of the union witnesses, overall, I found them to be truthful. The General Counsel and the Employer rely on the testimony of Thomas and Steven Wreford, Sharon and Curtis McCormick and Nazalean Dye. For reasons discussed heretofore, I have found that the testimony of these witnesses is unreliable. Accordingly, the account of these witnesses as to what transpired at the November 3 meeting and on other occasions in material respects is rejected. I find on the basis of the credible evidence that Culpepper did not condone violence or engage in other acts in violation of Section 8(b)(1)(A) of the Act.

The record discloses that after the union meeting, Hicks met with Thomas and Steven Wreford, Sharon and Curtis McCormick, and Nazalean Dye in the Mark Inn parking lot in a last ditch effort to attract a few more union votes. While he knew that these employees opposed the Union, he testified "my job is to try and get all the votes I could for the Union the next day [election day]. I thought as a last ditch effort, I would approach these people once more and I did." Dye testified that she told Hicks "[she] wasn't interested in the Union because I had gotten fired through a union and he [Hicks] said that he could understand my point, and he kindly just pushed me aside and kept talking to Curtis [McCormick] and them." According to Dye, she started to walk away and heard Hicks say, "[I]f you vote for the Union, you'll have a job tomorrow, but, if you don't, you might not have a job tomorrow." Sharon McCormick asserts, *inter alia*, that she questioned Hicks on how the Union was able to organize and obtain union cards for so long without her knowing about it and Hicks assertedly responded that he first approached "the dumb, the stupid and the illiterate ones, the ones that didn't know any better." McCormick testified that she told Hicks that she

thought that it was "very unfair for him to say that about the people." While she admits that her husband, Curtis, and brothers Thomas and Steven and Nazalean Dye were present when these remarks were made, none of these witnesses corroborated her testimony in this regard. As with Sharon McCormick's testimony in other areas, I find that the remarks that she attributes to Hicks are not worthy of belief. I also reject the assertion that Hicks threatened these employees with loss of jobs because they failed to support the Union.

Curtis McCormick testified that Hicks told the group in the Mark Inn parking lot that "if . . . we voted for the Union we had nothing to gain, that we already had everything the Company had to offer, we couldn't gain anything by it or we couldn't lose anything, but if we went ahead and voted for it it wouldn't cost us anything." The Employer asserts that such an inducement to vote for the Union is objectionable conduct. In *Savair Manufacturing Company*,⁹¹ the Supreme Court held that a union's promise to waive initiation fees for those employees who signed authorization cards interferes with employees' free choice in the election. The Employer's reliance on *Savair* however is misplaced. In the instant case the Employer had not demonstrated a nexus between the alleged waiver and employees signing union authorization cards. Further, the credible evidence does not support the assertion that a waiver was in fact made. Hicks merely noted that as Georgia is a right-to-work State, employees could receive union benefits without having to belong to the union. This does not connote that Hicks promised a waiver of dues or other benefits premised upon these employees voting for the Union. Sharon McCormick asserts that Hicks told them that they could still vote for the Union and no one will know how they voted. It does violence to logic to accept that the Union would acknowledge the secrecy of the ballot and then condition benefits only on these employees voting for the Union. In these circumstances I find that the credible evidence fails to establish that Hicks' remarks constitute an objectionable inducement within the scope of the *Savair* decision.

In sum, I find that the General Counsel has failed to establish on the basis of a preponderance of the credible evidence that Union Representatives Thomas Hicks and Jimmy Walker and Local Union President James Culpepper engaged in acts and conduct on November 3 in violation of Section 8(b)(1)(A) of the Act. Accordingly, I shall dismiss these allegations. I further find on the basis of the credible evidence that Thomas Hicks, Jimmy Walker, and James Culpepper did not interfere with the laboratory conditions necessary for the employees to cast these ballots in a free and untrammelled election or that they engaged in other acts or conduct that would require setting aside the election. Accordingly, it is recommended that these objections be overruled.

D. Alleged Election Day Misconduct

The Employer contends that the laboratory conditions for a fair and free election were completely destroyed, and the destruction of these conditions is directly attributable to

⁹⁰ The Union earlier that day distributed a two-part leaflet, the second part of which is in question and answer form and in pertinent part, reads as follows:

Question: Can Union Representatives call a strike?

