

International Manufacturing Company, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492. Case 20-CA-12442

September 29, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

On May 18, 1977, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed cross-exceptions and a brief supporting its cross-exceptions and opposing the General Counsel's exceptions.

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

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

We agree with the Administrative Law Judge's finding that, almost immediately after receiving the Union's demand for recognition,¹ Respondent violated Section 8(a)(1) of the Act by interrogating its employees, impliedly threatening a loss of raises, and denial of a prospective promotion because the employees were seeking union representation, requesting an employee to withdraw from the Union, and to solicit withdrawal letters from other employees, telling an employee that "if it ever did get to negotiations" that it "would just negotiate to an impasse and then let them picket and bring in a whole new crew," and by initiating unfavorable changes in its employees' working conditions.

The Administrative Law Judge further found that there were eight employees in the appropriate unit on or about February 1, 1977, and that, having only four authorization cards, the Union thereby did not represent a majority of these employees. Recognizing the "closeness of some of his unit findings," the Administrative Law Judge considered whether a bargaining order should issue assuming that the Union had a majority in an appropriate unit. The Administrative Law Judge concluded that the circumstances of this

case militate against requiring Respondent to bargain.

Excepting to the scope of the Administrative Law Judge's unit finding, the General Counsel maintains that the appropriate unit should include only office clericals of Respondent's wheel division, thereby excluding any office clericals at Respondent's step side division and dealer products division. The General Counsel also excepts to the Administrative Law Judge's inclusion of Helen Dunne, a salesperson employed in Respondent's wheel division. The General Counsel further claims that a bargaining order is warranted to remedy Respondent's unfair labor practices. We find merit in the General Counsel's exceptions.

Respondent operates three divisions. The wheel division and step side division are located in Benicia, California. The dealer products division is located in Concord, California, about 5 to 8 miles from the other divisions. These three divisions are located in physically separate plants and are engaged in the manufacture of different products.

On January 25, 1977, four office clericals at Respondent's wheel division, Wendy Swaney, Jane Bauhs, Karla Mannle, and Alanna Weaver, signed union authorization cards. As indicated, the General Counsel asserts that the appropriate unit consists of office clerical employees at the wheel division. Office clericals Coleen Mathews and Sandra Moriarity work at Respondent's step side division and dealer products division, respectively. The Administrative Law Judge found, in agreement with Respondent's contention, that employees Mathews and Moriarity should be included in the appropriate unit.

In concluding that office clerical employees at Respondent's wheel division constitute an appropriate unit, we note initially the presumptive appropriateness of a single location unit.² In addition, we note the absence of substantial evidence to rebut this presumption. As acknowledged by the Administrative Law Judge, Mathews and Moriarity are separately supervised within their respective divisions by their division manager. The division managers exercise considerable autonomy, having the authority to hire, fire, schedule hours, and responsibly assign work. Nor do Mathews and Moriarity perform any work for the wheel division directly. There is no evidence of interchange among the office clericals of Respondent's three divisions, although Mathews frequently visits the wheel division in order to examine files that are maintained there. We therefore conclude that a unit of office clericals limited to the wheel division is ap-

¹ The Union requested recognition by letter dated January 27, 1977.

² See, e.g., *Dixie Belle Mills, Inc., etc.*, 139 NLRB 629 (1962); *Becker County Sand & Gravel Company*, 157 NLRB 557, 576 (1966).

propriate and we shall exclude employees Mathews and Moriarity from the unit.³

We also disagree with the Administrative Law Judge's inclusion in the unit of Helen Dunne, employed in Respondent's wheel division. In our judgment, Dunne does not share a community of interest with the wheel division's office clericals. The record establishes that, in performing her sales function, Dunne is supervised by the sales manager, Norm Edwards.⁴ Dunne is salaried⁵ and, unlike other office employees, is paid a commission for her sales. While Dunne's duties consist essentially of performing sales solicitations by telephone, the record establishes that Dunne also meets directly with customers on Respondent's premises and solicits sales. Based on the foregoing, we are persuaded that Dunne performs a sales function and does not share a community of interest with Respondent's office clericals.⁶ We shall therefore exclude her from the unit.

