

418 Geary, Inc. d/b/a Stage Deli and Theatre Lounge and Sandra Rockman and Yvonne Nahem. Cases 20-CA-13529 and 20-CA-13600

September 22, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS MURPHY
AND TRUESDALE

On July 10, 1978, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed a limited exception to the recommended Order.

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 exception and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, 418 Geary, Inc., d/b/a Stage Deli and Theatre Lounge, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 2(c) and insert the following as paragraphs 2(c) and (d) and reletter subsequent paragraphs accordingly:

“(c) Expunge from its records all references to the corrective warning letters to employee Yvonne Nahem dated October 21 and 25, 1977, and notify Yvonne Nahem, in writing, that the written warnings issued to her on October 21 and 25, 1977, have been revoked and that all references to such warnings in

¹ Having found that the written warnings given employee Yvonne Nahem on October 21 and 25, 1977, were issued in violation of Sec. 8(a)(3) and (1) of the Act, the Administrative Law Judge appropriately recommended that Respondent cease and desist from issuing such discriminatory warnings. However, we find merit in the General Counsel's exception to the Administrative Law Judge's failure to order expunction of these warnings from Nahem's personnel file or other records maintained by Respondent. We also find that, in addition to expunction, notification to the employee that the unlawful warnings have been removed is appropriate to remedy this type of violation. See *Holly Manor Nursing Home*, 235 NLRB 426 (1977), and *Tekform Products Company, a Division of Bliss & Laughlin Industries*, 229 NLRB 733, 744 (1977). Accordingly, the recommended Order and notice are modified to reflect these changes.

the personnel files and other records of Respondent have been expunged.

“(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with this Order.”

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

APPENDIX

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

WE WILL NOT discharge employees, eliminate work shifts, change work assignments, issue warnings, or otherwise discriminate against employees for engaging in union or concerted activities on behalf of Hotel and Restaurant Employees and Bartenders Union, Local 2, or any other labor organization.

WE WILL NOT initiate more onerous working conditions to discourage union or concerted activities; interrogate employees regarding union or concerted activities; instruct employees not to talk to other employees about union or concerted activities; attempt to persuade employees to resign because of their union or concerted activities.

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

WE WILL offer Sandra Rockman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

WE WILL make Sandra Rockman and Yvonne Nahem whole for any loss of earnings they may have suffered as a result of the discrimination against them.

WE WILL expunge from our records all reference to the written warnings issued to Yvonne Nahem on October 21 and 25, 1977, and we will notify her, in writing, of the expunction of said warnings.

418 GEARY, INC., D/B/A STAGE DELI AND
THEATRE LOUNGE

DECISION

HAROLD A. KENNEDY, Administrative Law Judge: These two matters were heard at San Francisco, California, on April 17, 1978.¹ Case 20-CA-13529 arose out of a charge filed by Sandra Rockman with the National Labor Relations Board on November 28. The complaint, which issued on such charge on January 6, 1978, alleged Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by terminating Rockman. The charging paragraph (VI) reads:

On or about November 22, 1977, Respondent discharged its employee, Sandra Rockman, because of her membership in, or activities on behalf of the Union, or because she engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Case 20-CA-13600 is based on a charge filed by Yvonne Nahem on January 10, 1978. The complaint in this case issued February 24, 1978, and also alleged violation of Section 8(a)(3) and (1) of the Act. Paragraph VI of the complaint, as amended, avers that Respondent violated Section 8(a)(1) by:

1. Initiating "more onerous working conditions to discourage . . . Union or other concerted activities . . ." (subpar. (a)).

2. Interrogating "an employee regarding the Union and/or concerted activities of other employees and [giving] that employee the impression that her Union activities were the subject of surveillance" (subpar. (b) as amended).

3. Instructing "an employee not to talk to other employees about the Union" (subpar. (d)).

4. Attempting "to persuade an employee to resign her employment because of her activities on behalf of the Union" (subpar. (e)).

5. Instructing "employees not to talk to an employee about the Union" (subpar. (f)).²

The complaint (par. VII) alleged that Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following retaliatory conduct because of Nahem's union or other concerted activities:

(a) Nahem's work shift was eliminated on or about September 30.

(b) Nahem's work procedures were changed to reduce her income on or about September 30.

(c) Nahem's work assignment was changed in October 1977 to reduce her income.

(d) Nahem was given a written warning on or about October 21.