Answer: Absolutely not. Only a majority of the members in a secret ballot vote call a strike. (C.P. Our-Way, Exh. 2).

⁹¹ *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973).

the Union. In this regard the Employer asserts that on the day of the election there were threats by former employee Fred Langston to employee Billie Sue Elam, a threat by an unnamed union adherent to knife someone, and other disturbances including shouting and shaking of gates to the Company's premises by union adherents and that these acts require that the election be set aside. According to the Employer all of the aforementioned acts occurred with the exception of alleged threats by Langston in the presence of union representatives. Furthermore the Employer asserts that while the polls were still open Union Representative Jimmy Walker interrogated employees on how they voted and threatened these employees with discharge thereby creating additional confusion and further served to destroy the laboratory conditions for the election. None of the above acts are alleged by the General Counsel to be violations of Section 8(b)(1)(A) of the Act.

Billie Sue Elam testified in support of the threats attributed to former employee Fred Langston. Elam testified that on the day of the election, approximately 10 minutes before the 8 a.m. workday starting time, she stopped off at the Austin Avenue Buffet to buy hot chocolate and met Fred Langston. She stood at the end of the bar, some four stools away from Langston, and between them was seated employee Linda Toney. Elam asserts that Langston greeted her and asked her if she was going to vote for the Union. She answered no and told Langston that she liked her job and didn't want to have anything to do with the Union. According to Elam, Langston insisted four or five times that she vote for the Union, and she stood fast in her opposition thereto. She asserts that Langston threatened her that if the Union won, and if she did not vote for it, she would be made miserable. She repeated that she would not support the Union. She further asserts that Langston told her that he would set up picket lines and anyone who tried to cross the lines would "get their jaws busted and be sent to a hospital on stretchers." In this connection Langston assertedly told Elam that he learned from the Labor Board and the Union that he had a right to use any amount of force to repel anyone from crossing the picket line. According to the Company, Langston relied on the rhetoric he had heard at the union meeting the previous evening. Thus it argues that the threats assertedly made by Langston were a natural outgrowth of Culpepper's alleged illegal statements and condonation of violence and as such violates Section 8(b)(1)(A) of the Act.

On the basis of my observation of Elam as a witness, noting her admitted antiunion predisposition and the nature of the remarks which she ascribes to Langston, I do not credit her testimony. Thus the assertion that Langston told her that the "Labor Board" put its imprimatur on the use of any amount of force including busting heads and sending people to the hospital to compel compliance with a union picket line is so improbable, that in the absence of corroboration,⁹² I must reject it. Assuming *arguendo* the statement was made, Elam recognized these remarks as fabricated as she testified "I told him somebody has been lying to him and he'd better call the Labor Board and talk to them."

⁹² While Elam testified that employee Linda Toney was seated between her and Langston and heard all the remarks, she was not called upon to corroborate any of this testimony.

With regard to the Employer's contention that Culpepper set the tone at the Union meeting the previous evening for Langston's threats on election day, I have previously determined that the evidence fails to establish that Culpepper or any other union representative engaged in acts or conduct violative of Section 8(b)(1)(A) of the Act or otherwise engaged in objectionable conduct. Moreover, while the record discloses that Langston was an active union supporter and attended most union meetings, there is no showing, contrary to the Employer's assertion that he in fact attended the Union meeting of November 3. In any event, in the absence of an agency relationship and none has been developed herein, the acts of Langston are the acts of a third party. In this regard the Board has consistently accorded less weight to acts of third parties.⁹³ Thus the Board has refused to set aside elections, absent an agency relationship, where employees circulated rumors that employees who did not vote for the Union would lose their jobs⁹⁴ and where employees made statements that employees had to be union members to hold jobs.⁹⁵ Based on the foregoing and the evidence as a whole, I find that Langston did not engage in election interference.