In all other respects, we adopt the Administrative Law Judge's unit findings.⁷ It is evident therefore that, on or about February 1, 1977, the appropriate unit consisted of five employees, four of whom had signed authorization cards; the Union thereby clearly represented a majority of the employees in the single-plant unit found appropriate.

We also conclude that Respondent's unfair labor practices were calculated to undermine the Union's majority status and made a free choice by the employees in an election impossible. We agree with the Administrative Law Judge's finding that "the Company responded . . . by engaging in a short-lived but concentrated campaign to defeat that organizational drive," but not with his characterization of the unfair labor practices as lacking "serious" violations. Actual discharge was the only device this Employer avoided.

³ We further note that, while there is no history of collective bargaining for Respondent's office clericals, the record evidences that there are established collective-bargaining relationships covering other classifications of employees that are on a single-division basis.

⁴ Office clericals Swaney, Bauhs, and Weaver were supervised by Production Vice President Kenyon. Betty Mau was supervised primarily by Kenyon, but also by Cruz, on occasion.

⁵ Of the wheel division's office clericals only Mau was also on salary, but without commission or a sales function.

⁶ In reaching a contrary result, the Administrative Law Judge, citing *Capital Bakers, Inc.*, 168 NLRB 940 (1967), states that Board precedent holds that telephone sales personnel are clericals. The Administrative Law Judge's reliance on *Capital Bakers*, however, appears misplaced. There, the Board excluded two sales clericals from a unit that included driver-salesmen. Neither of the excluded sales clericals appears to have had the direct contact with customers that reflects the sales skills possessed by Dunne. See also *L. M. Berry and Company*, 198 NLRB 217 (1972), in which a unit including "premise sales" personnel, who left the office to solicit customers, with telephone sales personnel, but excluding office clericals, was found appropriate.

⁷ No exceptions were filed regarding the inclusion of Betty Mau in the appropriate unit. We agree with the Administrative Law Judge's conclusion regarding Mau and we adopt his finding *pro forma*. Respondent, however, excepts to the Administrative Law Judge's exclusion of Amy English, Roseanne Jacuzzi Thomas, and Janet Butts from the unit. We agree with the Administrative Law Judge's unit determinations regarding these three individuals for reasons stated by him.

In our judgment, Respondent's unfair labor practices, designed to demonstrate to its employees the futility of any further union adherence, were pervasive in character and precluded a fair election in the foreseeable future. That the Administrative Law Judge, himself, recognized that Respondent posted a notice of retraction shortly after committing the unfair labor practices does not affect the appropriateness of a bargaining order remedy. Similarly, that turnover in the bargaining unit renders it possible that the Union does not now represent a majority of Respondent's wheel division office clericals and does not affect the necessity for a bargaining order. For the situation must be appraised at the time the unfair labor practices occurred and not at the time the Board is deciding the case.⁸ To conclude otherwise would enable Respondent to benefit from its unlawful conduct.

We therefore find, contrary to the Administrative Law Judge, that Respondent's refusal to bargain with the Union after its January 27, 1977, demand for recognition based on a card majority violated Section 8(a)(5) and (1) of the Act and that a bargaining order is required to remedy its unfair labor practices. Under the principles set forth in *Trading Port, Inc.*, 219 NLRB 298 (1975), we find that Respondent had a duty to bargain as of January 31, 1977, the date on which Respondent embarked on a clear course of unlawful conduct designed to undermine the Union's majority status and make the holding of a fair election impossible.⁹

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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 be-

⁸ See, e.g., *D. H. Overmyer Co., Inc.*, 190 NLRB 341 (1971); *Gibson Products Company of Washington Parish, La., Inc.*, 185 NLRB 362 (1970); *N.L.R.B. v. L. B. Foster Company*, 418 F.2d 1 (C.A. 9, 1969), cert. denied 397 U.S. 990 (1970).

