

Ohmite Manufacturing Company, a Division of North American Philips Company and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO. Cases 1-CA-21196(1-2) and 1-RC-17896

August 31, 1988

**DECISION, ORDER, AND
CERTIFICATION OF RESULTS OF
ELECTION**

**BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT**

On June 12, 1984, Administrative Law Judge Phil W Saunders issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified² and to adopt the recommended Order.

1 The judge dismissed paragraphs 8(f), (j), (p), and (q) of the complaint, finding that the unfair labor practices alleged were not attributable to the Respondent. We disagree. Each paragraph alleges misconduct by one or the other of the Respondent's two group leaders, Peter Walden and Sis Paradise. For the reasons stated by the judge, we

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

We agree with the result reached by the judge in finding that Schneider's conversation with union activist Headley did not amount to interrogation in violation of Sec. 8(a)(1) of the Act. However, in affirming the judge's finding in this regard we do not rely on the judge's discussion of Headley's testimony that Headley was not threatened or intimidated by Schneider's question. Such evidence of an employee's subjective reaction to an employer's questions regarding employees' union activities is irrelevant in an analysis of "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984).

In adopting the judge's finding that the Respondent's temporary transfer and ultimate discharge of Supervisor Rickard did not violate the Act, we note that his citation to *Bennington Iron Works*, 267 NLRB 1285 (1983), is inapposite because it dealt with an agency question not relevant here. Also, in adopting this dismissal we find it unnecessary to rely on the judge's discussion of *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). Even assuming that the discharge of a supervisor in order to remedy employees' pre-election grievances could fall within those limited "circumstances" in which "the discharge of a supervisor may violate Section 8(a)(1)" (id. at 402), we agree with the judge that the General Counsel did not prove by a preponderance of the evidence that the Respondent's treatment of Rickard constituted the remedying of an employee pre-election grievance, and thus the discharge would not be a violation even under that theory.

² The Respondent filed a motion to strike certain alleged misstatements of fact in the General Counsel's brief. We deny the Respondent's motion. The General Counsel's statements are arguably supported by the record and, in any event, we have independently examined the evidence.

agree that Walden and Paradise were not statutory supervisors. Contrary to the judge, however, we find that they acted as the Respondent's agents in its antiunion campaign. Both played an integral role in that campaign. They regularly attended management meetings at which campaign strategy was discussed. Further, they were authorized to answer employees' questions about various campaign issues on behalf of the Respondent, and were instructed by the Respondent concerning the legal restrictions upon what they could say. Finally, they served as "couriers" for the Respondent, distributing the Respondent's antiunion literature to the employees. Under these circumstances, we find that the Respondent placed Walden and Paradise in a position so that the employees would reasonably understand that they spoke for management in connection with its antiunion campaign. The Respondent was therefore responsible for their actions within the area of such apparent authority.³

Nevertheless, we agree with the judge that paragraphs 8(f), (j), (p), and (q) of the complaint should be dismissed. As set forth below, we find that the General Counsel presented insufficient evidence to carry the burden of proving these allegations.

Paragraph 8(f) of the complaint alleges that sometime in May and June 1983 Walden threatened employees with a plant shutdown and layoffs if the Union won the election. The General Counsel presented no evidence whatsoever to support this allegation. The General Counsel now contends that the failure to do so was the judge's fault, i.e., that the judge erroneously refused on request to enforce Walden's subpoena or, alternatively, to accept Walden's affidavit into evidence.

Both contentions are without merit. The issuance of a subpoena carries with it prima facie authority to enforce it in the appropriate Federal court, no prior approval is necessary in normal circumstances.⁴ The judge, in fact, so advised counsel for the General Counsel at the hearing. The fault therefore, lies solely with counsel for the General Counsel.⁵ As for Walden's affidavit, inasmuch as Walden was not available for cross-examination by the Respondent and, as the judge found, the affidavit was given under circumstances casting doubt on

³ See, e.g., *EMR Photoelectric*, 251 NLRB 1597, 1601 (1980), citing *Hanover Concrete Co.*, 241 NLRB 936, 939 (1979).

⁴ See Sec. 11 of the Act and Sec. 102.31 of the Board's Rules and Regulations. The General Counsel identifies no authority supporting the argument that the judge's approval was required before seeking enforcement of the subpoena.

⁵ As the General Counsel concedes, the judge never expressly ruled against enforcement of the Walden subpoena. The judge ruled only that he would not discontinue the hearing pending court enforcement.

its trustworthiness, we find it was properly excluded⁶

Paragraph 8(j) of the complaint alleges that on May 16 Paradise threatened employees with the possible loss of their jobs if the Union won the election. In support of this allegation the General Counsel offered the testimony of employees Headley and Bezio. Both testified that during a lunchtime conversation in which employees were discussing whether they would lose their benefits if the Union won the election, Paradise stated that they should not worry about it because "we probably won't have a job anyway."

The General Counsel contends that Paradise's statement was clearly an unlawful threat. The testimony of employee Brown, however, casts considerable doubt on the General Counsel's contention. Brown testified that earlier in the conversation the employees had discussed the possibility that there might be a layoff due to a business slowdown. As the judge found, there had been such a layoff just 6 months earlier. Contrary to the General Counsel, therefore, we are unable to conclude that Paradise's statement about losing their jobs referred to the consequences of a successful union campaign. Rather, we conclude that at its worst it was vague and ambiguous.

Paragraph 8(p) of the complaint alleges that on June 17 Paradise threatened employees with a plant shutdown and layoffs if the Union won the election. Here again, the General Counsel failed to present any credible evidence of such threats. The only evidence the General Counsel offered was Bezio's testimony that employee Parker had told her that Paradise had told her that President Saunders had told her that he would close the plant if the Union got in. We find that the judge in his discretion properly rejected this uncorroborated testimony as unreliable hearsay.⁷

Paragraph 8(q) of the complaint alleges that on June 20 Paradise again threatened employees with a plant shutdown and layoffs if the Union won the election. Here, the General Counsel's evidence consisted of Headley's testimony that Brown stated to her and Bezio that a machine was recently removed from the plant "because they were going to start to move the work out," and that Paradise was

also present and did not deny Brown's statement. Thus, the General Counsel contends, Paradise ratified Brown's statement by her silence.

According to Brown, however, Paradise responded that she was not aware that the machine had been moved out. Moreover, Brown testified that thereafter Moriarty, the Respondent's purchasing agent, told her that the machine was merely being sent out for repairs, and that she immediately relayed this to Headley and Bezio. Accordingly, even accepting Headley's testimony that Paradise remained silent, we find that any alleged adverse impact that silence may have had was subsequently cured.

2 The judge also dismissed the allegation that the Respondent through Plant Manager Rickard violated Section 8(a)(1) of the Act by threatening employee Massey with an unexcused absence if she left work to attend the May 23 Board representation hearing. The judge found that receiving an unexcused absence was "relatively unimportant" insofar as it would take at least three unexcused absences in a month before an employee would receive even a written warning. Accordingly, the judge concluded that Massey "was not threatened with any meaningful disciplinary action if she chose to attend, but would merely be accorded an unexcused absence based on the Respondent's normal procedures."

We agree with the judge that this allegation should be dismissed, but do so for the following reasons. At the outset, contrary to the judge we do not deem it significant that it would take three unexcused absences before a written warning would be given, and many more before discharge. The fact is that an unexcused absence could lead to discipline. An unexcused absence was therefore "meaningful."⁸

The issue, then, is not whether Rickard effectively threatened Massey with meaningful disciplinary action. We conclude that he did. The issue is whether the threat violated the Act. As discussed below, we conclude that it did not.

Since *Standard Packaging Corp.*,⁹ the law has been clear that employees have no absolute right under Section 8(a)(1) and (4) of the Act to leave work to attend a Board hearing. What has not remained clear, however, are the circumstances in which an employer may lawfully refuse to permit

⁶ See *NLRB v McClure Associates*, 556 F.2d 725 (4th Cir. 1977), enfg. 223 NLRB 580 (1976), *Head Ski Division, AMF Inc.*, 222 NLRB 161, 162 fn. 3 (1976). Although the judge inadvertently states in fn. 8 of his decision that he is granting the Respondent's motion to quash the "subpoena," it is clear that he meant "affidavit" since it was Walden's affidavit and not the subpoena that the Respondent formally asked to have excluded from the record—a request the judge referred to as a "motion to quash."

⁷ We note that the General Counsel apparently made no effort to call Parker, whose credibility determines the probative value of Bezio's testimony, to testify about Paradise's alleged statement.

⁸ Moreover, we note that discipline was not in fact all that unlikely to result from the Respondent's refusal to allow Massey an excused absence. The Union's letter to the Respondent requested Massey's attendance not only on May 23 but "if necessary, on consecutive days thereafter, until completed." Thus, Massey might have accumulated several unexcused absences if she had attended the hearing as planned.

⁹ 140 NLRB 628 (1963)

employees to do so. In *Standard Packaging* the Board held that where the General Counsel failed to prove that the employer's refusal was improperly motivated, or that the employees' attendance at the hearing was necessary (i.e., that they were subpoenaed or that they otherwise had real need to attend), the employer's refusal did not violate the Act. This, however, was not the last word on the subject.

Some 15 years later in *Earringhouse Imports*,¹⁰ the Board all but eviscerated *Standard Packaging*. The Board in *Earringhouse* held that an employer violated Section 8(a)(1) and (4) by discharging 13 employees who defied its denial of their request for leave to attend the representation hearing. The Board so held notwithstanding that the judge had found no evidence that the employer had an unlawful motive or that the 13 employees had a need to attend the hearing.¹¹ The Board held that the burden was on the employer to establish that the employees' absence from work would have caused a significant economic loss, and that the employer failed to do so. In effect, therefore, the Board established a presumption of illegality, shifting the burden of proof from the General Counsel to the employer.

The Board's holding in *Earringhouse* was thus plainly contrary to *Standard Packaging*. However, as noted by the D.C. Circuit in denying enforcement in *Earringhouse*,¹² the Board did not even mention that case much less distinguish or expressly overrule it. Nor did the Board cite any other Board precedent for its presumption under Section 8(a)(1) and (4) of the Act.¹³

In view of the foregoing, and after carefully considering the merits of each, we agree with the D.C. Circuit in *Earringhouse* that the better approach is that originally followed in *Standard Packaging*. As the D.C. Circuit noted in denying enforcement in

¹⁰ 227 NLRB 1107 (1977) (Members Penello and Walther dissenting), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

¹¹ As in *Standard Packaging*, none of the employees were subpoenaed to appear at the representation hearing, and none testified.

¹² 600 F.2d at 936.

¹³ The only authority cited by the Board in *Earringhouse* allegedly supporting its presumption was *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). However, as the D.C. Circuit noted in denying enforcement in *Earringhouse*, the Supreme Court's discussion in *Great Dane* was in the context of Sec. 8(a)(3) and involved employer actions that appeared discriminatory on their face. 600 F.2d at 939 and fn. 22. The D.C. Circuit further noted that in *NLRB v. Brown*, 380 U.S. 278 (1965), a case cited in *Great Dane*, the Court stated, "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is *prima facie* lawful." The D.C. Circuit concluded that under the circumstances (no improper motive or necessity for attendance) denying the employees leave to attend the representation hearing had no more than a de minimis impact on employee rights, and thus that the employer's conduct was *prima facie* lawful. Id.

Earringhouse, "working time is for work."¹⁴ There is nothing inherently improper, therefore, in an employer's wanting to keep its employees at work.¹⁵ A presumption that such a decision is unlawful is thus clearly unwarranted.

Accordingly, we overrule *Earringhouse* and hold that the burden of proof lies where it customarily is in an unfair labor practice proceeding: with the General Counsel. Consistent with the Board's decision in *Standard Packaging*, that burden will be to prove that the employer's refusal was improperly motivated or that the employees demonstrated to the employer at the time of their request that they had a real need to attend the hearing. Only when the General Counsel has presented *prima facie* evidence of either or both of the above will the burden shift to the employer to either discredit the General Counsel's evidence or, as to the latter, show an overriding business reason for its refusal to allow the employees to leave work.