As noted above the Employer asserts that a union adherent threatened to knife someone in the presence of union representatives thereby further negating the laboratory conditions for a fair and free election. The credible evidence however falls far short of establishing that such a threat was made, and if made that union representatives heard the threat and condoned it in any form. In support of this contention, the Employer adduced testimony from Ray Angeles, James Rollins, and Larry Brown. These individuals were assigned by the Company to watch the gate and not to let anyone in to vote until a specified time. Employee Angeles testified that "[t]here was just one black dude . . . he had his hand in his pocket like this (indicating), coat pocket, and he said before he left that evening that he was going to cut somebody." According to Angeles, this person was in the Company of some previously discharged employees and about 7 feet away from him when he made the alleged threat. Angeles did not describe where any of the Union representatives were relative to the person accused of making the threat or whether they were close enough to hear the threat. In this regard it is noted that Angeles testified that the threat was not shouted out but merely stated. Angeles did not see a knife, nor could he tell whether this person carried a knife. He testified that he did not mention the threat to Rollins and Brown and they did not mention it to him, although he assertedly got himself a piece of pipe to defend himself against the knife. Angeles, when asked why he waited until long after the election to disclose that he heard the threat, answered that he didn't think it was any of his business. According to Angeles he was not told to report anything unusual, but merely instructed to watch the gate. He testified, "I don't know why I was there." I find that the foregoing responses by Angeles do not smack of candor. In

⁹³ *Marlowe Manufacturing Company, Inc.*, 213 NLRB 278 (1974); *Cross Baking Company, Inc.*, 191 NLRB 27 (1971).

⁹⁴ *Home Town Foods, Inc., d/b/a Foremost Dairies of the South*, 172 NLRB 1242 (1968).

⁹⁵ *E. H. Blum*, 111 NLRB 110 (1955).

particular, it appears highly unlikely that Angeles would not tell management about the threat to use a knife because he thought it was none of his business when he was stationed to guard the gate. Moreover, he thought enough of the threat to arm himself with a small piece of pipe but not enough to mention it to Rollins and Brown who were in his presence and were also assigned to watch the gates. In these circumstances I reject his testimony that there was a threat made to use a knife. With regard to the alleged threat the testimony of James Rollins also provides little or no probative weight. Thus when asked whether he heard anyone threaten anyone else, Rollins testified "Well, I heard no threats—just what Mr. Brown told me about the knife." According to Rollins, Brown told him that someone in a brown leather coat and a black and white checkered hat made a statement that he had a knife in his pocket and he was going to cut somebody. The foregoing clearly discloses that Rollins did not witness the alleged threat. With regard to Larry Brown, the record discloses that he is self-employed and has performed various jobs for Bobbi Bailey including carpenter work, for about 15 years. According to Brown he heard someone say "I've got a knife and I'm going to use it before I leave here." Brown did not hear any statement by anyone immediately prior to the alleged threat nor did he hear anything after it was made. Brown asserts that he did not tell Bobbi Bailey until a few days later although he saw her prior thereto and after the alleged threat was made. He claims that he told Bailey that he didn't know who made the threat and did not tell her that he pointed the person out to James Rollins. It is undisputed that Brown was stationed at the gate to watch it at the behest of Bobbi Bailey. In these circumstances, Brown's assertion that the only action he took regarding a threat to cut someone with a knife is simply to caution Rollins and to wait several days to disclose it to Bobbi Bailey is not believed. In view of the foregoing and the entire record I find that the credited evidence does not establish that the threat was made as alleged. Accordingly I find that it shall not serve as a basis for setting aside the election.

The credited evidence does not support the Employer's further contention that a mass of union adherents attacked the Company's gates and created other disturbances thereby generating such anxiety and fear of reprisals that rendered impossible the free and untrammelled choice of bargaining representation contemplated by the Act. The witnesses relied on by the Employer in support of this contention were either previously discredited herein or testified in broad generalities and conclusory form. Thus the testimony of these witnesses is of little probative or persuasive value. For example, the Employer attributes to a "mass of people" the violent shaking of the Company's gates. However, the record discloses that only approximately seven to nine people approached the gates and this included some discharged employees and their spouses. Further, only Virginia Huff and Jerry Williams were named by any of the witnesses as the ones involved in shaking the gates. According to Ray Angeles only Virginia Huff was involved in shaking the gate and from his vantage point he would have been able to observe any other person so involved. The record discloses that Huff and the others in her company were at the gate because they wanted to get into the plant

to cast their ballots and found the gate locked. Rollins testified that they shouted "open this gate. We want in, we come to vote." In this regard the record discloses that these gates were closed only on election day. Sharon McCormick, (previously discredited herein) testified that she heard yelling and banging on the gates on two different occasions on election day. However she was unable to see anyone make contact with the gates and recognized only the voice of Virginia Huff. On the basis of the credited evidence I find that the Employer failed to demonstrate that there were disturbances of the kind or intensity that would require setting aside the election.