⁹ Chairman Fanning and Member Jenkins would find that Respondent refused to bargain in violation of Sec. 8(a)(5) as of the Union's January 27, 1977, demand for recognition. Recognizing, however, that a Board majority would impose the bargaining obligation on the date 4 days later, when Respondent commenced its unfair labor practices, Chairman Fanning and Member Jenkins here agree to impose the bargaining obligation as of the latter date.

low, and hereby orders that the Respondent, International Manufacturing Company, Inc., Benicia, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(a) and re-letter the subsequent paragraph accordingly:

“(a) Refusing to recognize and bargain collectively in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492, as the exclusive bargaining representative of its employees in the appropriate bargaining unit described below:

“All office clerical employees employed by the Respondent at its wheel division, Benicia, California; excluding all other employees, guards and supervisors as defined in the Act.”

2. Insert the following as paragraph 2(a) and re-letter the subsequent paragraphs accordingly:

“(a) Upon request, recognize and bargain collectively in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492, as the exclusive bargaining representative of its employees in the appropriate units described above.”

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

APPENDIX

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

WE WILL NOT refuse to recognize and bargain collectively in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492, as the exclusive bargaining representative of all employees in the following unit:

Office clerical employees employed by the Respondent at its wheel division, Benicia, California; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT threaten our employees with reprisals because of their union activity.

WE WILL NOT interrogate our employees concerning their union activities.

WE WILL NOT solicit employees to withdraw from the Union or to seek the withdrawal of other employees from the Union.

WE WILL NOT threaten our employees that we would not bargain in good faith with any union that became their representative.

WE WILL NOT implement more arduous working conditions to discourage our employees from supporting the Union.

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

WE WILL, upon request, recognize and bargain collectively in good faith with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1492, as the exclusive bargaining representative of employees in the appropriate unit described above.

INTERNATIONAL MANUFACTURING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at San Francisco, California, on August 25 and 26, 1977, based on charges filed February 7, 1977, and amended March 16, 1977, and a complaint issued April 29, 1977, alleging that Respondent violated Section 8(a)(1) and (5) of the Act. The General Counsel and the Respondent have filed briefs.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a California corporation with a place of business at Benicia, California, is engaged in the manufacture and assembly of automotive components. During the past calendar year, Respondent has purchased and received goods, materials and supplies valued in excess of \$50,000 directly from suppliers located outside the State of California. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Issues*

In general terms, four of Respondent's office clerical employees signed union authorization cards about January 25, 1977. The Union requested recognition, by letter, on January 27, 1977. Between January 31 and February 4, Respondent engaged in conduct violative of Section 8(a)(1), as set forth in detail below. The General Counsel alleges that Respondent, by this conduct, undermined the Union's majority status, and precluded the holding of a free and fair elec-

tion, and that a bargaining order is necessary to remedy the unfair labor practices that occurred. Respondent claims that the Union never did have a majority in an appropriate unit. In any event, Respondent asserts, no bargaining order should issue because (1) the unfair labor practices shown to have occurred were not sufficient in scope or magnitude to warrant such an order, (2) the purported unfair labor practices were "cured" shortly after their occurrence by a notice posted by Respondent, so that conditions for holding a fair election have existed for some time, and now so exist, and (3) the Union allegedly engaged in discriminatory practices, and therefore should not be a beneficiary of a bargaining order.

B. *The Facts*

The Company operates three divisions, two at Benicia, California, (the "Wheel Division" and the "Step Side Division"), and one at Concord, California (the "Dealer Products Division"). Dealer products is about 5 to 8 miles from the other 2 divisions.

A number of office clerical employees at the wheel division met with Union representative Arthur Hacker (they contacted him) about securing union representation, and, on January 25, 1977, four office clerical employees, Wendy Swaney, Jane Bauhs, Karla Mannle, and Alanna Weaver, signed union authorization cards. On January 27, Hacker wrote the Company, claiming that the Union represented a majority of Respondent's office clerical employees, and requesting recognition. Between January 31 and February 3 or 4, all the alleged unfair labor practices occurred.