Applying our holding to the facts of this case, we find that the General Counsel failed to meet this burden. First, there is no evidence that the Respondent's refusal to grant Massey an excused absence was improperly motivated. Although Massey testified that employees had been granted excused absences for personal business in the past, it was never explained what the nature of that personal business was or whether such leave had been granted liberally. Further, the judge credited Rickard's testimony that his decision was based solely on his understanding of the Company's attendance policy.¹⁶

Second, there is no evidence that there was any real need for Massey to attend the hearing. Like the employees in *Standard Packaging*, Massey was not subpoenaed to appear and was not called to testify. Although the Union requested her presence as its "observer," neither the Union nor Massey offered the Respondent any explanation whatsoever at the time of the request why an "observer" was needed.¹⁷ As one of the most active union support-

¹⁴ See 600 F.2d at 932 and cases cited therein at fn. 1.

¹⁵ As the Board in *Earringhouse* conceded, an employer has a "legitimate interest in operating [its] business without disruption." 227 NLRB at 1108.

¹⁶ Moreover, the record reveals that the Respondent subsequently granted Massey paid time off to be the Union's observer during the July 1 election. Significantly, this was before the filing of the unfair labor practice charges on July 15.

¹⁷ Unlike our dissenting colleague, we are unwilling to speculate, post hoc, as to the advisory functions Massey might have served at the hearing as the Union's "observer." Nor would we require the Employer to have done so at the time of the leave request. Rather, in the absence of any contrary evidence, we assume that the term "observer" meant, and was understood to mean, precisely what it normally means: one who simply watches or observes.

ers Massey undoubtedly had a genuine personal interest in the hearing. Such an interest, however, does not rise to the level of a "real need."

Accordingly, we affirm the judge's finding that the Respondent did not violate Section 8(a)(1) when it refused to grant Massey an excused absence to attend the representation hearing.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Furthermore, it is certified that a majority of the valid ballots have not been cast for United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO and that it is not the exclusive representative of the bargaining unit employees.

CHAIRMAN STEPHENS, dissenting in part

I join my colleagues in the majority in all but their conclusion that the Respondent did not violate Section 8(a)(1) of the Act when its plant manager, William Rickard, responded to employee Doris Massey's request for an unpaid absence to attend the May 23 representation hearing by stating that such an absence would be marked as "unexcused." I agree with them that we should overrule *Earringhouse Imports*, 227 NLRB 1107 (1977), encl denied sub nom *Service Employees Local 250 v NLRB*, 600 F 2d 930 (D C Cir 1979), to the extent that it recognizes an absolute right for employees to take unpaid leave to attend Board proceedings in the absence of a showing of business necessity for denying them permission. Like the majority, I would return to the rule of *Standard Packaging Corp*, 140 NLRB 628 (1963), but in my view, finding a violation of Section 8(a)(1) on the facts here is entirely consistent with *Standard Packaging*.

In *Standard Packaging*, the employer's plant manager was presented with an employee request that at least four, and possibly seven, employees be released from work to attend a hearing on a decertification petition, although apparently none was scheduled to give testimony. The manager did not reject the request out of hand but stated that he wished to check production schedules to see if this would be possible. After checking, he informed the requesting employee (who was a chief sponsor of the decertification petition) that he could only allow that employee to attend. Upon further pleas by the employee, the manager agreed that one other employee could also go and that any others who turned out to be needed at the hearing could be released on telephone notification of the need for their presence. Two employees, Storms and Murray, who were not among those allowed to attend, went to the hearing notwithstanding their

lack of permission to leave work and were subsequently discharged for insubordination. In dismissing the complaint allegation that the discharges violated Section 8(a)(1), (3), and (4) of the Act, the Board explained (*id* at 630)

In the circumstances, we cannot find that Respondent's refusal to release Storms and Murray was motivated by any desire to interfere with the Board's processes or with such rights as the complainants may have had to attend the Board proceeding as prospective witnesses. Nor can we say that the position taken by Respondent would, had Storms and Murray accepted it, have occasioned an interference with the proceeding or precluded the complainants from attending the hearing upon a reasonable showing that their attendance was necessary. It is our belief that this record adequately supports the Respondent's asserted reliance upon its work schedule as the reason for its unwillingness, in advance of the hearing, to release more than two employees to attend the hearing.

I agree with the majority that the Board in *Standard Packaging*, implicitly applied a dual test. An employer that penalizes or threatens to penalize an employee for taking unpaid leave to attend a Board proceeding thereby commits a violation of Section 8(a)(1), (3), and (4) of the Act only if either (1) it does so with unlawful intent, i.e., out of hostility toward union or other protected activity, or (2) the employee's showing of need to attend the Board proceeding outweighs the employer's production-related ground for denying in whole or in part the employee request.¹ I also agree that, in the absence of any indication of an employee's need to attend the Board proceeding, the employer is under no obligation to show any business reason for denying the employee permission to do so by taking unpaid leave from work.

¹ This appears to be the test that the Sixth Circuit applied in *Vokas Provision Co v NLRB*, 796 F 2d 864, 876 & fn 15 (1986), denying encl 271 NLRB 1010 (1984). In *Vokas*, 6 employees out of a work force of 12 had demanded to attend a Board hearing en masse, on the representation that as-yet-unerved subpoenas awaited them there. The demand was made to the employer the day before the hearing. The judge credited the employer's evidence that its reason for allowing only one, rather than all six, to go was that the simultaneous departure of half of its work force would cause "serious business disruption." The court of appeals agreed with the judge both that there was no showing of unlawful motive and that the employer's business reasons for preventing all six from attending the hearing outweighed the employees' interest in attending. 796 F 2d at 878-879.

The court recognized, as established law, that there was probably an absolute right to obtain an unpaid leave of absence in order to testify under subpoena. In the absence of a subpoena, the balancing test was to be applied. 796 F 2d at 896.

I would not, however, hold that the demonstration of the employee's need to attend the hearing must be exceptionally strong before the employer has at least some burden of explanation. If the circumstances indicate that the employee may serve a useful function at the proceeding, I would impose on the employer, at the least, a burden of inquiry into the interest to be served by the employee's presence and consideration whether that interest can be accommodated without disruption to production. Indeed, the employers in *Standard Packaging*, *Earringhouse*, and *Vokas* all made at least some attempt to determine the need for employees' presence at the Board proceedings and then gave permission for at least one employee to attend.²

In the present case, one employee, Doris Massey, requested leave to attend a Board representation proceeding as the Union's observer. Massey was known to the Respondent as the principal union organizer among the employees. It was clearly possible for Plant Manager Rickard to ascertain whether the Respondent had received any other requests from the Union for employee attendance at the hearing or whether—as seems to be the case—Massey was the only employee whose presence the Union sought. Moreover, if Rickard had any questions about what function Massey might serve as an "observer," he could have called the Union's field representative who signed the letter requesting Massey's attendance in that capacity, since the Union's telephone number was included in the letterhead. It is not difficult to discern why a union might need the presence of at least one employee at a representation proceeding. Issues are often not well defined prior to a scheduled hearing in a representation case, and unforeseen questions about the workplace and eligibility for inclusion in the bargaining unit often arise during the prehearing conference, when the parties attempt to reach an election agreement, and during the hearing itself, if one is held.³ A unit employee, such as Massey, is often a valuable source of information on such issues. The usefulness of such advice is no less great if the union asks the employee to attend as an observer but does not subpoena the employee's attendance. Thus, while the issuance of a subpoena

may strengthen the showing of need, it should not be treated as an indispensable requirement.

Balanced against the circumstances indicating that Massey had an interest going beyond mere curiosity in attending the representation proceeding was Rickard's bare assertion of his understanding that it was appropriate under plant practice to mark her absence as unexcused. He made no claim at all that her absence on unpaid leave would cause any disruption of production. Indeed, he testified that the Respondent was concerned with employee absenteeism only if it were excessive.⁴ Since the letter requested Massey's attendance at a Board hearing "on May 23, 1983, and consecutive days thereafter, until completed," Rickard might understandably have been troubled by the prospect of her possibly being absent for a number of days, but he could have allayed such fears by calling the field representative who wrote the letter to reach some agreement on limits to her absence. Compare *Vokas Provision Co v NLRB*, supra, 796 F.2d at 875 (when employees are subpoenaed, an employer may call the Board to schedule appearances "in an orderly fashion" to "minimize disruption" to business).

In sum, where employee attendance at Board proceedings is concerned, I think our test should encourage all parties to act reasonably and in a manner that will serve the interests of employees, employers, unions, and the public. An indication that an employee's presence at a hearing might be useful should trigger at least a burden of inquiry on the part of the employer to see if some reasonable accommodation may be made. As to whether and to what extent a request for unpaid leave must be granted, each case should turn on its own facts. The stronger the showing of need, the greater the showing the employer must make to overcome it. Where, as here, the circumstances suggest a legitimate reason for the employee's attendance and the employer simply rejects the request without explanation, I would find that the balance weighs against the employer and that a violation of Section 8(a)(1) is established.⁵

² In *Earringhouse*, supra, the employer had been advised by its attorney that the attendance of all its warehouse employees at a representation hearing was unnecessary, and it offered to allow the employees to select one employee to attend as their representative. The employees had sought to attend en masse on the ground that the proceeding "concerned them." 227 NLRB at 1107-1108.

³ No hearing was actually held on the scheduled date for the hearing on the underlying representation petition in this case. Instead, the parties, on that date, entered into an election agreement that included a "side agreement" that, inter alia, permitted one named individual to vote subject to challenge as a "confidential employee/supervisor."

⁴ To the extent that the Respondent contended that there was no disciplinary significance to the classification of an absence as unexcused, however, I agree with my colleagues, for the reasons stated in the majority opinion, that telling Massey that the absence would be unexcused threatened her with a "meaningful" sanction.

⁵ In the absence of a showing of unlawful motive, I would find this to be an independent violation of Sec. 8(a)(1)—coercing, restraining, and interfering with the protected activity of participating in a proceeding related to a union representation petition—but I would not find violations of Sec. 8(a)(3) or (4). See *NLRB v Burnup & Sims*, 379 U.S. 21, 23 (1964) (independent violation of sec. 8(a)(1) may be found without proof of discriminatory motive), *Textile Workers v Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) (same).

Michael T Fitzsimmons, Esq, for the General Counsel
Edward E Shumaker, Esq and *Mark T Broth, Esq*, for
 the Respondent
Nello Morbidelli, for the Charging Party

DECISION

STATEMENT OF THE CASE

PHIL W SAUNDERS, Administrative Judge Based on charges filed on July 15, 1983, and amended charges filed on August 15, 1983,¹ by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO (the Union or the Charging Party) a consolidated complaint was issued August 23 and an amended complaint on October 13, against Ohmite Manufacturing Company (the Company or Respondent) alleging a violation of Section 8(a)(1), (3), and (5) of the Act Respondent filed an answer to the complaints denying it had engaged in the alleged matter Subsequent to the hearing, both the General Counsel and Respondent filed briefs in this matter Respondent also filed a reply brief, but I have only considered those briefs initially filed

On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Respondent is a division of North American Philips Company, a Delaware corporation, and at all times mentioned, has maintained an office and place of business in Hudson, New Hampshire, and is now and continuously has been engaged at this location in the manufacture, sale, and distribution of power-type resistance products, electromechanical components, and related products

Respondent, in the course and conduct of its business, causes and continuously has caused at all times mentioned large quantities of materials used by it in the manufacture of components, resistance products, and other products, to be purchased and transported in interstate commerce from and through various States of the United States other than the State of New Hampshire and causes, and continuously has caused at all times mentioned, substantial quantities of finished products to be sold and transported from the plant in interstate commerce to the States of the United States other than the State of New Hampshire

Annually, Respondent sells and ships goods valued in excess of \$50,000 from its Hudson, New Hampshire plant directly to points located outside of the State of New Hampshire

Respondent is and has been engaged in commerce within the meaning of the Act

II THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act

III THE UNFAIR LABOR PRACTICES

Respondent is a manufacturer of resistors and related materials used in the electronics industry, as aforesaid, and in addition to its New Hampshire plant, the Company also has production facilities located in Princeton and Skokie, Illinois, its principal office The Hudson, New Hampshire operation involved in the case, has been owned by Ohmite for over 10 years, and it employs approximately 89 persons

During April, the Union initiated an effort to organize the employees at the Hudson plant Union supporters within the plant used time available before and after work, breaks and lunch, and in some cases actual working time in the production area, to solicit employee authorization cards

On or about April 28, Respondent received a demand for recognition, which stated that the Union had achieved a card majority By letter dated May 16, the Union notified and disclosed to the Company the names of nine employees who made up a partial list composing the members of the union organizing committee See Respondent Exhibit 3

The Union and Respondent executed an election agreement on May 23, and pursuant to this agreement an election was conducted on July 1 The Union lost the election by a vote of 43 to 37 with 3 challenged ballots The Union subsequently filed objections to the election, but later several of the objections were withdrawn However, the remaining objections were consolidated with the instant unfair labor practice matter for hearing²

The main issues in this proceeding are as follows

Are Walden and Paradise supervisors or agents of the Respondent?