Still further, the Employer contends that Jimmy Walker, union representative interrogated employees on how they voted and threatened them with discharge, while the election was not yet over. In support of this contention Sharon McCormick, and her brother Steven Wreford testified that after they voted, they ran into Walker and James Culpepper on the corner of the street and they were assertedly asked how they voted. Sharon McCormick testified that her brother pointed to a button that he was wearing (presumably procompany) and said "I voted no." Sharon McCormick asserts that she told Walker and Culpepper that it was a secret ballot and that she didn't have to reveal her choice. She testified that Walker added "Well, I guess you'll be looking for a job anyway." It appears unlikely that in the circumstances of this case Wreford and McCormick would be asked how they voted. First off it appears that Steven Wreford displayed either an antiunion or procompany button. Further, the record discloses that the Union challenged his ballot at the election. Walker and Culpepper denied that they asked any of the employees how they voted in the election. For reasons discussed heretofore I have found Sharon McCormick and Steven Wreford not to be credible witnesses. In these circumstances, and in the absence of any independent corroboration, I reject the contention that the Union interrogated employees on how they voted and threatened them with loss of jobs.

In sum, I find that the record fails to support the allegations that the Union committed acts in violation of Section 8(b)(1)(A) or otherwise engaged in conduct which serve to set aside the election.

V. CHALLENGES

As noted previously the tally of ballots showed that of approximately 249 eligible voters, 109 cast valid votes for and 93 cast valid votes against the Petitioner (Union), 36 cast challenged ballots* and 1 cast a void ballot. As the foregoing reveals, the challenged ballots were determinative of the outcome. However, in order to expedite the resolution of all material issues in the consolidated proceeding herein, including the question concerning representation, the parties stipulated, and I find that certain employees are ineligible. Thus the parties stipulated that the ballots of 19 named individuals remain unopened and uncounted for the "entire purpose of this proceeding." In this regard the parties stipulated that *Dot Brown* exercises the indicia of super-

* See G.C. Exh. 1(r).

visory status within the meaning of Section 2(11) of the Act and that her ballot not be opened and counted. The parties also stipulated that *Sara Savage* is ineligible as an office clerical⁹⁷ and that her ballot remain unopened and uncounted. Further, the parties stipulated that *Debbie Speer* was ineligible on the basis that she was not employed on the eligibility date and her ballot should not be opened and counted. The record disclosed that *Raleigh Smith* was not employed on the day of the election, and the parties stipulated that his ballot remain unopened and uncounted. Still further the parties stipulated that the ballots of *D. Chesser, R. O. Henry, M. E. Johnson, James Klein, E. M. Roach, J. W. Rollins, E. L. Lassiter, S. Stevens, J. P. Upchurch, Shirley Brown, Frances Caldwell, Shirley Carter, F. C. Jones, Larry Christian, and Pat Bailey* remain unopened and uncounted. The aforementioned stipulations involving the ballots cast by the 19 employees named above, reduced the total number of 36 challenged ballots to 17. As 109 valid votes had already been cast for the Petitioner it would need only one additional ballot cast in its favor for a conclusive result at a total of 110. Thus the total 93 ballots cast against the Petitioner would only be increased to 109 if the other 16 ballots voted against representation. This group of 17 challenged ballots includes *Virginia Huff, Jerry Williams, Jerry Ellefsen, Larry Grier, Fred Langston, and Johnny Cole* all of whom have been found herein to have been discharged in violation of Section 8(a)(3) and (1) of the Act. Thus, at all material times herein they have been employees and eligible to vote. The parties noted the likelihood that the alleged discriminatees voted for the Petitioner and stipulated that the challenged ballots were no longer determinative. The tally of ballots as modified by the aforementioned stipulations is now such that five of the six alleged discriminatees would have to be found unlawfully discharged and eligible to vote and all have voted against the Petitioner, for there to be any mathematical possibility of foreclosing a union majority of the valid votes cast. This would increase the total number of votes cast against the Petitioner from 93 to 98, but still 11 short of 109 valid votes cast in favor of the Petitioner. Further militating against the likelihood that the above named discriminatees voted against the Petitioner is that all of them conspicuously supported the Union by *inter alia*, wearing union patches at work and passing out union authorization cards. However, even under such unlikely circumstances whereby five of the six above named discriminatees voted against the Union, the other 11 challenged ballots, (not yet resolved) would all have to be overruled⁹⁸ and all have cast ballots against union representation for the Employer to gain a tie vote and negate the Union's majority. In these circumstances, a conclusive result is a virtual certainty with the opening of the ballots of the discriminatees. Having herein determined that the discrimi-