On January 31, 1977, late in the afternoon, Vice President Harold Benassini asked employee Alana Weaver to come to his office. He then asked Weaver what the Union could do for her, and why the employees needed a union, and said that "We'd be building up a barrier that we didn't need, . . . we didn't need the Union to talk between the two of us." Benassini added that year-end raises were coming up, and that she had done a very stupid thing, because they "couldn't go ahead and continue with them." The talk, with Benassini continuing along the same "quite repetitious" lines, went on for about 40 minutes.

On February 1, the next day, Respondent's president, Rudy Jacuzzi, spoke with Weaver, in Benassini's office. He asked her why she was "doing this" and "why did we need the Union." Weaver responded that she stood "on the fifth. I don't want to talk about it." Jacuzzi took Weaver into another office to "talk about this." He went on to say to Weaver that a barrier would be built between management and the office employees if a union came in, and that the Union could not do for the employees what he had already done, listing some of the benefits the Company presumably gave. When Weaver asked Jacuzzi how he knew she was for the Union, and why he was singling her out, he replied "I can't see anyone having a ring through your nose. You're just too alert. You don't seem to be a follower." He then asked Weaver if she would write a letter to the Union withdrawing her name, that she did not have to tell him what she wrote in the letter, just to tell him when she mailed it withdrawing her name. He also asked her if she could get the "other girls to sign a letter withdrawing their names."

Jacuzzi then told Weaver that "if this thing goes through, I will fight it diligently. And you can strike and strike and strike, but this union will never come into my office." According to Weaver, Jacuzzi was yelling at this point. He added that he "was going to be making changes and eliminating people in the office." And he then said "Well, I was hoping to make you credit manager." Jacuzzi referred to the office personnel as "babies." He concluded the conversation with Weaver by saying that he "was taking this as a personal slap in the face," that Weaver was "going to be embarrassing him; since he has established himself well in the community, and . . . all his fellow people, workers, businessmen, were going to be wondering what he was doing so wrong that he needed a union for his office clerical."

In the course of that conversation, Jacuzzi suggested that Weaver speak with Mike Chevalier (special accounts manager) or Norm Edwards (sales manager) about the matter. She did have a conversation with Edwards, with the latter giving her "his opinions" about unions. Nothing about this conversation is alleged as having violated Section 8(a)(1) of the Act.

That same day, a meeting was held in Benassini's office, with Karla Mannle, Betty Mau, Helen Dunne, Jane Bauhs, Wendy Swaney, Alanna Weaver, Myron Kenyon, and Benassini present. Benassini began the meeting by saying that the employees "all know now about the Union coming in," and that he wanted to "just get it out in the open." Dunne asked whether she would have to join the Union if it came in, and Benassini replied that she would have to.

The next day, as Weaver was walking back toward her office, she met Jacuzzi. She had been in the plant proper, taking invoices to Karla Mannle. Jacuzzi told Weaver that she was to get permission to go into the plant, and added "You are to get permission for anything you do." Later that morning, Jacuzzi told the office clerical employees of a number of changes he was instituting among them. Thereafter, there was to be no food at work desks, employees had to follow strict break schedules, as distinct from the informal arrangements existing up to then, and also to follow strict lunch schedules, differing both in time and duration from the previous practice. In addition, Bauhs was told to stay in her seat at all times, unless she had specific permission to do otherwise, and Weaver was told not to answer the phone any longer.

A day or two later, either February 3 or 4, Jacuzzi called together Bauhs, Swaney and Weaver. He told them that "it was not too late to call this whole thing off, and our office could go back to its normal atmosphere." Weaver said, "Before you go on, I would like to have a business representative present." Jacuzzi replied, "Well, we don't need one for what we're talking about," and Weaver said "I feel we do." Bauhs replied that she did too to Jacuzzi's asking her what she thought. Weaver then turned around and walked off. Jacuzzi (either then or just before Weaver left) said "If you are willing to forget, then I am." His final remark before he left the room was "Okay, then I'm going to take it as you're going through with this."