Did Respondent unlawfully enforce its rules regarding solicitation and personal phone calls?

Did Respondent threaten to discipline an employee if she attended an NLRB hearing

Did the Respondent threaten to close its Hudson facility in retaliation for its employees' union activity?

Did Respondent threaten its employees with loss of benefits because of their union activity?

Did Respondent threaten to deny a wage increase to its employees because of their union activity?

Was Respondent's withholding of a pay increase prior to the election and granting of same subsequent to the election unlawful?

² Respondent contends that par 8 of the amended complaint should not be allowed as it violated its right to due process, that the amendment contains many allegations that were previously dismissed or withdrawn by the Union in lieu of dismissal by the Regional Director However, it is clear, as pointed out, under Sec 102 17 of the Board's Rules and Regulations, that a complaint may be amended by the Regional Director prior to hearing, and I am in agreement that the amended complaint meets the requirements of Sec 102 15 and, accordingly, it is sufficient to form the basis for litigation It is further noted that all the pending allegations come within the scope of the amended charges and that none of them were either specifically withdrawn or dismissed I am also aware and note that several additional unfair labor practice charges were not included as a part of the amended complaint even though they were brought against the Company during or subsequent to the election campaign, but after investigation by the Board all of these charges were withdrawn in lieu of dismissal Moreover, at the instant hearing before me the General Counsel withdrew pars 9, 10, and 11 of the consolidated complaint

¹ All dates are 1983 unless stated otherwise

Did Respondent unlawfully interrogate and solicit grievances from its employees?

Did Respondent remove Plant Manager Rickard from the plant prior to the election and discharge him subsequent to the election in order to dissuade employees from supporting the Union?

Does Respondent's unlawful conduct warrant the setting aside of the election?

Did the union represent a majority of the unit as of April 28?

Are the unfair labor practices committed by the Respondent sufficient to warrant a bargaining order remedy.

Before addressing and discussing the specific allegations and issues, it should be noted at the outset that the election campaign here in question, and which lasted through May and June, was obviously quite open and "freewheeling" to all employees. In fact, this record shows that the plant's lunchroom and hallways were covered with both pro and antiunion propaganda and, as indicated, vocal employees on both sides of the issue aggressively asserted themselves and solicited support.³ From time to time the Company's role also included clarifying misstatements of fact and law contained in the pronoun materials, and policing *both* employee groups to help minimize the campaign's interference with plant operations and production. There were also numerous occasions when both pro and antiunion forces passed out and distributed leaflets, notices, and other literature.⁴

It is equally clear by this record, and most of the witnesses on both sides readily admitted, that the Company had a recognized "open door" policy in place both before and during the campaign period. Witnesses testified that they had numerous conversations and discussions with members of the corporate and plant management team in the months and years prior to the July 1 election, and in which employee grievances were openly discussed, investigated, and in some cases remedied. Moreover, it is also clear that a companywide grievance procedure, grievance committees, "birthday meetings," and other less formal channels of communication were continuously available to and used by the employees, and that the Company made efforts not to disrupt this system. A threshold question in this case is the supervisory status of Peter Walden and Sis Paradise.⁵

³ All charges and objections regarding the contents of the company *letters* and *memos* to employees were withdrawn or dismissed.

⁴ See R Exhs 13-39 separate pro and antiunion samples of campaign material posted during the campaign in the off-work areas of the plant.

⁵ During the time here in question, William Rickard was the plant manager, William Hogan was the plant foreman, Paul Moriarty was the manager of manufacturing services, and Hilda DeGrenier, Paul Walden, and Sis Paradise were classified as group leaders. Rickard was in charge of the entire plant, Moriarty reported to Rickard and was in charge of five quality control inspectors, Hogan reported to Rickard and through DeGrenier, Walden, and Paradise was in charge of the production employees. Max Sanders is the president of Respondent, Charles Dillon is the director of industrial relations, William Schneider is manager of manufacturing, and James Berg is the materials manager at the Skokie plant and served as acting plant manager for 2 weeks at Hudson. All the above individuals are admitted supervisors, except Walden and Paradise.

The General Counsel produced testimony through union committee members Jean Headley and Dot Bezio to the effect that Sis Paradise gave them instructions as to their work; that if they forgot to punch in for work, Paradise had the authority to sign for them; that on occasions Headley had received oral complaints about her work from Paradise; that if they were going to be absent from work or wished to leave early, they would contact Paradise; that there were approximately 10 to 15 employees in the finishing department supervised by Paradise; that at times Paradise authorized employees to work overtime; and that Paradise functioned as a conduit for messages from Plant Manager Rickard.

The General Counsel points out that in the election agreement, the Respondent consented that group leaders (including Walden and Paradise) were supervisors as defined in the Act; that it held them out to the employees as supervisors both by posting the Board election notice and distributing its own literature specifically stating their supervisory status.⁶

As above, the Company denies that group leaders Sis Paradise and Peter Walden are supervisors within the meaning of the Act, and while the Company did agree with the Union to exclude the group leaders from the bargaining unit, it did not stipulate to their supervisory status, and even so such a stipulation would not constitute a final determination of their supervisory status.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-recognized Board law that the status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. It is also well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status, and while these enumerated functions in Section 2(11) of the Act are to be read in the disjunctive, that section also "states the re-

⁶ The Stipulation for Consent Election, G C Exh 3, and the Notice of Election, R Exh 22, excluded group leaders and other supervisors from the unit, but otherwise there are no admissions in these exhibits that Paradise or Walden was a supervisor or, for that matter, even the group leader. Moreover, under the Act, the status of an employee, and whether he or she is or is not a supervisor, is always determined by the individual's duties, and not by his title or job classification. It is also true that a finding or agreement to supervisory status in a representation case is not binding in an unfair labor practice case, *Serv-u-Stores*, 234 NLRB 1143 (1978).

quirement of independence of judgment in the conjunctive with what goes before" Thus, the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate an employee into the supervisory ranks Further, the existence of independent judgment alone will not suffice, "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise of some one or more of the specific authorities listed in Section 2(11) of the Act" In short "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former"

This record clearly establishes that Paradise had none of the responsibilities and work-related duties associated with supervisory status Unlike senior group leader Hilda DeGrenier who reported directly to the plant manager, Paradise was under the direct supervision of Plant Foreman Bill Hogan, and Hogan credibly testified that he had full responsibility for the hiring, firing, discipline, training, and instruction of the 50-60 employees under his supervision, and that all other employees were supervised by either Materials Manager Paul Moriarty or Hilda DeGrenier Unlike Hogan and DeGrenier, it is clear that Paradise had no authority to interview or hire new employees, that only Hogan had the authority to issue warnings, discipline, or terminate employees under his supervision Hogan further testified that Paradise, who had no office and who was not on salary, could not schedule work hours, assign overtime, or evaluate other employees' work Moreover, Paradise did not have the authority to determine if an employee's absence would be excused or unexcused, could not grant an employee time off from work, and could not make adjustments on employee timecards

This record also shows, contrary to the testimony of the General Counsel's witnesses, that it was not necessary for employees to seek permission from Paradise to be late or absent from work or to leave the plant early Bill Hogan and others testified that employees were instructed to call the plant before their shift if they would be absent or delayed and that prior to 7:30 a.m. the office phone would ring only on the plant floor and in so doing it might be answered by any nearby employee In fact, employees Doris Massey and Dot Bezio admitted that they regularly answered calls during the early morning hours and then communicated the call-in messages accordingly In fact, on cross-examination the testimony of Jean Headley and Dot Bezio confirms in several respects the Company's position that Paradise served only as a work expeditor and a conduit of information to and from the employees Both Headley and Bezio agreed that Paradise had no authority to hire, fire or discipline employees, and that the written warnings came directly from Bill Hogan They further admitted that Paradise reported directly to Hogan, and that they actually had no idea how decisions regarding overtime work were made Finally, Headley agreed that Paradise functioned as a

team leader, and only occasionally would act or give instructions unless told to do so by Hogan

I do not attach any special significance to the argument by the General Counsel that the Company used Paradise at times to distribute their literature, and/or authorized her to answer employee questions concerning their upcoming election As noted, the organizing campaign here in question was openly and vigorously conducted by both sides and continuously sprinkled with numerous questions and answers on related subjects, distributions of notices, posters, buttons, T-shirts, rumors, and various literature constantly displayed or circulated by all parties, and all coupled with frequent discussions among everyone concerned Therefore, it is highly unlikely that any one person would or could be singled out with any special significance as to these endeavors, and certainly there are no such indications in this record

I now turn to the question of whether Peter Walden was an agent and supervisor within the meaning of Section 2(11) of the Act, as alleged The General Counsel introduced testimony through Tom McNamara to the effect that Walden gave her instructions regarding her work, that if she called in sick or had to go home early she would speak to Walden or Hogan, and that "most of the time" Walden would authorize overtime

Doris Massey testified that Walden was in charge of the coding area of about 15 to 20 employees, that he directed her work, that she contacted Walden when she was unable to come into work or wanted to leave early, that if she forgot to punch in Walden would sign in for her, and that on occasions Walden would relay instructions or directions from management people However, on cross-examination, both Massey and McNamara admitted that Walden did not have the authority to interview or hire employees, nor did he have authority to issue written warnings, discipline, or terminate employees

It was also established by the credited testimony of Foreman William Hogan that Walden was paid hourly, could not independently assign overtime, but would only communicate Hogan's request that particular machines work extra hours and Walden would then convey such instructions to the machine operators It is also clear that Walden was not responsible for evaluating other employees' work, could not excuse an employee's absence, and could not even make final adjustments of errors on employee timecards without the approval of Hogan In the final analysis, both the union and company witnesses generally agreed that Walden was a "work expeditor" whose main function was to make sure that the work was processed quickly and in an orderly fashion, but under the direction of the foreman and plant manager⁷

In light of the fact that Walden and Paradise exhibited none of the characteristics traditionally recognized by the Board as indicative of supervisory status, I have found that there is lacking an adequate basis in this record to find that either one was an agent of Respond-

⁷ Like the circumstances involving Paradise, I also do not place any special significance on the fact that from time to time Walden may have passed out literature for the Company or answered questions—he was only one of many for both sides so engaged, as previously detailed

ent and a supervisor within the meaning of Section 2(11) of the Act and, therefore, Respondent is not chargeable with their statements or conduct, as alleged. In accordance with the above, I dismiss the allegations contained in paragraphs 8(f), (j), (p), and (q) of the amended complaint.⁸

Paragraphs 8(a), (b), and (c) of the amended complaint alleges that:

(a) Since on or about January 18, 1983, by issuing an employee rule book, Respondent promulgated, and since that date has maintained, the following rule:

SOLICITING AND DISTRIBUTION OF LITERATURE

Vending, soliciting or collection of any type for any reason during working time in any plant area is prohibited. However, any employee may engage in solicitation during non-working time in any plant area. Employees may not distribute pamphlets, notices of meetings, political material or any other type of literature at any time in work areas. Employees may distribute literature during non-working time only in non-working areas.

(b) Since on or about May 1, 1983, Respondent maintained the rule described above in subparagraph (a) in order to discourage its employees from joining, supporting or assisting the union.

(c) On or about May 1, 1983, Respondent acting through Walden and Hogan maintained and enforced the rule described above in subparagraph (a) selectively and disparately by applying it only against employees who joined, supported or assisted the Union.