⁹⁷ The record disclosed, the parties stipulated and I find that *Sara Savage, Debbie Speer, D. Chasser, and F. C. Jones* maintain desks in the office area, perform office functions, are supervised by the office manager, and enjoy certain terms and conditions not shared by production employees. The Petitioner amended the challenges to *D. Chasser* and *Sara Savage* on the basis that they are office clericals. It also challenged *F. C. Jones* and *Debbie Speer* as office clericals. In view of the foregoing, I find that *Savage, Speer, Chasser, and Jones* are ineligible for the additional reason that they are office clericals rather than unit employees.

⁹⁸ One of these ballots was cast by *Albert Harp*. The allegation that he was discharged in violation of Sec. 8(a)(3) and (1) was previously dismissed.

natees are eligible to vote and having previously overruled the Employer's Objections *in toto*, I shall recommend that the Board sever and remand case 10-RC-10825 to the Regional Director for Region 10 for the purpose of opening and counting the ballots cast by *Virginia Huff, Jerry Williams, James Ellefsen, Larry Grier, Fred Langston, and Johnny Cole* and certify the Petitioner if at least one of the ballots was cast for the Petitioner.⁹⁹ On the other hand, if none of these ballots were cast against the Petitioner, it is recommended that the Board instruct the Regional Director for Region 10 to determine and process further, the eligibility status of the other 11 challenged voters in accordance with the terms of the underlying election agreement herein.¹⁰⁰

VI. OBJECTIONS AND CHALLENGES (CONCLUSION)

Having found that the Union has not engaged in preelection misconduct interfering with the laboratory conditions required for a free and uncoerced choice on the question of representation, and noting the likelihood that the opening and counting of certain challenged ballots will produce a conclusive result, I shall recommend that case 10-RC-10825 be severed and remanded to the Regional Director of Region 10 for the purpose of opening and counting of said ballots and further processing as set forth above in section V.

VII. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent-Employer set forth in section III, above, occurring in connection with its operations 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.

CONCLUSIONS OF LAW

1. Our-Way, Inc., and Our-Way Machine Shop, Inc., (collectively referred to herein as Respondent-Employer) comprise a single employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Firemen & Oilers, AFL-CIO-CLC, (herein referred to as the Union, Respondent Union or Petitioner), is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their interest or the interest of other employees in the Union, by soliciting employees to report on the Union activities of other employees, by creating the impression of surveillance and by engaging in actual surveillance of em-

⁹⁹ See, e.g., *International Ladies Garment Workers' Union* 137 NLRB 1681 (1962); cf. *El Fenix Corp.*, 234 NLRB 1212 (1978).

¹⁰⁰ This group includes the name of *Albert Harp* who as noted previously was found not to have been discharged in violation of Sec. 8(a)(3) and (1) of the Act. Thus this finding would have to be reversed for his ballot to be opened and counted. The other names in the group are *Rozite Crawford, James Childnes, William Alger, Willie Hill, Keith McFarland, Andrew Brenan, Terry Wallace, Walter Laurens, Stephen Wreford, and Thomas Wreford*.