The General Counsel also elicited testimony from Michael Fleming, an employee at the dealer products division (and Alanna Weaver's "boyfriend") to the effect that Jacuzzi came over to dealer products on February 1, and

asked him whether he had heard of the Union activity at the wheel division. Fleming replied that he heard of it from Weaver. Jacuzzi asked Fleming if he knew Weaver well enough to talk her out of it. Fleming replied that it would be hard to talk her out of it. Jacuzzi then asked him to ask Weaver for a letter withdrawing her name from the Union, and he would then be willing to forget the whole matter. If he did not get such a letter, he would "fight it with all his resources and make it hell on the girls over there." Jacuzzi also said that if they "pursued the Union activities, that he'd fire them all, like at 2-week intervals, fire them one at a time, and . . . if it ever did get to negotiations that he would just negotiate to an impasse and then let them picket and bring in a whole new crew." During the next few days, Jacuzzi asked Fleming on two occasions whether he had "any lunch talking to Alanna," and Fleming said no, he had not.¹

C. Discussion

That Respondent violated Section 8(a)(1) during the first 4 days of February, 1977, is clear from the facts reported above. In direct response to the Union's organization drive, in fact, almost immediately after the Company received the Union's demand for recognition, Respondent, through President Jacuzzi and Vice President Benassini, interrogated its employees, impliedly threatened a loss of raises and a denial of a particular promotion because of the "stupid thing" (seeking union representation) the employees had done, requested an employee to withdraw from the Union and to seek to have other employees write letters of withdrawal, told an employee (Fleming) that "if it ever did get to negotiations that he [Jacuzzi] would just negotiate to an impasse and then let them picket and bring in a whole new crew,"² and initiated changes in its employees' working conditions (for the worse).³

I find, accordingly, that by the aforesaid conduct, Respondent violated Section 8(a)(1) of the Act.

¹ There was substantial disagreement at the hearing both at the time Fleming testified and just prior to Jacuzzi's being called as a witness with respect to whether the substance of Fleming's testimony, as reported in the text above, was covered by the allegations of the complaint. I indicated at the time that I would only make unfair labor practice findings based on his testimony as to matters encompassed by the complaint, except that if Respondent chose to put on evidence going to any of that testimony, it might be considered "fully litigated," and an unfair labor practice finding, if otherwise warranted, be made. Respondent in fact did not choose to rebut Fleming's testimony. The only pertinent question asked Jacuzzi was "Mr. Fleming testified that you commented to him that you were going to fight the Union with all the resources that you had. Do you recall that testimony?" Jacuzzi replied, "Yes, I stated that I would oppose the Union with every legal means that we had at our disposal."

² That Fleming was not an "office clerical" employee, or in the unit being sought by the Union, does not mean that he was not Respondent's employee, or that this statement to him should not be found an unfair labor practice. Indeed, as Jacuzzi began the conversation with Fleming by asking him if he knew Weaver well enough to talk her out of the Union, and asked his help in inducing Weaver to write a letter of withdrawal from the Union, it can reasonably be presumed that Jacuzzi intended that Fleming repeat the full substance of what he said to Weaver. For reasons set forth above, I am limiting my unfair labor practice finding with respect to this conversation to the one statement reported above, which I regard as covered by Section VI (e) of the complaint.

³ Respondent's brief does not appear to contest that at least some of the 8(a)(1) allegations of the complaint have been shown, claiming only that, as to 3 of the 9 alleged violations of that section there was no proof whatsoever.

D. The Unit and Majority Questions

The General Counsel, as noted above, submitted four authorization cards, those of Swaney, Bauhs, Mannle, and Weaver. The General Counsel contends that the appropriate unit consists of office clerical employees at the Company's wheel division, and that this description would include only the four card signers.⁴ Respondent, on the other hand, asserts that the appropriate unit should embrace office clerical employees at all three divisions, not just the wheel division. Specifically, Respondent would include in the unit the four card signers, and six other employees, Betty Mau, Janet Butts, Helen Dunne, Amy English, Roseanne Jacuzzi, Coleen Mathews, and Sandra Moriarity. I discuss these contested unit questions *seriatim* below.