(e) Nahem was given a written warning on or about October 25.

(f) Nahem was constructively discharged on or about November 15.³

¹ All dates refer to 1977 unless otherwise indicated. The two matters were consolidated by an order dated February 24, 1978.

² At the hearing the allegation set forth in subpar. (c) of par. VI of the original complaint was deleted, and a new subpar. (b) was substituted. All of the alleged 8(a)(3) violations, except the one referred to in par. 5, were said to have occurred in September. The conduct referred to in par. 5 (VI(f)) allegedly occurred in September and October.

³ According to the complaint, these 8(a)(3) and (1) violative acts were committed through General Manager Snyder. Snyder was also allegedly in-

Several matters were established by the pleadings and stipulation or by essentially undisputed evidence, including the following:

1. Respondent is a California corporation engaged in the retail sale of food and beverages in San Francisco. Its place of business on Geary Street, sometimes referred to as the store, includes a lounge section and a restaurant section. One waitress is normally assigned to cover the lounge. Three waitresses ordinarily serve customers in the restaurant area. In general, waitresses consider the lounge area a less desirable assignment than the restaurant.⁴ A \$2 minimum is usually charged lounge customers. The menu indicates that there is a minimum \$1 charge in the restaurant. The store is open from 7 a.m. until 12 p.m. and sometimes until 1 a.m.

2. Respondent's restaurant is a cash house, which means that the customers pay their checks directly to the waitress or waiter. Under the current collective-bargaining agreement, to which Respondent is a party, a cash house waitress is to be paid \$21.55 per shift. The contract rate for a waitress in a noncash house is \$24.25 per shift.

3. Respondent is now, and at all times material, an employer engaged in commerce and in operations affecting commerce within the meaning of the Act. During the past year, Respondent grossed over \$500,000. In the same period it purchased goods and supplies originating outside of California valued in excess of \$5,000.

4. Hotel and Restaurant Employees and Bartenders Union, Local 2, is now, and at all times material, a labor organization as that term is used in the Act.

5. At all times material, Max Lipkin and Henry Snyder have been supervisors and agents of Respondent as those terms are used in the Act. Lipkin has no title and holds no financial interest in Respondent, but he spends a considerable amount of time in the restaurant.⁵ Henry Snyder has been general manager of Respondent since August 1977. He works primarily during the day, but he has the overall responsibility for operation of the restaurant. John E. Watson is the night manager, a position subordinate to the general manager. Snyder filled in for Watson for a week in October while Watson was on vacation and again for another week in November while Snyder was in the hospital.

6. Yvonne Nahem and Sandra Rockman have been employed as waitresses by Respondent. Rockman worked at night in the lounge between August 20 and November 22. Nahem started on August 7 and, except for the first few days of her employment, worked on a day shift until she left on November 15. She was reinstated on January 31, 1978.

Case 20-CA-13529 raises only the question of whether Sandra Rockman was unlawfully terminated on November 22 by General Manager Snyder. The General Counsel contends Rockman was discharged for protected activity—i.e.,

involved in the 8(a)(1) charges contained in Case 20-CA-13600 except for the allegation contained in par. VI(e). Par. VI(e) alleged that Respondent's agent and supervisor, Max Lipkin, attempted to persuade an employee to resign because of her union activities.

⁴ Respondent's general manager stated that the "back station" in the restaurant is the least desirable assignment for a waitress. He claimed the lounge could be a very desirable and profitable assignment.

⁵ Waitress Yvonne Nahem referred to Lipkin as one of the owners, but Lipkin testified that his "brothers own the store, and I help them in any way I can."

because she went to the Union, along with two other waitresses, and complained about the working conditions at Respondent's place of business. Respondent maintains, however, that Rockman's discharge was in no way related to her complaint. It contends that Rockman was terminated "because of her utter defiance of her supervisor," General Manager Snyder. It asserts that Rockman had been twice reprimanded for failing to enforce the \$2 minimum applicable to the lounge where she encouraged customers to protest to the manager that the minimum charge was not disclosed on the menu.