Respondent's solicitation and distribution rule is presumptively valid. *Our Way, Inc*, 268 NLRB 394 (1983), in which the Board held that "rules barring solicitation during working time state with sufficient clarity that employees may solicit on their own time." As a result of the *Our Way* holding, the burden is on the General Counsel to establish that some violation of Section 7 rights occurred through enforcement of an otherwise valid rule.

The General Counsel produced testimony through Doris Massey, a leading union adherent, to the effect that prior to May 1 she was allowed to walk around the plant and talk to employees while she was at work, but

testified that after May 1 she was reprimanded by Walden and Hogan for talking to employees while she was at work. Massey further testified that during the campaign she observed other workers talking to employees while they were at work, but these employees wore buttons that said "Vote No."⁹

In making my conclusions and findings concerning this allegation, it is first noted, and as duly acknowledged by Massey, that the Company also has a well-recognized rule stating that employees are supposed to be at their machine or in their work areas, unless they are on breaks or have been sent some place by someone in management. Moreover, the General Counsel's witnesses testified that they understood the distinction between break and worktime, and members of the union organizing committee—including Bezio, McNamara, Massey, Headley, and Ayers—admitted that they were not restricted from distributing prounion literature during nonworktime, including periods before and after their shift, during breaks, and lunch, and several of these same individuals testified that they were not even prevented from soliciting authorization cards during worktime in the plant production area.

As indicated, this record establishes that the Company took a uniform approach to the enforcement of its solicitation policy. Witnesses testified that the walls of the lunchroom and adjoining hallway were covered with both prounion and antiunion literature throughout the election campaign, but steps were taken to prevent the spread of campaign literature to the work area and members of both the prounion and antiunion groups were told to restrict their activities to areas other than the plant floor. In fact, both Massey and Bezio testified that they met with Plant Manager Rickard on or about May 13 to discuss alleged violations of the solicitation policy by the antiunion group. It appears that on this occasion Rickard repeated the Company's position that solicitation was restricted to the periods before and after work, and during breaks and lunch. Moreover, as Rickard testified, he then also took the precaution of warning *both* groups that solicitation was prohibited on the plant floor, and on cross-examination Massey conceded that Rickard informed the *antiunion* group to stay at their machines and that they were not to be posting and handing out items during working time.

Massey acknowledged that as a leader of the organizing committee it was her practice to initiate conversations with other employees to gather support for the Union, but at the same time, recognized it was part of Hogan's responsibility to maintain productivity by enforcing rules that required employees to remain in their work area except during breaks. On cross-examination, Massey testified:

Q. So the rule that we're talking about is a rule that except during breaks you're supposed to be at

⁸ The General Counsel subpoenaed Peter Walden to testify, but Walden did not respond to the subpoena, and at the hearing the General Counsel initially offered the affidavit of Walden as an aid in the decision of whether to enforce the subpoena. However, after due considerations of all the factors involved, the General Counsel then decided to make an offer of proof consisting of Walden's affidavit. However, from the credited testimony of Foreman Hogan it appears that Walden was terminated by the Company for poor attendance and performance and, therefore, a consideration of this affidavit by me would deny to the Company the required opportunity for the cross-examination of a discharged former employee, and under such circumstances the strong possibility of a biased statement against Respondent. I have rejected the offer of proof, and due to the circumstances and events noted above, Respondent's motion to quash the subpoena is granted.

⁹ She also testified that on one occasion Peter Walden told her not to leave her work area—to stay near her machine because she was being watched. However, because Walden is not a supervisor, as stated above, this statement cannot be chargeable to the Respondent.

your machine or in your work area, unless you've been sent somplace else by management?

A Right

Q And that's so that we can produce resistors, which is what the company's business is? Correct?

A Right

Q And if everybody is wandering around the plant it's not very good for production, is it?

A No

Q And you say that you were told after May 1st to stay in your work area and not to be passing out literature or posting things when you were supposed to be at your machine?

A Right

Q Now the company never tried to stop you from posting things in the lunch room or the ladies room before and after work or during breaks, did they?

A No

Q You were allowed to do that?

A Yes

Q And nobody ever said you couldn't?

A Right

In the final analysis, the reprimand Massey received from Hogan, above, was clearly only a part of the Company's lawful general practice of confining the election campaign to nonwork areas of the plant and maintaining productivity and was not improper discipline or interference. As testified to by Massey, this policy was applied evenly to both the prounion and antiunion groups. In accordance with the above, this allegation of the amended complaint is dismissed.

It is alleged that since on or about May 1, 1983, Respondent imposed more onerous terms and conditions of employment on its employees by more rigorous enforcement of its rule against receiving personal phone calls at work and selectively and disparately applying it only against employees who joined or assisted the Union.

Union committee member Jean Headley testified that on one occasion during the election campaign she had difficulty receiving a personal call from her husband concerning her sick child, but that after "arguing for a few minutes," she was then allowed to leave her work area to answer the call. Headley testified that antiunion employees, those wearing "Vote No" buttons during the campaign, were permitted calls and such were announced over the loudspeaker.

Union committee member Doris Massey testified that prior to May 1 she was allowed to receive personal phone calls at work, but that this policy changed and after this date employees with "Vote No" insignia on them were allowed to receive personal phone calls. Massey also testified that during the campaign she received an oral reprimand from Foreman Hogan for spending excessive time on the telephone.

The General Counsel argues that at the onset of the union organizing drive, Respondent, for the first time in over a year, began to enforce its rule relative to its employees receiving personal phone calls, and that the timing of this event, together with the lack of justification for it, other than vague and conclusionary testimony

to the effect that a large number of calls were being made, is sufficient to establish a violation of the Act. Moreover, the example of Headley's call not being forwarded the day after she appeared with the Union at the National Labor Relations Board RC hearing on May 23, contrasted with Massey's testimony regarding a trivial phone call being put through to another employee, also establishes the disparate enforcement of the policy.

This record shows that throughout the years at their Hudson operations, management has periodically reminded employees of the handbook rule concerning personal telephone calls. As stated in the employee handbook—the Company's policy is to screen incoming messages and then call employees from their work areas only in emergency situations¹⁰ and, as pointed out, both employees and supervisors agree that such periodic reminders are necessary to avoid unnecessary disruptions in the plant. In fact, Jean Headley even admitted policy reminders on phone calls were given in the year preceding the election campaign. Moreover, this record reveals that the Company had posted a reminder notice on the employee bulletin board approximately 1 year prior to the union campaign here in question,¹¹ and Doris Massey's testimony, after reviewing Respondent's Exhibit 6, even confirms that the Company had a regular practice of enforcing its personal phone policy.

Q And this was long before the Rubber Workers were ever organizing at Ohmite? Correct?

A Right

Q So periodically it's fair to say that the Company has had to crack down on the number of personal phone calls because they were interfering with work?

A Right

Q And the same thing happened in the Spring of 1983? Correct?

A Yes

As set forth more fully by Respondent—the testimony in this case makes clear that despite the Company's acknowledged effort to enforce a reasonable work rule on phone calls, employee access to calls and phone messages was relatively unimpeded during the campaign, and aside from the short delay in the processing of Headley's call, stated above, no other witnesses testified that they were denied incoming telephone calls. Further, several witnesses for the General Counsel admitted that calls were received by union committee members including Gauthier, Ayer, Bezio, G Hagen, Marks, McNamara, Arsenault, and Headley. In fact, on cross-examination Ayer admitted that employees were receiving personal phone calls whether or not they were on the union organizing committee.

In regard to Massey's reprimand from Foreman Hogan, as previously noted Hogan admitted that he did speak to her on one occasion regarding her constant use of the telephone. Hogan testified that he responded to

¹⁰ See G C Exh 2 at 7

¹¹ R Exh 6

Massey's request to leave her work station to make a personal call by stating:

A. I said, okay, there's no problem, but you know, you have been using the phone an awful lot lately and you know, I want to keep it to a minimum.

Q. Now why did you say that?

A. Because she had been the using the phone an awful lot.

Q. During working hours?

A. Yes.

In her testimony, Massey agreed that Hogan's comment to her was a product of the Company's general enforcement of their phone policy. It is also noted that Massey, who was recalled in rebuttal as a witness after Hogan's testimony, did not dispute his claim that she was frequently seen out of her work area making and receiving personal calls. Moreover, as further indicated, at no time did Massey receive a written warning or other discipline on these grounds, nor were her telephone privileges discontinued.

I am in agreement that the General Counsel has introduced insufficient evidence to meet his burden that the isolated incidents described by Headley and Massey were discriminatory in nature or related to the organizing campaign and, accordingly, this allegation is also dismissed.

It is alleged that on several occasions in May, Respondent, by William Schneider, interrogated employees concerning their support for the Union, solicited grievances from them, and remedied the grievances.

Before turning specifically to the allegation, I think it best to set forth some of the background evidence in this record relating to the overall situation and circumstances pertaining to the Company's recognized policy of maintaining an "open door" for employees with complaints and grievances, as briefly indicated previously.

Charles Dillon, the Company's director of industrial relations, testified that he has maintained an open door policy since he joined the Company in 1966, and stated that this policy:

. . . is one where employees have a right and privilege to come in to management and discuss their problems . . . employees have a right to use the complaint procedure or come directly to a manager or into personnel with their problems.

Thus, as further indicated, employees are regularly encouraged to discuss problems with supervisors and with the corporate headquarters people from the Skokie home office during their frequent visits to the Hudson plant. Dillon stated that he averaged five to seven annual visits to Hudson, while William Schneider, in his capacity as manager of manufacturing, visited the plant on a monthly basis, and it is clear in this record that during such visits Dillon, Schneider, and a few other corporate staff members, regularly made it a practice to meet with employees at the work stations and to discuss their prob-

lems.¹² In fact, Jean Headley, and several other employees who testified, agreed that it was quite common for Dillon, Schneider, and others to regularly visit the Hudson plant and to discuss employee problems during these visits. Moreover, Doris Massey, a leader of the prounion group, confirmed that the Company encouraged employee-management communication:

Q. And the Company maintained an open-door policy?

A. Yes, they did.

Q. When Mr. Dillon came out from Skokie did you see him walking around on the plant floor?

A. Yes.

Q. Did he ask you if you had any complaints, any problems?

A. Yes, I suppose he did.

Q. And this all, of course, took place long before the election campaign ever stated?

A. Yes.

The General Counsel produced testimony through Jean Headley to the effect that sometime around mid-May, Manager Schneider approached her at work, said he noticed she was wearing a union button, and then asked her why she felt the employees needed a union. She explained to him what she felt was the overall problem, i.e., people not being treated fairly, and he then inquired if she had any specific problems. Headley told him that she had not received her efficiency ratings (on which her bonus was based) for a considerable period of time. Schneider then left, but returned shortly, and gave Headley her ratings. Headley further stated that while she had seen both Schneider and Dillon at the Hudson plant prior to the time period here involved—that in May and June they were at the plant more than ever before. She also testified that Schneider was not the person who normally gave out efficiencies and that he had not spoken to her since he had originally set up her machine in February 1982.

On cross-examination, Headley admitted that her talk in May was not her first or only conversation with Schneider regarding production problems, and further conceded that Schneider, who had set the piece rate on her machine in 1982, regularly attempted to solve employee problems. Headley also stated that the change in the method of efficiency rating reporting was again explained to her after the discussion with Schneider—that she was then informed that in order to see efficiency ratings, she would have to go to the plant office and ask for them.