ployees' union activities, by imposing a discriminatory rule requiring a doctor's excuse for 1 day's absence, by maintaining or enforcing overly broad no-solicitation, no-distribution rules in its plant during working hours, by threatening to discharge employees because of their union activities and by threatening to close the plant if unionization occurred, Respondent-Employer has committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily imposing more onerous working conditions on Rebecca Dunlap, by discriminatorily laying off Maxey Cox on certain dates in October and November 1976, by discriminatorily issuing warning slips and thereafter suspending Maxey Cox and Joe Lewis Smith for 3 days, and by discriminatorily discharging employees Virginia Huff, Jerry Williams, James Ellefsen, Benny High, Larry Grier, Fred Langston, and Johnny Cole, because they engaged in organizing for the Union or supported the Union and in order to discourage employee activity and support for the Union, Respondent-Employer has committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By discriminatorily issuing warning slips and thereafter suspending Maxey Cox because he gave testimony under the Act, Respondent-Employer violated Section 8(a)(4) and (1) of the Act.

6. The General Counsel has not established by a preponderance of the evidence that Respondent-Employer violated Section 8(a)(3) and (1) of the Act by discharging Albert Harp, by shutting down its entire plant operation on November 5, 1976, and by shutting down its Carrier plant from November 8 to 12, 1976.

7. Except to the extent set forth in conclusions of law 3 through 5 above, the Respondent-Employer has not otherwise committed unfair labor practices as alleged in these consolidated cases.

8. The General Counsel has not established by a preponderance of the evidence that Respondent-Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

THE REMEDY

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

It having been found that Respondent-Employer discharged Virginia Huff, Jerry Williams, James Ellefsen, Benny High, Larry Grier, Fred Langston, and Johnny Cole in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent-Employer be ordered to offer them full and immediate reinstatement¹⁰¹ to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings they may have suffered from the date of their discharge to the date of Respondent-Employer's offer of reinstatement. In addition, it having been found that Re-

¹⁰¹ Respondent-Employer's assertion that Grier and Langston engaged in postdischarge misconduct thereby forfeiting any right to reinstatement is not supported by the credited evidence and is hereby rejected.

spondent laid off Maxey Cox on certain days in October and November 1976 in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent-Employer make him whole for any loss of earnings as a result of such layoffs. Further, it having been found that Respondent-Employer issued warning slips and suspended for 3 days Joe Lewis Smith in violation of Section 8(a)(3) and (1) of the Act and Maxey Cox in violation of Section 8(a)(4) and (1) of the Act I shall recommend that said warning notices be rescinded and expunged from their personnel files and other records. Additionally, I shall recommend that Respondent-Employer make whole Joe Lewis Smith and Maxey Cox for any loss of earnings they may have suffered as a result of the unlawful suspensions. Still further, it having been found that Respondent-Employer violated Section 8(a)(3) and (1) of the Act by assigning unfamiliar and more onerous production work to Rebecca Dunlap, I shall recommend that Respondent-Employer offer her an immediate reassignment to her former job of general cleanup work, without prejudice to seniority and other rights and to otherwise treat her in a nondiscriminatory manner in employment. Backpay shall be computed according to the Board's policy set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Payroll and other records in possession of Respondent-Employer are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corporation* 231 NLRB 651 (1977).¹⁰²

The serious unfair labor practices herein found strike at the heart of the rights guaranteed by the Act, and, accordingly a broad order shall be recommended directing Respondent-Employer to cease and desist from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). *P.R. Mallory and Co. v. N.L.R.B.*, 400 F.2d 956, 959-600 (C.A. 7, 1968), cert. denied 394 U.S. 918 (1969); *N.L.R.B. v. Bama Company*, 353 F.2d 323, 324 (C.A. 5, 1965).

On the basis of the above finding of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰³

Our-Way Inc., and Our-Way Machine Shop, Inc. (collectively Respondent-Employer), their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, laying off, imposing more onerous working conditions, or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of

¹⁰² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰³ 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.

their activities on behalf of International Brotherhood of Firemen & Oilers, AFL-CIO-CLC, or any other union.

(b) Issuing warning slips, suspensions, or other reprisals against employees for giving testimony under the Act.

(c) Threatening employees with discharge or other reprisals, or issuing warning notices because of their union activities.

(d) Threatening employees to close the plant if the plant is unionized.

(e) Creating impressions of surveillance and engaging in actual surveillance of employees' union activities.