Being a night waitress, Rockman normally worked under the supervision of Watson. Rockman did not readily accept supervision from General Manager Snyder.⁶ She acknowledged that there was a personality conflict between her and Snyder and that she argued with him on several occasions. She also acknowledged that she had been reprimanded on two occasions prior to November 22, the date of her dismissal, for failing to charge lounge customers the \$2 minimum. Snyder issued to Rockman a written warning notice on October 22 which states in part (G.C. Exh. 4(d)):

After many verbal reprimands and warnings, Sandra still totally refuses to recognize her obligation to her employer to observe and follow company policy and rules of department on the job. Sandra does not follow directions or company policy as to how the lounge is to be worked. She insists on working her way even though it conflicts with company rules and policy. When she is told about this, instead of listening and doing as instructed, she continually argues with management

A final written warning was issued to Rockman on the night of November 22 at the time of her termination. It reads in part (G.C. Exh. 4(b)):

Waitress refused to follow company policy and rules. Sandra did not enforce \$2 minimum charge in lounge after repeated warnings that this policy must be enforced. She was again instructed before going on floor that \$2 minimum must be enforced in lounge. She later wrote a check, #56337, for \$1.10 even though she was told that there were no exceptions Employee terminated.

Sometime during the day of November 22, Rockman had gone to the Union with two other waitresses to complain about working conditions at Respondent's restaurant. She said she learned on her arrival at the restaurant that evening from another waitress that Snyder knew of her visit to the Union and that "he was very angry about it." She testified Snyder indicated that he knew of her visit when she started her shift, telling her that "he was going to go by the book and watch me all night and that if I did anything wrong, that he was going to fire me."

A little later in the evening, Rockman told another waitress that she was unable to cover any tables in the restaurant "because I work in the lounge." Apparently this comment was overheard by Snyder, for, according to Rockman, he immediately confronted her and told her that she would

work "anywhere I want you to work." Later in the evening, around 10 or 10:30, Snyder complained to Rockman for not charging a customer a \$2 minimum.⁷ She responded that she did not know that the minimum was in effect after the dinner hour.

Rockman explained the final incident which culminated in her discharge as follows:

There was an incident with some cab drivers who I charged the \$2.00 minimum for even though they hadn't eaten \$2.00's worth. They had taken the issue up with Henry; one of them had taken the issue up with Henry and gotten money back from him.

Henry said that I hadn't informed them that there was a \$2.00 minimum and I had—I told Henry that I had informed them that there was a \$2.00 minimum.

And he said, "You've got to follow company policy." I said that I was following the company policy and that I would be following the company policy.

He kept yelling about the minimum and so finally I said I felt we had nothing further to discuss. So, he said, "Well, you're fired then."

Asked on cross-examination whether she had said anything to the cabdrivers to encourage the protest, she replied:

I told them that it wasn't posted on the menu and that they could take it up with Henry, but that I needed to charge them the \$2 minimum because that was the rule.⁸

Snyder testified that he knew Rockman had gone to the Union on or about November 22; also, that he had talked with Golden Gate Restaurant Official Guy Leonard on November 22 about it and the warning notice he had issued to Rockman on October 22. He said he told Leonard that he should have fired Rockman earlier. He testified that he did not decide to fire her until later on in the evening of November 22 because she continued to defy him. According to Snyder, Rockman responded to the complaint about issuing the \$1.10 check (instead of enforcing the \$2 minimum) by indicating that "she didn't think . . . a \$2 minimum was right." Snyder said he intended to write a warning to her on the following day but that "she said she would wait there and she wanted me to write it up right then and there and take care of it."⁹

The legality of Rockman's termination is a close one. She was not a cooperative waitress. She argued with General Manager Snyder and at times appeared to be questioning his authority to supervise her. On the other hand, Snyder was "a very demanding supervisor," as Respondent concedes in its brief. Max Lipkin, a brother of the owners and clearly a spokesman for them, acknowledged that Snyder was a "tough boss" and "reprimanded everyone." But the issue raised by the complaint in Case 20-CA-13529 is not to be determined by how competently each performed his or her job or which is the more at fault for their "stormy

⁷ Rockman wrote the check for \$1.10 as noted in the November 22 warning notice (Resp. Exh. 1).

⁸ Snyder agreed that the \$2 lounge minimum was not posted.

⁹ Rockman also testified that she insisted upon being written up that night "before I leave."