Betty Mau: Mau worked as a purchasing clerk at the time of the events in question here. Her duties consisted primarily of making purchases for the Company, with rather limited authority in terms of amount and in terms of discretion in choosing a supplier. She worked under the supervision of three different Company officials, primarily Myron Kenyon, production vice president, but also, on occasion, by controller Winston Cruz and Vice President Benassini. The General Counsel points to differences in her functions and supervision from that of the other office clericals, the fact that Mau was on salary, unlike the others, and the assertion that she did not sign a timecard, as the bases for excluding her from the unit. I am satisfied that the differences⁵ are not sufficient to make Mau's interests different from those of the other office clericals. Although salaried, her pay was not much different from the hourly-paid employees. Mannle, admittedly part of the unit, was also supervised by Kenyon, not Cruz, and Kenyon was Mau's primary supervisor. Her duties, those of a low level purchasing clerk, are considered to be "office clerical" in nature by the Board. *Baldwin Supply Company*, 159 NLRB 745 (1966). Accordingly, I include Mau in the unit.

Helen Dunne: Dunne's duties consist of performing sales solicitations by telephone. She does not exercise discretion in terms of establishing prices or giving credit. She is salaried and also receives commissions on her sales. Her salary is dependent, however, on the number of hours she works, and she does fill out a timecard. Both Bauhs and Weaver worked with Dunne in typing up invoices and orders in relation to Dunne's sales work. In accordance with Board precedent holding that telephone sales personnel are "clericals," *Capital Bakers, Inc.*, 168 NLRB 904, 907 (1967), I conclude that Dunne should be included in the unit.

Janet Butts: Butts was hired February 8, 1977, after both the Union's request for recognition and the unfair labor practices found to have taken place. Respondent contends that she should be included in the unit because the Board, in directing an election in a representation proceeding, would use a February 15, 1977, payroll period to establish

⁴ The General Counsel states that only one other employee, Betty Mau, "might conceivably be concluded to be part of the appropriate office clerical unit and consequently that the unit consists of no more than these five employees, and thus the Union majority status has been established."

⁵ As to whether she punched a timecard, the evidence is conflicting. Weaver testified that she was told by Cruz not to collect a timecard from Mau. Benassini testified that it was Company policy for Mau to sign a timecard, but he did not know if she actually did so.

eligibility to vote. As her employment began after the critical dates herein, I do not regard the fact that Butts would have been eligible to vote in an election conducted after she was employed⁶ as relevant to whether she should be considered part of the unit for the purpose of establishing whether the Union had a majority on or about January 31 through February 4. I therefore do not count Butts for the purpose of ascertaining the Union's majority status. If, of course, a bargaining order should issue, Butts would be part of the represented unit, as, after she was hired, she was an office clerical at the wheel division.

Amy English and Roseanne Jacuzzi Thomas: These two employees shall be considered together, as both were students and part-time employees at critical times herein. The facts show that both English and Thomas,⁷ college students, have been working for Respondent since 1973, in concededly office clerical roles. Respondent's records show that English worked more than 400 hours in 1973, 630 hours in 1974, 1150 hours in 1975, and 1031 hours in 1976. Thomas worked 533 hours in 1974, 385 hours in 1975, and 425 hours in 1976. Both employees' working periods are apparently limited to college vacation periods, including summers and other holidays.

The General Counsel, relying upon *Crest Wine and Spirits, LTD.*, 168 NLRB 754 (1967), contends that they should be excluded as lacking "regular part-time status" after returning to school. In *Crest Wine*, the Board excluded a student who worked during three summers and three Christmas vacations, and also during two other 3-month periods, averaging between 6 and 27 hours per week in 1 of them and 3-1/2 to 6 hours per week in the other. The Board recently restated the principle of *Crest Wine* (and see *Gioradano Lumber Co., Inc.*, 133 NLRB 205, 207 (1961)) in *Lake City Home for Aged, Inc., d/b/a Shady Oaks*, 229 NLRB 54, 55 (1977), stating that "Where students' employment is shown to be sporadic, temporary, or seasonal in nature . . . the Board excludes them from the regular full-time unit." Utilization of this criterion seems to dictate the exclusion of English and Thomas from the unit, as both, according to Benassini's testimony, worked only during school vacations.