Schneider testified that he talks to the employees on the production floor every time he comes to the Hudson plant, and that it is common for the employees to contact him regarding their efficiencies or piece rates, or problems with their machines. Schneider stated that he first

¹² In *Brookfield Dairy*, 266 NLRB 698 (1983), the Board held that an 8(a)(1) violation occurred when, because of union activities, an employer discontinued its open door policy under which employees were free to discuss all job-related matters with their employer. Similarly, in *Gould, Inc.*, 260 NLRB 54 (1982), the Board held that even the threat of eliminating an open door is unlawful.

learned from Headley that the past company practice of providing written efficiency rating slips had been changed by management in the Hudson plant—that he then investigated the matter and learned that under the new system the efficiency ratings were available to employees in the plant office, and were also given to employees on their payroll checkstub, and as a result Headley was then given her rating by him and told how she could obtain this information in the future under the new procedure

Headley's testimony confirms that the Company had, in fact, maintained an open-door policy, and for many years had encouraged employees to discuss problems with management, and Schneider's conversation with Headley demonstrated a consistent application of such practice

Turning now to Headley's testimony which she stated that on this occasion Schneider also asked her why the employees needed a union In *Rossmore House*, 269 NLRB 1176 (1984), the Board held that it would no longer apply the PPG standard¹³ to the effect that questions of interrogations concerning union sympathies were inherently or per se coercive, but rather the standard for evaluating whether interrogation of employees violates the National Labor Relations Act, is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act"

The Company does not deny that Schneider may have asked Headley why she felt the employees needed a union at the Hudson plant, but there is no evidence that this conversation was accompanied by any coercive conduct or had any adverse effect on Headley or on the outcome of the election Headley, along with the other members of the organizing committee, was known to the Company to be a supporter because of the Union's letters to the Company, but, nevertheless, Headley did not hesitate in responding to the question and listing her several grievances as to why they needed the Union As indicated, she further testified that she was not threatened or intimidated in any way by Schneider's question, and also stated that it had no effect on her vote Moreover, her testimony on cross-examination clearly establishes that union activities were a small part of a larger dialogue, discussed above, concerning the distribution of employee piecework efficiency ratings

As stated above, this was one of many conversations between Headley and Schneider, but the particular conversation here in question was obviously innocuous and apparently without effect in that no other employees were present, and there is no evidence of it having any effect on the election outcome or on Headley's active participation in the union campaign Examined in context, and in consideration of all the circumstances, Schneider's question was neither intended nor had the effect of denying employee Section 7 rights

Organizing committee member Kathy Gauthier testified that on May 19, and with employee Abby Williams present, she was approached by William Schneider and asked "What I thought about the union, and I told him I

would rather not talk about it, that I'd rather talk about the weather"

Schneider testified that what occurred on May 19 was just one of numerous conversations he has had with Gauthier and other employees during his regular visits to the Hudson plant He stated that he made a point of talking to Gauthier every time he came to the Hudson plant as he has known her for a long time He described Gauthier as a talkative person who often asked for and received advice from him on personal problems

Schneider testified that the May 19 conversation was another of his normal discussions with Gauthier as he could not recall her raising any specific grievance or complaint, and denies introducing the topic of the Union and recalled " maybe she said something like, you know, I asked how are things, and she said, well, everybody is talking about the union, but I'd rather talk about the weather" Schneider testified that employee Williams was not present during this discussion, and further indicated that if he spoke to Williams, it was after talking to Gauthier, as her work area was nearby

I have credited the testimony of Schneider in which he denies introducing any union conversation, but even, assuming arguendo, accepting *Gauthier's* testimony and version of this incident, there is still no violation of the Act as no other unlawful conduct occurred with respect to either employee, and the nature of this inquiry, in the total context of all the circumstances, as stated above, is not sufficient to establish the kind of interference, restraint, or coercion that would constitute "a violation of Section 8(a)(1)" *Rossmore House*, supra Similarly, in *Stumpf Motor Co*, 208 NLRB 431 (1941), the Board held that management asking "a self-proclaimed and known union adherent" what he thought of the union, did not violate Section 8(a)(1), but was merely a conversation opener

In accordance with the above, this allegation relating to Schneider is dismissed

It is alleged that on or about June 22, and on two occasions on or about June 23, Materials Manager James Berg, from the Respondent's Skokie plant and headquarters, interrogated an employee concerning the employees' union sentiments and solicited grievances and impliedly promised to remedy the grievances

Kathleen Gauthier testified that on June 22 James Berg spoke to her at her work station and asked why she wanted a union, and that she replied "for more benefits and more respect" She also testified that Berg then asked her if the discharge of William Rickard, the plant manager, "would stop the thing with the union," and she replied that she didn't think—"We've gone too far"

Manager Berg testified that because of his unfamiliarity with the Hudson plant, he made a point of touring the plant floor and meeting the employees immediately after his arrival

Well, basically since I did not know the operation that well, I wanted to go out on the floor and just see how the floor flowed through and how we followed up on our orders in case I did get a call from Skokie on a preorder I would know where to go or who to see

¹³ 251 NLRB 1146 (1980)

Berg also confirmed that he did initiate a conversation with Gauthier during his tour of the plant, he stated

I did walk out to the floor I had a purpose of going to that work area She was assembling what we call a DA assembly, it's an assembly for winders And we've been having problems with parts situations and I was walking out to that area at the plant to find out just what type of DA's the ladies were making As I walked in that area she was the very first girl I happened to see walking through there and I happened to say Good morning, how are you? What DA's are you working on? And she told me and I said how are you working, are the machines running properly And she began to say that her machine had not been running as well as it could have, or as it had in the past, that she had been having minor problems with mechanical problems and that she wasn't satisfied where she wasn't getting service When she did have problems no one responded to her problems and she wasn't making as many parts as she thought she should have

Berg also testified that he was interested in Gauthier's complaint because it related to his work in the Skokie plant as both plants made several assemblies for each other

Berg testified that through her minor complaints about not getting respect, not being advanced fast enough, and having some mechanical problems with her machine, he then began to realize that Gauthier was a union sympathizer, and he replied

I kind of said that I really don't understand why you need outside help These problems seem minor and they should be able to be taken care of right here within the plant and that's all I said

Berg further testified that he then told Gauthier he would look into her problems

Q And that was your, that was company policy, isn't it?

A Yes

Q If an employee has a problem the manager looks into it

A Yes

Q And that had been the case long before this organizing drive ever started

A Definitely

Dot Bezio testified that during the third week of June she had two discussions with Berg, and that both of these conversations occurred at her workplace She stated that in the first conversation Berg asked her why she felt that she needed "outside help" to negotiate, and if some changes were made would it make a difference Bezio said that the second conversation occurred the following day when Berg again asked her why she needed outside help, and after she complained that the internal grievance process was not working and in particular complained about the way she had been treated by Rickard—Berg then told her "that doesn't sound good—I'll look into it"

Berg testified that on the occasions in question he and Bezio had talked for quite a while about different things—that Bezio was a gregarious person—and the more they talked the more she began to tell him about her problems Berg stated that he was "shocked" at some of her complaints "because some of the problems were so minor Some of the things were very solvable right there, immediate"

Q Was this problems with the machines or what?

A Machines, personalities, small grievances not being attended to More or less the same type of thing the other girl was saying the previous day

Berg confirmed that he told Bezio that he did not believe she needed outside help with these type of grievances, but that he would look into a few of her complaints

But I couldn't promise her I could fix it I was only going to be there for two weeks

Q Was it your understanding, was that company policy when an employee said they had a problem you would also look into it?

A Yes

The General Counsel argues that Gauthier's testimony should be credited over that of Berg—that Berg's testimony was inconsistent regarding what Gauthier said to him and incredible in his claims that he did not know Gauthier was a union adherent when others in management were obviously aware of her activities Moreover, that any determination of Berg's credibility must include a determination of why Berg was at the Hudson plant at the time in question because Berg admitted that his position at Skokie is not comparable with that of a plant manager, and that none of the functions of his position are performed by a plant manager, and that other than an earlier 2-day visit he had never even been at the Hudson plant, but despite these factors he was put in charge while Rickard was absent during the last 2 weeks in June The General Counsel further points out and argues that in the past Berg had been sent to the Respondent's plant in Princeton when a union campaign was taking place, and it is the contention of the General Counsel that the real reason for Berg's assignment to Hudson was to be the "nice guy," and find out exactly what it would take to dissuade the employees from supporting the activities there, and that his total lack of credentials to serve as the Hudson plant manager, together with his admitted assignment to another plant during a union organizing campaign, cannot be dismissed as a mere coincidence

Turning to the testimony of Bezio—the General Counsel maintains that there is not a great deal of difference between Bezio's and Berg's version of their conversations, and to the extent they differ it is the General Counsel's contention, for the reasons set forth above regarding Berg's credibility, that Bezio's version be credited If credited, this testimony clearly establishes that Bezio was unlawfully interrogated and solicited, and neither the fact that she was wearing a union button or the

Company's preexisting open door policy is a defense to Berg's action

First of all, in making my determinations concerning the testimony here in question, I am unable to attach any significant weight to the argument by the General Counsel that Materials Manager Berg lacked credentials to serve as the temporary manager at the Hudson plant in the absence of Rickard

The credited evidence in this record reveals that Plant Manager William Rickard was away from the Hudson plant for the last 2 weeks in June, while attending a computer training course and consulting with company engineers regarding machine modifications (more on this later), and that the Company assigned James Berg, Skokie plant materials manager, to cover for Rickard during his 2 weeks' absence. Moreover, whatever other functions the General Counsel assigns to Berg while at the Hudson or Princeton plant, must be deemed as pure speculation, and his inferences therefrom are completely lacking in any evidentiary status so far as this record is concerned. Berg struck me as a highly capable executive with considerable experience, and as a straightforward and a very candid witness in all respects.¹⁴

As indicated, it is also noted that both Gauthier and Bezio admitted that their conversations with members of management were a result of the Company's ongoing open-door policy and, as previously pointed out, the Board has held that it can be a violation of 8(a)(1) to discontinue an existing open-door policy during an organizing campaign—*Brookfield Dairy*, supra. The testimony in this record clearly establishes that the Company has consistently applied and maintained its longstanding practice of soliciting and remedying employee grievances. In fact, Dot Bezio, in this regard, testified on cross-examination as follows:

Q Mr Dillon has been coming out for years, hasn't he?

A Yes

Q And when he came out he went around and talked to employees about what problems they had?

A We talked about panel meetings

Q Birthday meetings or grievance panel meetings?

A Grievance panel meetings

Q And all that was before the union?

A That's right

Q So this conversation with Mr Berg wasn't really much different from those earlier conversations, was it?

Mr Fitzsimmons: Objection

Judge Saunders: Well, if you know

A That conversations with Mr Berg were different? Yes

Q But he was asking what the problems were, wasn't he?

A Right

¹⁴ Berg denied any talk with any employee about the possibility of firing Rickard. Berg stated that he was in no position to obtain Rickard's termination—that Rickard did not report to him, that, in fact, both of them were managers but in different chains of command.

Q And earlier Mr Dillon and other people from Skokie had asked similar questions, hadn't they?

A More or less

Regarding the interrogation of these two employees by Berg, it is equally clear that no violation of the Act occurred. Berg's comments, which he freely admitted to, and under all the circumstances noted above, were neither coercive in intent or intimidating in result. *Rossmore House*, supra.¹⁵

In the final analysis, the General Counsel has not sustained his burden of establishing that Bezio and Gauthier were in any way inhibited from exercising their Section 7 rights. Berg's casual inquiries must be deemed as only a pattern or part of a larger dialogue in which corporate management officials have used for many years in their contacts and visits with employees while in Hudson, and in so doing seeking out their individual problems and then in some instances followed with their endeavors to help correct such difficulties.

The allegations as to James Berg are dismissed.

It is alleged that on or about June 23, 1983, Respondent, by Charles Dillon, solicited an employee's grievances and impliedly promised a remedy to the grievances.

Kathleen Gauthier testified that she had a conversation at her work station with the Respondent's director or industrial relations, Charles Dillon, on June 23, and Dillon asked what did she want out of a union, and she replied, "respect." No evidence was introduced of any promise by Dillon to remedy this request.

As to this incident here in question, Dillon testified as follows:

Q Did you, in fact, have a conversation with her?

A Yes, I did

Q And by that time you received Mr Morbidello's letter informing you that she was on the organizing committee, had you?

A That's right

Q So, you knew where Cathy stood, didn't you?

A Oh, yes

¹⁵ In *Graham Architectural Products v NLRB*, 697 F.2d 534, 541, (3d Cir. 1983), the Third Circuit has also made the same approach.

In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover, as the United States Supreme Court recognized in *NLRB v Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the First Amendment permits employees to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *Id.* at 618, 89 S.Ct. at 1942. This right is recognized in section 8(c) of the Act. Section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employee's right to organize.