⁶ Rockman claimed she knew Snyder only as the day manager until Watson went on vacation in October.

personal relations on the job." The question presented is simply whether Rockman's union or concerted activities played any part in Snyder's decision to fire her.¹⁰

After having considered the whole record, I am constrained to find Respondent's discharge of Rockman to be unlawful. The evidence, especially as it relates to the timing of the discharge, does give rise to an inference that the dismissal of Rockman on November 15 was accompanied by a discriminatory motive and that the Act was thus violated. Snyder knew Rockman went to the union hall that day to complain about working conditions at Respondent's store. He admitted speaking that day to Guy Leonard, the restaurant association official, and telling him that he had good reason to fire Rockman previously but had not yet done so. Snyder then let it be known that he knew waitresses had been at the union hall and that he was angry about it—so angry, in fact, that he told Rockman that evening that "he was going to go by the book" and fire her if she did anything wrong. And he did—after threatening to fire her again for telling another waitress that she [Rockman] was assigned to work in the lounge and not the restaurant part of the store.¹¹

Rockman pressed the issue of having a written notice on the night of her termination, but it was Snyder who decided that she should be let go at that time. And it is evident that her union and concerted activities that day were involved in Snyder's decision to end her employment. I find, therefore, that the discharge violated Section 8(a)(3) and (1) of the Act.¹²

Case 20-CA-13600 involves the alleged unlawful discharge of Yvonne Nahem and a number of other 8(a)(3) and (1) charges.

Nahem and her husband (a union official named Schack) had known Snyder on a "cordial" basis at one time in New York. The relationship between them at the Stage Deli, however, has been "strictly business." Nahem obtained her waitress job at the restaurant through her husband, who had spoken on her behalf to one of the owners, Sidney Lipkin. She worked irregular hours when first employed, beginning on or about August 7, but was soon given a regular day shift.¹³ Initially, Nahem was satisfied with her employment. She testified that "I had been treated very well." However, she detailed these incidents and events that oc-

curred between September and November 22, the date on which she walked out of Respondent's restaurant:¹⁴

1. In early September, Nahem complained that her paycheck was short, according to the terms of the collective-bargaining agreement in effect. She contended that Respondent had paid her an incorrect amount on the basis that the restaurant was a cash house and that it had failed to pay her a uniform or laundry allowance. She filed with the Union a grievance, alleging that she had not been paid the correct amount. (Watson and Snyder became involved in discussions of this issue, and she was ultimately paid the amount she claimed due. No laundry or uniform allowances were furnished her, however.)¹⁵

2. Nahem testified that on September 22 she had a three-way conversation with Snyder and Lipkin. She said that Snyder, who did most of the talking, called her into the lounge and complained to her that the store did not have problems with the Union until she arrived. She said Snyder informed her that in the future she should not hang around the restaurant except when on duty. Nahem said she turned to Lipkin and asked, "why was there this discrimination." Lipkin responded, she said, by saying that he "never interfered with his manager." She asked why she had not been fired, whereupon Snyder asked, "Why don't you quit?" She testified that Snyder repeated the question, and Lipkin offered the comment that he wouldn't work where he wasn't wanted. At the end of the conversation, she said that Snyder told her that "we don't want you hanging around in the back talking about the Union to the other employees." Nahem filed another grievance based on this incident (G.C. Exh. 6(b)).¹⁶

3. According to Nahem, harassment became intense after September 22 which was facilitated by establishment of a new guest check procedure. Under the new procedure, guest checks were signed for and issued to the waitresses only "at the exact hour" the shifts began. Also, the restaurant thereafter operated as a cash house, with the waitresses being required to collect for the checks and take the money to the cash register. Nahem said she was unable to prepare herself for the shift and consequently started late and lost income. She testified that it was difficult to collect the checks and perform her other duties, with the result that Snyder frequently yelled at her for not following company policy. (Snyder said he did yell at the help in order to get people served. He testified that he stopped issuing guest checks early because of a complaint from the Union.)

¹⁰ It makes no difference that there was a legitimate reason for terminating her if it was done because of her protected activities. *Local 152, affiliated with the International Brotherhood of Teamsters, etc. [American Compressed Steel] v. N.L.R.B.*, 343 F.2d 307 (C.A.D.C. 1965). The Board recently stated in *Charles Edwin Luffey, d/b/a Consolidated Services*, 223 NLRB 845 (1976): "It is well established that a discharge motivated in part by an employee's exercise of Section 7 rights is a violation of the Act even though another valid cause may also be present." Of course, the discharge of an insubordinate employee who has been a union activist is not *per se* unlawful. See *Golden Nugget, Inc.*, 215 NLRB 50 (1974), and cases cited therein.