Respondent argues that English and Thomas are "regular seasonal employees," and therefore should be included in the unit, citing Board cases where seasonal employees who have a reasonable expectancy of recall each season are so included. Although the two students here, in particular English, who worked more than 1000 hours in both 1975 and 1976, would seem to have been on the job during the past few years as much as or more than "seasonal employees" would normally work, the Board, as indicated above, does view full-time students as a different category from seasonal employees who are not students. And the results of the Board's cases in this area suggest, if not require, more than vacation time, albeit long vacations such as the entire summer, employment before the Board will permit the in-

⁶ Obviously, she could not have voted in an election conducted prior thereto.

⁷ English is the daughter of Respondent's marketing manager, Frank English, and Thomas is the niece of Respondent's president. As there is no showing that either is given any special treatment as a result of these relationships, neither would be excluded from any appropriate unit on the ground that she is related to a member of management. *John Rosetta and Jim Rosetta d/b/a Fresno AG Hardware*, 185 NLRB 412 (1970).

clusion of students in a unit of regular full-time employees. See, e.g. *Gruber's Super Market, Inc.*, 201 NLRB 612, 613, fn 5 (1973). *William J. Keller, Inc.*, 198 NLRB 1144 (1972).

For these reasons, although not without some misgivings in light of the length of service and hours of employment of the two employees, I shall exclude English and Thomas from the unit.

Mathews and Moriarity: These two employees work at the Step Side Division and the Pool Products Division respectively. The General Counsel's position that they should be excluded from the unit rests largely on the contention that only the wheel division office clericals constitute an appropriate unit. The testimony shows that Mathews and Moriarity are supervised within their divisions, Moriarity by James Nero, the head of dealer products division, and Mathews apparently by Gary Peaslee, manager of the step side division. Neither performs any work for the wheel division directly, although certain requisitions made by Moriarity go to the office personnel at the wheel division for approval and she works on some documents relating to accounts payable, credit, and collection that are also worked on in part by wheel division clericals. Mathews came to the wheel division "almost daily" to use files that are maintained there. The wheel division and step side division are both located, as noted above, at Benicia, and the dealer products division is about 5 to 8 miles away. In August 1976, the Regional Director concluded that the employees at step side division (called in that case the "LUV assembly operations") constituted a separate appropriate unit, rejecting the Employer's contention that it was an accretion to the wheel division unit already under contract with the IAM. No mention is made in that decision of the concord (dealer products) division, apparently neither party advancing any argument with respect to it.

Although here too the matter is not free from doubt, I am inclined to the view that the office clerical employees at all three divisions should, in the circumstances of this case, constitute an appropriate unit. I predicate this conclusion in large part on the fact, as pointed out by Respondent, that a contrary result would leave a single clerical at each of the two divisions, step side and dealer products, in a position where she could not have any right to collective bargaining, as single employee units are not recognized by the Board. Secondly, there is at least some work product contact between Mathews and Moriarity and the clerical employees at the wheel division, and Mathews does on occasion use some of the facilities at the wheel division. Accordingly, I find that both Mathews and Moriarity are included in the appropriate unit.

In view of my findings above, there were eight employees in the appropriate unit on or about February 1, 1977. As the Union only had four authorization cards, it did not at any relevant time represent a majority of these employees.

In view of the closeness of some of the unit findings, I shall consider whether a bargaining order should issue in the event the Board disagrees with my unit placements to a sufficient extent or that the Union would have had a card majority in an appropriate unit.

As noted above, Respondent claims, first, that the unfair labor practices were not sufficient in scope or magnitude to warrant a bargaining order. Although it is true that the unfair labor practices here were not many, and did not in-

clude any discriminatory discharges or "serious" violations, the fact remains, as the General Counsel correctly asserts, that the Company responded almost immediately to the Union's request for recognition by engaging in a short-lived but concentrated campaign to defeat that organizational drive. I view the unfair labor practices in these circumstances as sufficient to warrant the imposition of a bargaining order in the event the Union is found to have possessed a majority. Respondent points to numerous Board cases in which no bargaining order was imposed despite unfair labor practices more onerous and numerous (as Respondent reads the cases) than in the instant case. And the General Counsel points to precisely the opposite kind of cases, those in which the Board did issue bargaining orders despite less onerous and numerous unfair labor practices. Although different Board panels, at different times, may have reached seemingly contradictory results, each case turns on its own peculiar facts, and the situation here, as I have indicated, warrants issuance of a bargaining order, viewing the unfair labor practices in isolation.