(f) Soliciting employees to report on the activities of other employees on behalf of International Brotherhood of Firemen & Oilers, AFL-CIO-CLC.

(g) Coercively interrogating employees concerning their own union activities and those of fellow employees.

(h) Imposing any discriminatory rule for excused absences.

(i) Maintaining in effect or enforcing overly broad no-solicitation, no-distribution rules which preclude employees from such activities on behalf of a union during their non-working time.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Offer employees Virginia Huff, Jerry Williams, James Ellefsen, Benny High, Larry Grier, Fred Langston, and Johnny Cole immediate and full reinstatement to their former jobs or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer immediate reassignment to employee Rebecca Dunlap to her former position of clean-up work or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges.

(c) Make employees Maxey Cox and Joe Lewis Smith whole for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy" and rescind and expunge from their personnel files and other records the disciplinary warnings they received on or about June 30, 1977, and September 10, 1977.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay due under the terms of this Order.

(e) Post at each of its plants in Atlanta, Georgia, copies of the attached notice marked "Appendix B."¹⁰⁴ Copies of the notice on forms provided by the Regional Director for Region 10, shall be signed by an authorized representative

¹⁰⁴In 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."

of Respondent-Employer and posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent-Employer to insure that the notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent-Employer has taken to comply therewith.

IT IS FURTHER RECOMMENDED that the consolidated complaint against Respondent-Employer be dismissed insofar as it alleges unfair labor practices not found herein.

IT IS FURTHER RECOMMENDED that the complaint in Case 10-CB-2679 be dismissed in its entirety.

IT IS FURTHER RECOMMENDED that the Board overrule all the objections to the election conducted on November 4, 1976, in Case 10-RC-10825.

IT IS FURTHER RECOMMENDED that Case 10-RC-10825 be severed and remanded to the Regional Director for Region 10 for the opening and counting of the ballots of Virginia Huff, Jerry Williams, James Ellefsen, Larry Grier, Fred Langston, and Johnny Cole. Thereafter, if the revised tally of ballots indicates that the Petitioner was designated by a majority, the Regional Director shall issue a certification of representative. Should the revised tally of ballots fail to disclose that the Petitioner has been designated by a majority, the Regional Director shall process the case further in the manner set forth in this Decision in the section of this Decision entitled "Challenges."

APPENDIX B

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

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

WE WILL NOT terminate, suspend, lay off, impose more onerous working conditions, or otherwise discriminate against employees in regard to hire or tenure of employment because of membership in or activities on behalf of, International Brotherhood of Firemen & Oilers, AFL-CIO-CLC, or any other labor organization.

WE WILL NOT issue disciplinary warning slips, suspend or otherwise discriminate against employees because they have given testimony under the Act.

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

WE WILL NOT create the impression among employees that their union activities or the union activities of other employees are under surveillance or engage in actual surveillance of employees' union activities.

WE WILL NOT solicit employees to report on the union activities of other employees on behalf of Inter-

national Brotherhood of Firemen & Oilers, AFL-CIO-CLC, or any other labor organization.

WE WILL NOT threaten employees to close the plant if the plant is unionized.

WE WILL NOT impose any discriminatory rule for excused absences or otherwise impose discriminatory rules to discourage our employees from engaging in union activities.

WE WILL NOT maintain and implement overly broad no-solicitation, no-distribution rules tending to inhibit our employees from soliciting union membership on company premises during their nonworking time.

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

WE WILL rescind and expunge from our personnel records and other records the disciplinary warnings given to Maxey Cox and Joe Lewis Smith in June and September 1976.

WE WILL offer immediate reassignment to Rebecca Dunlap to the position she held prior to August, 1976 and treat her and other employees in a nondiscriminatory manner with regard to union or other protected concerted activities.

WE WILL offer Virginia Huff, Jerry Williams, James Ellefsen, Benny High, Larry Grier, Fred Langston, and Johnny Cole immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered by reason of our unlawful discrimination against them, together with interest.

WE WILL make Maxey Cox and Joe Lewis Smith whole for any loss of earnings they may have suffered by reason of our unlawful discrimination against them, together with interest.

OUR-WAY, INC./OUR-WAY MACHINE SHOP, INC.