¹¹ As for Snyder's reprimand of Rockman that evening for writing a \$1.10 guest check instead of one for the \$2 minimum, I credit Rockman's statement that she did not know that the \$2 minimum (which was not posted anywhere) applied after the dinner hour. She said she had been told to "charge it only when the TV screen was on to keep the business."

¹² There is, of course, an 8(a)(1) derivative violation whenever an 8(a)(3) violation occurs.

¹³ Nahem testified that she worked 9 a.m. to 5 p.m. on Monday, Tuesday, and Thursday; 12 to 8 p.m. on Wednesday and Friday.

¹⁴ As has been noted, it is agreed that Nahem was fully reinstated on January 31, 1978.

¹⁵ Respondent provided uniforms to the waitresses beginning in October. Waitress Thea Peterson thought they "looked absurd," but she said Snyder indicated that Nahem and the Union had forced the issue. Snyder testified that the uniforms were the ones "available at the time" and that wearing of them was optional.

¹⁶ Snyder and Lipkin disputed Nahem's account of the September 22 incident. Waitress Joyce Waller testified, however, that she heard Lipkin harass Nahem and say to her, "I wouldn't work where I wasn't wanted." Lipkin denied engaging in any three-way conversation. He said she did complain to him while he was trying to eat his breakfast one morning, and he only offered an "opinion of what I would do and not what she should do." Snyder denied that there was a three-way conversation or that he "interrogated anyone." He said he did tell Nahem's husband, who he said had threatened him, to stay out of the restaurant. He maintained that he did not restrict her from being at the restaurant while off duty.

4. According to Nahem, she was then taken off rotation (a system utilized to enable the waitresses to share in the best tipping areas of the restaurant) and assigned to work in a less desirable area in the lounge. At about the same time Nahem said her Wednesday shift was also eliminated. She protested the action [in form of a grievance to the Union (G.C. Exh. 6(a))], and her hours were restored. She said she lost about two shifts but was paid for the loss. (Snyder maintained that Nahem's shift was eliminated only for economic reasons, and that two others were affected, including one who was "laid off completely.")

5. On October 21, Snyder issued a written warning to Nahem (G.C. Exh. 5(a)) for failing to pick up her guest checks and be at her station at 12 noon. Nahem testified that she had arrived early that day but was "completely ignored" by Snyder when she asked for her guest checks. At the request of another waitress, she prepared some grapefruit and other food for service and then stepped into the lounge to light a cigarette while "waiting for Mr. Snyder . . . to present my guest checks." She said he then stepped into the lounge and "started shouting" at her for being late.

6. Nahem received two warnings on October 25. The first (G.C. Exh. 5(b)) asserts that she "was in the kitchen" contrary to store rules. The warning goes on to state that she argued with the manager, walked off of her station and yelled and screamed in the presence of customers before she was sent home. The second warning (G.C. Exh. 5(c)) states that "her yelling and screaming in the dining room was not the act of a responsible waitress or union member." Nahem testified that she was in the kitchen in an effort to be cooperative, as requested earlier by Snyder because of the absence of one of the busboys. She said she had not been aware previously of the rule against being in the kitchen. According to Nahem—and waitress Deborah Weisberg, who also testified briefly with respect to this incident—it was Snyder who screamed and yelled in front of customers that day. Nahem said she became so upset that she retreated to the lounge and then the ladies room to compose herself. She said she returned to her station, and the shouting continued. She then told Snyder she could not tolerate the constant criticism in front of guests and told him: "Goddamit, you will listen to me." Snyder told her to stop screaming at him and then sent her home.

7. The final incident occurred on November 15, the day she left the store and her employment with Respondent. She said it had become very busy that day, and she had been trying to serve and collect from a number of customers with "constant screaming back and forth." Nahem testified that Snyder complained of her failure to collect and serve customers and then complained of a 10-cent error she had made on a check. She said she could no longer concentrate and, leaving her checks with another waitress, went into the lounge to call the union hall. Snyder saw her on the phone and asked her if she were on a break. He told her to get back to her station, saying she had no right to be calling the Union. Nahem said she returned to serve two new parties and then, with Snyder shouting at her, she told Snyder, "I cannot stand this anymore" and left.¹⁷

¹⁷ Waitress Weisberg supported Nahem's testimony concerning the events of November 15. Weisberg told of Snyder's yelling at Nahem and of Nahem's crying that day. She testified that Snyder yelled at other waitresses,