Q. And was Cathy's version of that conversation entirely accurate.

A. No.

Q. Would you tell the Judge in your own words based on your own memory how that conversation went.

A. I was walking over to where Cathy was working in the capping area and she had one of these big union buttons on. That was the first time I had seen her wear one, although she may have worn it before that, but it was the first time for myself. And I, in a way kiddingly, said I'm surprised to see you wearing one of those buttons and she responded that she felt that maybe we need some changes around here and that was the reason she was for the union.

She also indicated that there were some problems with the equipment and the people could not communicate to their plant manager. And she said also that if a union could not do anything for them they could always, she used the term, fire them, after a year.

Q. What, if anything did you say?

A. My response to her was the fact that, that it may be much more difficult to get rid of them than you think.

Q. She said that you said it was a long process. Do you think you may have said that?

A. I said it was a long process

Q. Did you in any way say that it was impossible to get rid of the union?

A. No.

Q. In fact, you know that it isn't

A. That's right.

Q. Did you say that you would—Did you say anything threatening to her about her wearing the button?

A. No, sir.

Q. Did you say anything bad was going to happen to her because she was wearing the button?

A. No, I did not.

Q. Did you promise her that anything good would happen if she took it off?

A. No

Q. How long do employees have to wait after an election before they can ask for a decertification of election? Do you know, Chuck?

A. It's a year.

Q. Is that what you were referring to was a long time?

A. That's right.

In making my conclusions as to this allegation, it is first noted the admitted testimony of Gauthier to the effect that the conversation here in question was just one of many she had with Dillon during his frequent visits to the Hudson plant, and that she "always got along" with Dillon, and agreed that it had been his regular practice for quite some time to discuss plant related and personal matters with her

Since both the testimony of Gauthier and Dillon establishes that this conversation was not coercive or intimi-

dating and was not communicated to other employees, and based on decisions previously noted *Rossmore*, supra, no violation of the Act should be found, and I have so concluded.

It is alleged that on May 19 and 20 Dillon conditioned a wage increase on the defeat of the Union; that on or before July 1, 1983, Respondent failed to give a pay increase to its employees because they joined, supported, or assisted the Union and in order to discourage them from engaging in such activities; and that on or about July 14, 1983, Respondent gave its employees a pay increase retroactive to July 4, 1983, in order to discourage its employees from joining, supporting, or assisting the Union.

The General Counsel produced testimony through Jean Headley to the effect that at a "birthday meeting" in May,¹⁶ in which about 14 employees were in attendance, and one of them asked Industrial Relations Director Dillon about the pay raise they had been getting each year, and that Dillon replied:

. . . that as we knew the raise was usually *effective on July 1st*, and that this year the fly in the ointment was the union activities. And that the election was coming up on July 1st, and that if you voted no for the union the raises would go through as per usual. And if we voted yes, that we would have to wait and see, that they couldn't give us a raise right away because the union could use it against them as an unfair labor charge.

It appears that Lillian Ayer was also at the "birthday party" in May, and she testified that on this occasion someone inquired about the pay raise, and Dillon replied:

Dillon said something about a worm in the ointment—a fly in the ointment. And then I turned and spoke to the person next to me, and I didn't hear the rest of the statement.¹⁷

Jeanine Gagne testified that in late June, she asked Dillon if employees were going to get a raise, and he answered: "It all depends on the union. If it comes in we wouldn't, and if it didn't we would get the raise." Gagne stated that each year the Company had given a wage increase and usually during the first week in July.

Counsel for the General Counsel argues that the testimony by his witnesses establishes that Respondent placed the onus for its failure to continue its prior pay raise policy on the Union, and thereby violated the Act. Moreover, maintains counsel for the General Counsel,

¹⁶ It appears that "birthday meetings" were started by Rickard some time ago, and each employee whose birthday falls within that particular month was invited to the conference room for a general meeting with management and a discussion on production and other related matters. Headley agreed that Dillon had been attending such meeting for several years during his visits to the Hudson plant.

¹⁷ Ayer agreed that even prior to the advent of organizational activities Dillon would visit the Hudson plant from time to time and would walk around the production floor talking to the employees and trying to find out if they had any complaints or problems, and then tell them he would endeavor to do something about it. Ayer also agreed that "for years" this had been Dillon's practice.

even if his witnesses are not credited, Respondent's statements and propaganda establish a violation—that an employer who wishes to lawfully withhold a pay raise during a campaign may do so only if it postpones the increase for the duration of the campaign and informs its employees of such, and then states that its reason for doing so is to avoid the appearance of interfering with the election—that in *Uarco Inc*, 169 NLRB 1153 (1968), the employer made it clear in its campaign statements that whether or not its employees were represented by a union, it planned to continue its established practice of adjusting wage rates, but Respondent, in the instant case, has made no such announcement, and never assured its employees that they would get their annual raise even if they selected the Union, and this lack of a positive statement by Respondent was particularly harmful in the instant case as the plant was full of rumors that the pay raise would not be granted if the Union was selected. The General Counsel maintains that these rumors were the most talked about subject in the campaign, and not a surprising fact in light of the propaganda being turned out by the antiunion employees. Moreover, contends the General Counsel, because Respondent was aware of this propaganda, by means of it being posted, it had almost a mandatory obligation to make a positive statement that the employees would get the pay raise even if the Union won the election. The General Counsel further maintains that none of Respondent's propaganda specifically ensures the pay raise if the employees selected the Union—rather, it informed them that the wage increase would be granted if the Union lost but would be subject to negotiation if the Union won, and that this is shown by the text of President Max Sanders' June 29, 1983 speech to the employees (G C Exh 5) in which Sanders (above) informs the employees that if they select the Union to represent them there is no guarantee that they will receive any wage increase at all, and that even if they do, it will be subject to what could prove to be many months of bargaining, and then proceeds to contrast that with the treatment the employees would receive if they reject the Union, specifically making reference to the annual wage increase and the fact that Dillon has completed the annual wage survey for the increase.

This record clearly establishes that it was Dillon's responsibility, as director of industrial relations for all three plants, to recommend the amount of the annual wage increase, and that his recommendation in this respect is reviewed by the company president and division directors who often make adjustments before approving the proposed increase. To prepare his recommendation, Dillon conducts an annual area wage survey for each plant, and in the Hudson area this involves collecting information from local employers and the Southern New Hampshire Industrial Association, and determining a competitive wage rate based on this data.

Dillon credibly testified that unlike prior years, he was unable to complete the 1983 wage survey until the mid-June, and cited a variety of factors as responsible for this delay, including his other obligations as director of in-

dustrial relations and the time consumed by several NLRB proceedings involving the Hudson plant.¹⁸

As further indicated, on May 23, Dillon and counsel for Respondent attended the *unit* hearing at the Regional offices, and at this time the Company and the Union agreed that the election should be held on a payday (Friday) after both sides had an opportunity to share their views. Dillon testified that he then discussed several dates with his counsel, and in so doing learned that his counsel would be unavailable on two Fridays, June 17 and 24, because of other commitments. However, the parties then agreed to Friday, July 1, as the date for the election. Dillon also testified that soon after the unit hearing, he then informed his counsel of the potential problem with the election date and the annual increase.

I discussed with our attorney the fact that there was this [election] on July 1st, and we normally gave out our wage increases at that time and felt that this could be a difficult situation for us because by granting an increase before the election might influence the employees and thereby invoke an unfair labor practice charge against us.

Dillon testified that after discussing the above matters with members of management it was then decided to withhold judgment and simply go ahead with the survey, and it appears that the Hudson plant wage survey was completed in mid-June, and then sent to the directors, but final approval of the wage increase was not received until the second week of July.

Q And why was it delayed?

A Well, [we] couldn't get all the division directors together at one time, some were out of town, the president also, our attorney was unavailable.

Dillon also testified that the wage increase for Hudson was then announced on July 12, and that the decision to make the raise retroactive was made by the company president who agreed that the employees should not be penalized because of Respondent's own delay.

In making my determinations regarding these allegations, it is initially noted that the Board has held in numerous wage increase cases that there is no violation of the Act if the employer acts consistently with his own past practice even if that practice is not entirely regular.¹⁹ As indicated, in *Sugardale Foods*, 221 NLRB 1228

¹⁸ It appears that as a result of former employee Pat Tabor's unfair labor practice charge filed May 2, Dillon was also obligated to spend considerable time preparing the Company's response. Tabor's charge was subsequently withdrawn. Moreover, the receipt of the Union's recognition letter on April 28, 1983, placed additional demands on his time, and required him to meet with the Company's directors, plant supervisors and counsel on numerous occasions.

¹⁹ It should also be noted that an employer is under no absolute prohibition in the matter of granting benefits to employees, even during the course of a union organizing campaign, but it is true that benefits announced and granted during such a sensitive period will be closely scrutinized. Indeed, the Board has held, in the matter of granting wage increases, that there arises a strong presumption of illegality in the granting thereof during a union campaign. However, an employer is free to grant benefits as if the union were not in the picture, i.e., as it would in its normal business operations, absent any union organizing effort. *Wintex Knitting Mills*, 216 NLRB 1058 (1975).

(1975), the Board held that no violation occurs where the employer's reason for delaying the wage increase was to avoid election interference. The Board noted that when there is no evidence that the employer sought to undermine the Union by delaying the increase, and the employees understood the reason for the delay, no violation can be found, and the Board further found that, as in the instant case, there is no violation if the pay raise is subsequently applied retroactively.

In the instant case, Dillon had explained to several employees that the timing of the wage increase could result in an unfair labor practice charge, and numerous employee witnesses testified that they understood management's concern that a pay raise on or before election day could be viewed as a "bribe," or an unfair labor practice.²⁰ Therefore, even if the Company had completed the wage survey in time for July 1, a delay until after the election could have been appropriate.

In the final analysis, the Company acted consistently with its past practices (granted annual wage increases sometime during the first part of July); avoided their apprehensions of possible election interferences by delaying the increase until after the election; and explained to employees on several occasions why the delay in their opinion was necessary.²¹

Under the facts and circumstances of this case, I am unable to conclude or find that Respondent's deferral of the pay raise was coercive in nature or created an atmosphere that interfered with the employees' exercise of a free choice in the election. On the contrary, I find no evidence that the Company sought to undermine the position of the Union or to influence the votes of employees in the impending election by deferring the increases, or that the employees believed such to have been the

case. Indeed, as the Company made it clear to the employees that the sole purpose of deferring the expected pay increases was to avoid the appearance of interference with the election, and therefore within the guidelines of *Uarco Inc.*, 169 NLRB 1153 supra.

It is alleged that on or about May 20, 1983, Manager Rickard told an employee that attending an NLRB hearing would be an unexcused absence.

Doris Massey testified that on the date indicated below she gave a letter addressed to William Rickard from Union Agent Morbidello, which requested that she act as an observer for the Union at the RC hearing on May 23 and, if necessary, on consecutive days thereafter.²² Massey stated that later in the day she asked the plant manager if she could be excused to attend the hearing as indicated in the letter, but that Rickard then replied that if she took the day off it would be an unexcused absence and would go against her record. Massey testified that prior to the date in question she had been allowed absences for personal business and she was also aware of other employees who were permitted excused absences for personal business. Massey said that as a result of her conversation with Rickard she did not attend the hearing even though Rickard did not tell her that she could not go.

The General Counsel points out and argues that Rickard threatened Massey by stating that her attendance at the RC hearing would result in an unexcused absence because it is clear that such an absence, while not a per se basis for discipline, can together with other absences, result in discipline up to and including discharge, and that the best evidence of the reality of the threat is that Massey did not go to the hearing. Moreover, Massey's testimony that both she and others have received excused absences for personal business was not refuted. The General Counsel also points out that although Respondent made much at hearing that Massey's requested attendance was only as an observer, it is clear that by the date of her request Respondent was aware of Massey's status as the foremost union adherent, and that her request was not one made out of mere curiosity and, accordingly, Rickard's statement to her violated Section 8(a)(1).

The Company does not dispute that union adherent Doris Massey was told that her absence from work to observe the May 23 unit hearing would be considered "unexcused," but the Company maintains that this action was proper and consistent with past practice and does not constitute a violation of the Act.