Respondent's second "defense" to the issuance of a bargaining order is that the unfair labor practices were "cured" by the notice posted by it. But the Board has consistently held that cases of this nature are to be judged by the impact of the unfair labor practices at the time they occurred, rather than at the time the Board is deciding the case. See, e.g., *O. H. Overmyer Co., Inc.*, 190 NLRB 341 (1971). The ninth circuit has specifically agreed with the Board's view in this respect, *N.L.R.B. v. L. B. Foster Company*, 418 F.2d 1 (C.A. 9, 1969), cert. denied 397 U.S. 990 (1970), stating that "To appraise the problem in the light of subsequent event is wholly unrealistic." Cf. *N.L.R.B. v. Coca-Cola Bottling Co. of San Mateo*, 472 F.2d 140 (C.A. 9, 1972), where the same court, in a case strikingly similar to the case at bar, stated that it would "allow," but not "order" the Board to take evidence on an alleged "substantial change in this minuscule bargaining unit, which was not brought about by any impropriety on the part of the Company," and reconsider whether it wished to issue a bargaining order in the light thereof.

Respondent also alleged at the hearing that the Union engaged in "discriminatory practices" and should not therefore be a recipient of a Board bargaining order. I rejected Respondent's proffer of evidence on this point on the authority of *Handy Andy, Inc.*, 228 NLRB 447 (1977), and, of course, adhere to that view. Respondent is plainly preserving this point for possible court review.

It is thus technically correct, for the reasons stated, to reject each of Respondent's arguments against issuance of a bargaining order here (pretermittting the unit, and hence majority, questions). But I do not perceive the Board's role in a case such as this as requiring so mechanistic an approach. Even though no single contention raised by Respondent, under prevailing Board precedent, may suffice to reject the General Counsel's assertion that a bargaining order is warranted, the whole is greater than the sum of its parts. Thus, the unfair labor practices here are borderline, both qualitatively and quantitatively, in terms of whether they warrant imposition of a bargaining order. Three of the four card signers have left the Company's employ, leaving but one in a unit that appears to have at least six employ-

ees.⁸ And Respondent has taken at least some steps in the direction of making a free and fair election possible. Given the fact that the unit considerations are so closely balanced as to make the determination of a majority extremely difficult (therefore, the Union's majority is at best questionable), I believe the foregoing combination of factors militates against requiring the Respondent to bargain, even if the Union, on February 1, 1977, represented a majority, of the present office clerical employees to be represented by a union which may not in fact represent them. The purposes of the Act, in short, will best be served here by fully remedying the unfair labor practices that did occur, and then, if circumstances so warrant, conducting a Board election, with the unit questions resolved on the basis of a full representation on case record.

CONCLUSIONS OF LAW

1. By lawfully interfering with, restraining, and coercing its employees as found herein, Respondent has engaged in unfair labor practices within the meaning of Section 8(A)(1) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not violated the Act in any other respect.

THE REMEDY

I shall recommend that Respondent cease and desist from its unfair labor practices, and take certain affirmative action designed to effectuate the policies of the Act.

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

ORDER⁹

The Respondent, International Manufacturing Company, Inc., Benicia, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Interrogating its employees concerning their union activities.
 - (b) Threatening its employees with reprisals because of their union activities.
 - (c) Soliciting employees to withdraw from the Union and to seek the withdrawal of other employees.
 - (d) Threatening its employees that it would not bargain in good faith with the Union.
 - (e) Implementing more arduous working conditions to discourage its employees from supporting the Union.
 - (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁸ If the unit contained eight (or more) employees, as found above, then of course, no bargaining order could issue. This discussion assumes that the Union did possess a majority of cards on February 1, 1977.

⁹ 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.

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

(a) Post at its plant at Benicia, California, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized represent-

¹⁰ 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."

ative, shall be posted by Respondent 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.

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

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.