Respondent argues that Nahem "is a high strung individual" who has difficulty working under pressure and quit her job. It contends that Respondent did not harass her. Respondent agrees that Snyder, admittedly a "tough boss," reprimanded everyone, but it maintains that Nahem was reprimanded "no more than necessary . . . under the circumstances."¹⁸

Granted that the Act does not proscribe employment of a tough boss who reprimands employees indiscriminately, it does forbid an employer from making working conditions so intolerable because of an employee's union or other protected concerted activity that the employee leaves her job. Such conduct, of course, results in a constructive discharge, and it is prohibited by Section 8(a)(3) of the Act.¹⁹

I am persuaded that Nahem was constructively discharged by Respondent. On September 22, Snyder and Lipkin talked to her about the union problems she brought to the store and she was told, in effect, that she should leave.²⁰ Snyder eliminated Nahem's Wednesday shift on one occasion, and he assigned her to an undesirable area in the lounge out of rotation. Such conduct, I am convinced, occurred because of Nahem's union and concerted activities and in order to discourage union activities by other employees.

By filing with the Union a grievance questioning the amount of compensation due her under the collective-bargaining agreement, Nahem raised an issue which, admittedly, "could have caused the Company serious liability." The relationship between Respondent and Nahem thereafter steadily deteriorated—i.e., it became "strictly business."²¹ The warnings issued to Nahem were unjustified and discriminatory.²² General Manager Snyder harassed Nahem

but, she said, Snyder "did single Yvonne out." Weisberg said Snyder was difficult to get along with and that she was once fired by Snyder for being 3 minutes late. Weisberg also testified that Snyder directed other employees away from Nahem, an assertion Snyder denied while testifying on defense.

¹⁸ Respondent also argues, unpersuasively, that Nahem was not harassed for her union activities "or for any other reason," adding that it did not believe Nahem's absence would improve its union relations. Respondent also asserts that the General Counsel's waitress witnesses were disgruntled employees. Obviously, such witnesses were not enthusiastic about working for Respondent, but their testimony was persuasive. Night Manager Watson testified that he did not know if Snyder harassed Nahem, but acknowledged that he did. According to Snyder, Nahem discussed union problems on company time.

¹⁹ Quoting from the Fourth Circuit's decision in *J. P. Stevens & Co., Inc. v. N.L.R.B.*, 461 F.2d 490, 494 (C.A. 4, 1972):

Where an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job because of union activities or union membership, the employer has constructively discharged the employee in violation of §8(a)(3) of the Act.

²⁰ Nahem's version of the September 22 three-way conversation is somewhat different from the accounts given by Snyder and Lipkin. I credit the testimony of Nahem and the other waitresses over that given by Snyder. Lipkin's testimony was limited, but the message contained in his short comment to Nahem seems clear enough: she should leave Respondent's store and take the problems with which she was involved with her.

²¹ Waitress Peterson said she heard praises about Nahem from both Snyder and Watson when she first came to work, but within a month or so their comments about Nahem had become negative. In fact, Peterson was told by Snyder that she was to report it to him if she saw Nahem "hanging around the restaurant."

²² As the General Counsel points out, Snyder's references to Nahem's alleged failure to conduct herself as a "responsible union member" indicates a "predisposition to control Nahem's conduct as a union member and an unlawful interference with her Section 7 rights."

by delaying the issuance of guest checks to her and then again by reprimanding her for reporting late. The reprimand to her for being in the kitchen was unwarranted. Snyder embarrassed her by yelling and shouting at her in front of others. It is apparent that the general manager's conduct was in retaliation for Nahem's union activities and that such behavior made working conditions for Nahem so unbearable that she was justified in walking off of her job. Thus, I find Respondent engaged in the unlawful discriminatory acts as alleged in subparagraphs (a), (c), (d), (e), and (f) of paragraph VII. Snyder's elimination of Nahem's Wednesday shift, even on a temporary basis, sustained paragraph VII(a). I do not find paragraph VII(b) sustained, as the record does not establish that the new procedures governing the collection and issuance of guest checks were established to reduce Nahem's income as alleged. Nahem was assigned to the lounge area out of rotation because of her union and concerted activities and to reduce her income and, thus, paragraph VII(c) was established. The warnings issued to Nahem on October 21 and 25 were discriminatory and violated the Act as alleged in paragraphs VII(d) and (e). And, as stated above, Nahem was constructively discharged on November 15 as alleged in paragraph VII(f).