Plant Manager Bill Rickard testified that whether an absence is considered excused or unexcused is relatively unimportant unless an employee has a noticeable attendance problem, and that it would take at least three unexcused absences in a month before an employee would receive even a written warning.

Plant Foreman Bill Hogan testified that excessive absenteeism was rarely regarded as a termination offense except under extreme circumstances or where it became "habitual—for example group leader Peter Walden was

²⁰ Dillon credibly refuted the statements attributed to him by Jean Headley Dillon testified that at this May meeting, when a question was asked if a pay increase would be given, he replied by stating that at this time it was very difficult to answer this question and pointed out that by announcing the wage increase the Company could have an unfair labor practice charge filed against them. Employee Kim Adams testified that no one from management ever told them that they were not going to get a pay raise, but there were rumors to the effect that if the Union came in there would be no pay raise or that he raise might be delayed—that Dillon had stated that he did not want the union people to think that the Company was "bribing" them. Employee Mary Brown testified that she had two conversations with Dillon regarding the pay raise, and on the first occasion in March he told her that they were "pretty sure" the raise would be given, and on the second occasion in June, Dillon told her that the raise may have to be held off because the Union could say the employees were being bribed. Employee Terry Cote also gave similar testimony. It should also be noted that not one of the participants, other than Headley, testified that they came away believing that the wage increase was conditioned on the election results, and employees Terri Cote, Diane Arseneault, Kim Adams, and committee member Lillian Ayer each testified that they had no doubt that they would receive a raise in 1983. Moreover, Dillon's May 10 letter to employees spoke of "continued wage increases" (R Exh 24), and his June 24 preelection letter referred to wage increases "every year" for our "past ten years" (G C Exh 6). Finally, on the eve of the election, Respondent's President Max Sanders spoke to all employees and in so doing mentioned that Dillon had "just recently completed his annual wage survey," and also mentioned that employees were aware of the company policy in which wage adjustments were made each year.

²¹ In posted notices to employees relative to the election, there are no references to any wage increase delays or nonpayment that I am aware of. In fact, in R Exh 26, dated May 23, 1983, Dillon states that the Company expects to continue its policy of wage increases.

²² See G C Exh 30

terminated after he missed 18 out of 26 workdays with unexcused absences

In her testimony, Massey admitted that she was not under a subpoena to attend the RC hearing,²³ and further admitted she was not told that she could not attend the hearing, and was not threatened with any form of discipline. It appears that Rickard simply informed her that her absence would be considered unexcused, based on his understanding of the Company's attendance procedures, and Massey was not given a written warning on this or any other occasion during the campaign.

As further indicated, the decision not to attend the unit hearing was made by Massey, and not by the Company, and whether an absence was unexcused or excused has no effect on an employee's earnings or wages. Further, Massey had no grounds for concern unless she made a habit of her absenteeism, and there is no evidence of this. I am in agreement that the Company treated Massey's request no differently than it would an employee's request to visit a lawyer, a doctor, or attend any other need of a personal interest. In the final analysis, Massey was not prevented from attending the hearing, and was not threatened with any meaningful disciplinary action if she chose to attend, but would merely be accorded an unexcused absence based on the Respondent's normal procedures. In accordance with the above, this allegation is dismissed.

It is alleged that on or about June 1983, Respondent, by Hilda DeGrenier, threatened employees that they would not receive their annual pay increase, that they would lose all their benefits, that the Company would shut down the plant, and they would be laid off if they selected the Union to represent them.

Kathleen Gauthier testified that in the third week in June she and two other employees, Carol Marks and Carol Maginguy,²⁴ had a conversation with supervisor and senior group leader Hilda DeGrenier, and in which DeGrenier told them

She didn't have much to say too much about a union because she was in one and she didn't think they did much for the people. And then if we did we'd lose our benefits if we did go for a yes vote. We'd lose our vacation and a lot of other things. It could get down to 10 to 15 people, if there were to be like a layoff.

Gauthier also remembered DeGrenier telling them that "they could get to close the shop, and the union people could be out of a job."

DeGrenier testified credibly and at quite some length regarding her several conversations with Gauthier and other employees during the campaign. DeGrenier, who has worked for Ohmite and its predecessor for many years, testified that she had numerous friends in both the pro and antiunion group, and for this reason took no active part in the campaign, but prior to her employment

at the Company she had worked in several factories where she became an active union member and at one time even served as a steward. DeGrenier testified that through this background, and her husband's current membership in a union, she had a good understanding of negotiations and contract ratification process, and that some of the employees were aware of her knowledge in these matters, and as a result asked her questions about the Union's campaign promises. DeGrenier testified that during such conversations she expressed her own opinion on a variety of employee questions and on matters regarding the contents of the posted pro and antiunion campaign literature in the plant.

DeGrenier testified that during this conversation Gauthier and the two other employees approached her with questions regarding a particular prounion wall poster that promised increased wages, benefits, and job security if the Union was elected. DeGrenier testified that when asked if the Union could make such guarantees by Gauthier and Marks, she stated

And so I had explained to her that it wasn't necessarily so. That company nor union could guarantee you a job because if things got slack, we would have a layoff and that the least senior person would get laid off first (the layoff procedures at Hudson).²⁵

DeGrenier stated to employees that whether layoff occurred at the plant depended on the economy, and not on whether there was a union in the plant. DeGrenier testified that she told the employees that the Union could not guarantee increased wages, that this was not necessarily so, but denied saying anything about losing wages or benefits.

Q Did you say that they would lose their vacations if they voted for the union?

A No, sir.

Q Did you think that was the case?

A No, sir. I knew better.

Q How did you know better?

A Because that is not—even with the other unions I belonged to, it was never worked that way.

Q You never lost your vacation?

A No, sir.

Q Did you tell them they would lose their insurance and their benefits if they voted for the union?

A No, sir.

Q Did you tell them the plant was going to close down if they voted for the union?

A No, sir.

Q Did you tell them that they had killed the wage increase for this year?

A No, sir.

²³ See R. Exh 31—a company notice to employees stating that any employee subpoenaed to testify at the instant hearing, would be paid their normal wages minus witness fee received.

²⁴ Marks and Maginguy were not subpoenaed or called as witnesses by the General Counsel.

²⁵ There had been a general layoff at the Hudson plant in December 1982, over 6 months before the election. This record also shows that an unfair labor practice charge filed by the Union alleging that the Company had unlawfully tampered with Gauthier's seniority because of her union involvement was later withdrawn or dropped by the Union.

Q. Did you think there would be a wage increase this year?

A. Yes, sir.

Supervisor DeGrenier further testified that Gauthier was concerned about her seniority, stated above, and the possibility of another layoff and raised the issue during subsequent conversations, but she repeatedly told Gauthier that she had no knowledge of any plant shutdown. However, as also indicated, DeGrenier did state that a union could not guarantee job security and that the negotiation process carried no guarantees of improved wages or benefits—that the parties would get together and would then “dicker” over insurance, vacation, and holidays.

I am in agreement that the General Counsel has introduced no credible evidence that DeGrenier threatened employees during her conversations with them; but on the contrary, the evidence adduced clearly establishes that DeGrenier presented an accurate, fair, and balanced approach in employee-initiated discussions of union matters and bargaining realities. See, e.g., *White Stag Mfg. Co.*, 219 NLRB 1246 (1975).²⁶ Moreover, several employees testified that their conversations with DeGrenier left them with no impression whether unions were good or bad, and even Gauthier admitted that DeGrenier told employees to vote their conscience: “I told them that it was very important that they all vote. It was their right to vote regardless of whichever way they voted. But please vote.”

In the final analysis, the union statements or replies admitted by DeGrenier did not constitute threats that the Company would not bargain in good faith; that employees would not receive the annual pay increases or would lose all benefits; or that the plant would be shut down; or that employees would be laid off if they selected the Union. Further, there is no evidence that any of the employees involved in the alleged incident, all of whom were committee members, were inhibited, restricted, or dissuaded in their support for the Union. DeGrenier's comments were merely the expression of personal opinion of a low-level supervisor and, under the circumstances here, no violative conduct can be attributed to her as she merely informed interested employees in some of the basic realities in the collective-bargaining process.

This allegation is dismissed in accordance with the above.

It is alleged that on or about June 17, 1983, Respondent removed William Rickard from the plant as a benefit to employees to induce them not to select the union to represent them, and that on or about July 7, 1983, Respondent discharged Rickard in order to discourage its employees from joining, supporting, or assisting the Union.

It appears that some 9 or 10 months ago from the date of the hearing, the Hudson plant installed a data process-

ing computer system of Texas Instruments in order to process invoices and to improve the transmission of payroll data, and Dillon testified that during early 1983, when this related matter came up for discussion, Rickard expressed interest in attending a training school on the use of this equipment so as to be familiar with it, and then, in turn, he would be in a position to train employees at the Hudson plant. Dillon stated that about the same time period, it was also necessary for Rickard to work with and acquire experience in processing new coating methods on certain machines, and during the latter part of June, Rickard was sent to Skokie for this purpose and then went to the Anchor Brush headquarters in Tennessee for training on the data processing equipment. Dillon testified that Anchor Brush set the time for the training and Rickard's trip during the last 2 weeks in June had nothing to do with the Union.

Bill Rickard testified regarding his whereabouts 2 weeks prior to the election and corroborates the testimony of Dillon:

Q. Just a couple other questions, Bill. Where were you during the two weeks prior to the election?

A. I was in Skokie and in Tennessee.

Q. Would you briefly tell the Judge what you were doing in Skokie.

A. In Skokie we were working on a problem we had with the 44 processing, that was type of resistor that we made, and I was working with the engineers on that out in Skokie. We also were working on another process which is called a 22 coating machine, which Skokie was putting together and because of Hudson being the only location that had that process, I was helping them develop the equipment. And I also went down to Tennessee to develop a program, computer program, that we had been working on for months, the T.I. system.

Q. For a Texas Instruments system?

A. Right.

Q. And when did the Hudson plant acquire that Texas Instruments system?

A. On, at least eight to ten months prior to me going out there.

Q. Prior to late June.

A. Right.

Q. And what were you learning in Tennessee about the Texas Instruments system, just briefly?

A. Well, what we were doing was, we had several manual reports that were being done in the office and because of the expense of the Texas Instruments system, we were trying to convert those over to a computer entry.

Q. And somebody from Hudson had to go to this seminar?

A. Yes.

Q. And how did you come to be the one?

A. Well, I actually volunteered because of my background in computer programming.

Q. You like working with computers?

A. Yes, I do.

²⁶ Sec 8(c) of the Act provides

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat or reprisal or force or promise of benefit

Rickard testified that he was informed a week or two prior to June 17 that he was going to Skokie and Tennessee by Dave Kluxdahl, the Respondent's general manager and director of operations

This record reveals that in March, prior to any union activity, Rickard received an unfavorable performance evaluation as plant manager, and Dillon testified that he was then aware that Rickard's continued employment was in jeopardy and later learned that management intended to terminate him. Rickard testified that, in late June, he was informed by Respondent's president, Max Sanders, that he was going to be discharged for poor performance, and thereafter received 2 weeks' severance pay

It is undisputed that Rickard was absent from the plant the last 2 weeks prior to the election, and that his discharge was announced to the employees after the election.²⁷ As aforesaid, Respondent claims that this was merely the result of good-faith business decisions. However, it is the General Counsel's position that these acts were done to undermine the employees' support for the Union

The General Counsel points out and argues that supposedly Rickard was sent to Tennessee to learn how to operate a computer despite the fact that the Company had the equipment for 10 months prior to this, and that he was sent to Skokie to assist in the conversion of a piece of machinery despite the fact that the manufacturing manager, Paul Moriarty, was in charge of this machine. Moreover, maintains the General Counsel, these trips were ordered on 2 weeks' notice irrespective of the fact that Respondent was seriously considering Rickard's discharge, and that the man who replaced Rickard was totally without credentials, and that these facts, together with what Respondent had to view as Rickard's responsibility for the union campaign, lead to the inevitable conclusion that his removal from the plant was a deliberate attempt to undermine support for the Union