Further, it is clear that Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights as alleged in subparagraphs (a), (d), and (e) of paragraph VI. For reasons to be explained hereinafter, I find that the allegations of paragraph VI(b), as amended, were sustained only in part and that the allegation in paragraph VI(f) was not established.²³ More onerous working conditions, in the form of new guest check procedures requiring the collecting of money by the waitresses and delay in the issuance of guest checks to the waitresses until the start of the shifts, were imposed sometime late in September and, I am convinced, in order to discourage union activities as alleged in paragraph VI(a).²⁴ General Manager Snyder did coercively speak to Nahem concerning her union and concerted activities during the so-called three-way conversation on or about September 22. He spoke more in terms of statements than questions, but his comments did call for a reply from Nahem. He improperly restricted Nahem from being at the restaurant in her off hours so she would not be discussing union and concerted matters with other employees. However, I do not agree that Snyder spoke in a manner that suggested "Respondent had a source of information concerning Nahem's activities, creating the impression her activities were the subject of surveillance," as asserted on page 11 of the General Counsel's brief. Waitress Peterson testified that Snyder told her that she was to report it if she saw Nahem "hanging around the restaurant," but such testimony does not fall within the ambit of the second clause of amended paragraph VI(b). Cf. *Continental Bus System, Inc.*, 229 NLRB 1262 (1977). Thus, paragraph VI(b), as amended, was sustained only in part. Paragraph VI(d) was

established by the testimony of waitress Weisberg, who testified that "when there came to be a lot of problems with the Union and things," Snyder directed her to "a different part of the restaurant." Weisberg added that Snyder told her, as well as others, not to talk to Nahem "because she doesn't know what she was talking about." I find Lipkin did attempt to persuade Nahem to resign, and he did so because of the union and concerted activities in which she had been engaged as paragraph VII(e) alleges. While the testimony of Weisberg would have established the allegations of paragraph VI(f), it also established, as found above, the almost identical allegation contained in paragraph VI(d). From the record, repetition of the same charge was not justified, and paragraph VI(f) will be dismissed.

Based on the foregoing and the whole record, I make the following conclusions of law:

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. Hotel and Restaurant Employees and Bartenders Union, Local 2, is a labor organization within the meaning of the Act.

3. By discharging Sandra Rockman on November 22, 1977, because she engaged in union and protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By constructively discharging Yvonne Nahem on November 15, 1977, because she engaged in union and protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By eliminating Yvonne Nahem's work shift, assigning her out of rotation to the lounge, and giving her written warnings, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By initiating more onerous working conditions, interrogating an employee concerning union and concerted activities, instructing an employee not to talk to other employees about the Union and by attempting to persuade an employee to resign, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

REMEDY

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

As I have found Respondent unlawfully discharged Sandra Rockman, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered as a result of the discrimination against her. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Yvonne Nahem was reinstated on January 31, 1978. Having found Respondent constructively discharged her on

²³ As has been noted, par. VI(c) was deleted from the complaint in Case 20-CA-13600.

²⁴ The General Counsel points out that Respondent could argue that Respondent was simply bringing its practices into conformity with the requirements of a noncash house restaurant under the collective-bargaining agreement. But the procedures did more than that; they were applied so strictly as to discourage any union or concerted activities, and I am persuaded that was the intended effect.

November 15, 1977, in violation of Section 8(a)(3) and (1) of the Act, however, my recommended order will also provide for making Nahem whole for loss of earnings and other benefits in accord with *F. W. Woolworth Company, supra*; *Isis Plumbing & Heating Co., supra*; and *Florida Steel Corporation, supra*.

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

ORDER²⁵

The Respondent, 418 Geary, Inc., d/b/a Stage Deli and Theatre Lounge, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees, eliminating work shifts, changing work assignments, issuing warnings, or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment because of union protected concerted activities.

(b) Initiating more onerous working conditions to discourage union or other concerted activities.

(c) Interrogating employees regarding union and concerted activities.

(d) Instructing employees not to talk to other employees about the Union.

(e) Attempting to persuade employees to resign because of their union or concerted activities.

(f) 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 which I find will effectuate the policies of the Act:

(a) Offer Sandra Rockman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

(b) Make whole Sandra Rockman and Yvonne Nahem for any loss of earnings suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with paragraph (a) above.

(d) Post at its San Francisco, California, place of business copies of the attached notice marked "Appendix."²⁶ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

²⁵ 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.

²⁶ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."