Turning to Rickard's discharge—the General Counsel contends that a review of his final evaluation (R Exh 30) shows that Rickard was a "union organizing drive waiting to happen," and in particular it should be noted on his evaluation that he was rated as aggressive, not aware of the feelings of others, and someone who disregards personnel policies to accomplish short-term goals. It is also pointed out Rickard's testimony to the effect that he was not told about his discharge when he received his evaluation in March although Dillon described Rickard's position as then being in jeopardy, but it is clear that Respondent did not intend to discharge him at that time, and, argues the General Counsel, Respondent did not adduce a single event that occurred between March and July to support its discharge of Rickard. Therefore, in light of this, and the events discussed below, there can be no other conclusion but that Rickard was discharged in order to remove a prime incentive for the employees supporting the Union. Moreover, in late June, Respondent began an intense effort by means of unlawful solicitation of grievances to determine what was necessary for it to prevail against the Union, and it

had already recognized Rickard as a major reason behind the employees' desire to have a union and had temporarily removed him from the facility, and now, through Berg and Dillon's unlawful solicitation, it discovered that the depth of feelings against Rickard ran even deeper. Further, on June 22, Berg solicited Gauthier whether Rickard's discharge would induce the employees not to support the Union, and on the following day Dillon solicited from Gauthier that one of the major reasons the employees wanted the Union was because they could not communicate with Rickard. Additionally, contends the General Counsel, during the same week Dillon also found out from Jeannine Gagne that Rickard's actions and attitudes were "why we needed something," and James Berg also solicited from Dot Bezio that her major complaint was that Plant Manager Rickard was unfair

In concluding his argument, counsel for the General Counsel maintains that by this time Respondent had now ascertained from three members of the union organizing committee that Rickard was the major source of employee dissatisfaction, and his demise shortly followed. Moreover, the fact that the benefit (Rickard's discharge) was not conveyed until after the election, does not minimize its unlawful effect

In making my conclusions regarding these allegations, it is first pointed out that in my evaluations there is insufficient evidence in this record to show that Rickard's absence from the plant was related to the organizing campaign and the election. As indicated previously, Rickard left the Hudson plant approximately 2 weeks before the election, and spent this time consulting with company engineers at the headquarters in Skokie and attending a computer training course in Tennessee. It appears that both trips had been planned in advance but were delayed somewhat because of difficulty in finding a computer training facility that used the Company's new computer system. It was also established that while in Skokie, Rickard assisted company engineers in converting the Hudson plant's "44 Process" coating machine

The General Counsel states that this allegation is supported by the testimony of Kathy Gauthier regarding her conversation of June 22, with Respondent's materials manager, James Berg. However, as previously indicated, Berg credibly testified that he is not Rickard's supervisor, had no involvement in his absence from the plant, and specifically denied any talk with any employee about the possible discharge of Rickard. In this regard, Berg testified as follows

Q Did anytime during that conversation, did you ask her if it would help if Rickard was fired?

A No, never, sir

Q Did you ever talk with any employee about firing Rickard?

A No, Sir

Q Would it be your position to obtain Mr Rickard's termination?

A No

Q Organizationally, were you two more or less on the same level?

A We're all managers

Q Did he report to you or you report to him?

²⁷ See R Exh 5

A. He did not report to me. He reported to Bill Schneider.

Q. And who do you report to?

A. I report to Dave Kluxdahl.

Q. So you're in different chains of command.

A. Yes, sir.

Q. Did you mention anything about Mr. Rickard's continued employment during that conversation?

A. Never mentioned his name once.

In the final analysis, the theory advanced by the General Counsel is that Rickard was terminated so as to remove an unpopular condition of employment (Rickard), and which complaints about him had been voiced by the employees to management.²⁸

In the first instance, the record in the instant case clearly shows that the Company had adequate business justifications to send Rickard to Skokie and Tennessee, and there is no testimony in this record otherwise. There is some confusion in this record concerning the exact date when the actual *decision* was made by President Max Sanders to discharge Rickard and, therefore, it is somewhat difficult for the General Counsel to successful-

²⁸ In *Parker-Robb Chevrolet*, 262 NLRB 402 404 (1982), the Board noted, *inter alia*, as follows

... a supervisor's discharge is found to be unlawful if it is motivated by a desire to thwart organizational activity among employees. However, the justification for finding a violation and reinstating a supervisor who would otherwise be excluded from coverage under the Act is grounded upon the view that the discharge itself severely impinged on the employees' Section 7 rights. As noted above, the Board has found that, when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion. In contrast, although we recognize that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees, we believe that, when a supervisor is discharged either because he or she engaged in union or concerted activity or because the discharge is contemporaneous with the unlawful discharge of statutory employees, or both, this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act. Thus, it is irrelevant that an employer may have hoped or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider, and perhaps abandon, their own concerted or union activity. No matter what the employer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.

In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis. The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Sec 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

When this test is applied in the instant case, I am unable to conclude that the discharge of Plant Manager Rickard interfered with the right of employees to exercise their Section 7 rights or that his reinstatement is necessary to convey to employees the extent to which the Act protects these rights.

ly maintain that Rickard made the above trips when the Company was about to discharge him. The final evaluation sheet, also relied on by the General Counsel, merely shows that the Company had adequate reasons and justifications to fire Rickard whenever they decided to do so, but any other deductions or inferences therefrom must be deemed as pure speculation. There is also the argument that in June management made unlawful solicitations of grievances to find out what was necessary for the Company to prevail over the Union. However, in earlier sections of this decision, I have fully considered and detailed such allegations and have recommended dismissal of the same. Finally, the argument is made that management had now ascertained from three members of the organizing committee (Gauthier, Bezio, and Gagne) that Rickard was the major source of employee dissatisfaction. In this regard Berg testified that Gauthier complained to him about minor mechanical problems and that she "wasn't getting service." Under the totality of circumstances in this case, this statement by Gauthier can hardly be deemed a serious complaint about the plant manager. Dot Bezio testified that prior to the election she told Berg that Rickard "was unfair" because she had "bid off a job" but nevertheless Rickard had told her to take it. However, Berg only recalls several minor complaints mentioned by Bezio, as previously detailed herein, but there were no specific complaints about the plant manager. The General Counsel apparently maintains that the complaint Jeannine Gagne had as to Rickard was registered in a conversation she had with Dillon:

Q. You remember the election day on July 1st.

A. Yes.

Q. Prior to that election did you ever have any conversation with Mr. Dillon about the union?

A. Yes.

Q. When did that conversation take place?

A. The 25th of June. Around there.

Q. Where did it take place?

A. At my work area.

Q. Was anyone else present?

A. Not at my table, but surrounding me. Yes.

Q. Could you tell me what was said in that conversation? Tell me what Mr. Dillon said to you and what you said to Mr. Dillon.

A. Well, he was going by and I glanced at him, and I said: "I suppose you're not coming to see me," and he said: "Good morning." I said: "It's too bad about the mess we're in. It didn't have to happen. That's why we need something." For instance, Mr. Rickard, our plant manager, I asked him about my machines. They were down, and they had been down seven weeks. I had loads of work, a lot of red tags, and some of the other supervisors were coming to look for their work and I couldn't do a thing.

Again, it appears to me that while Rickard may have been unable on certain occasions to meet all the demands and needs of his employees, nevertheless, there is no substantial showing that his presence and performance as plant manager was in any way injurious to the extent or

scope as contemplated and suggested by the General Counsel. Moreover, it is again noted that the Board has generally refused to hold an employer responsible for the antiunion conduct of such a supervisor absent evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such a manner as to lead the employees to reasonably believe that the supervisor was acting on behalf of management. *Bennington Iron Works*, 267 NLRB 1285 (1983). By this record, I am not persuaded that Respondent encouraged, authorized, or ratified Rickard's activities or led the employees to believe he was acting on behalf of management even if there was a link to union activity.

The General Counsel has introduced no evidence in support of these allegations that were not fully rebutted by Respondent. In fact, Doris Massey, head of the organizing committee, agreed that Rickard was "all right." Rickard was absent from the plant on legitimate business trips (there are only inferences to the contrary), and was terminated on or about July 5 because of concerns about his job performance dating back to his last formal evaluation in February, and the employees were not even aware of his discharge until *after the election*, and under such circumstances, it is highly unlikely that employees were thereby induced not to select the Union. In accordance with the above, I also dismiss these allegations.

It is alleged that on or about May 12, 1983, Respondent, by Rickard, implied to an employee that the Union had killed a raise, and told the employee that if the Union gets in all benefits are up for grabs, and that on or about May 13, 1983, Rickard told employees that if the Union got in all benefits were up for grabs.

The General Counsel introduced testimony through Dot Bezio to the effect that on May 12, she showed Rickard a small sheet of paper that was being distributed by antiunion employees, and which stated, *inter alia*, that the Union had killed the annual pay increase,²⁹ and asked him if something had happened that she was not aware of. According to Bezio, Rickard then replied by telling her that "everything is up for grabs" and that everything has to be "renegotiated." The next day Bezio had another conversation with Rickard in which she attributed the same statements to him. Massey was present for this conversation and also testified to Rickard's statement—she stated that Rickard told them that all benefits "were up for grabs," and if the Union got in "everything we did would have to be renegotiated," that employees would not get any more benefits than what they did have, and that the Company would have the last say.

Rickard testified that in the conversation here in question, the subject matter of the Union was brought up and what would happen if the Union got in, and his response was "that all the benefits would have to be negotiated." Rickard then testified that this question was asked quite often during the campaign and he probably could have said either negotiate or renegotiate. Rickard denied saying anything about the Union killing the wage increase, nor did he say employees would lose their vaca-

tions or benefits, or that they would have to renegotiate to get what they had already.

The General Counsel argues to the extent the testimony between the parties differ, Bezio's and Massey's testimony should be credited as Rickard's testimony was evasive throughout his cross-examination, and that this is particularly shown by his testimony regarding Respondent's policy on absences. The General Counsel also notes that as both Bezio and Massey are still employed by the Respondent they would have much to lose by testifying falsely.³⁰

In closely examining the testimony pertaining to this allegation, it appears to me that on cross-examination Bezio was less certain of the substance of the conversation here in question. In contrast to her earlier testimony, Bezio stated that she did not remember Rickard saying anything about whether employees would get a pay raise in 1983, but could only recall the phrase "up for grabs" and that employee benefits would have to be "renegotiated" if the Union won the election. As indicated, Rickard confirmed that he was never asked to read or comment on the leaflet here in question. He credibly stated that Bezio initiated the conversations to "talk about the fact that nonunion people were distributing the leaflet on Company time," and *not* to discuss the contents of the leaflet. Moreover, that he did not even see the leaflet mentioned by Bezio, that he was not asked to read it, nor did he affirm or disclaim any of the contents.

Rickard also credibly denied ever using the phrase "up for grabs" in regard to employee benefits, but does recall telling Bezio that solicitation by both pro and antiunion groups was limited to periods before and after work, during breaks, and lunch, and it appears that both groups were subsequently monitored to assure that the distribution of literature was confined to the lunchroom and hallways, as previously indicated.

On May 13, union organizing committee members Bezio and Massey initiated a second conversation with Rickard to again discuss solicitation matters, and in which both claimed that Rickard repeated that if the Union got in, "everything we did have would have to be renegotiated" and all the benefits "were up for grabs," but Rickard's recollection of this conversation differs significantly from that of Bezio and Massey. Rickard stated that after discussing solicitation and other issues

Well, to the best of my recollection, I believe we got to the point of saying, well, what would happen if the union got in. And my response to that was that all the benefits would have to be negotiated.

Q Can you remember, there was a lot of discussion yesterday about negotiate or renegotiate, can you remember if you said negotiate or renegotiate?

A Probably, it came up in several conversations, I probably could have said both.

³⁰ The General Counsel stipulated that the antiunion group of employees were *not* agents of the Company. No charges have been pressed against the Company regarding the content of any campaign materials, and Rickard is no longer employed, having been terminated in earlier July 1983, as stated above, so any possible repercussions against Massey and Bezio because of their testimony has been considerably reduced or eliminated altogether.

²⁹ G C Exh 47

I am in agreement that whether Rickard said "negotiate" or "renegotiate" in either conversation is quite unimportant and immaterial within the context of this organizing campaign. The record and exhibits in this case show that employees initiated countless number of conversations and other communications about the Union prior to the election Rickard testified.

It was very hectic, in fact, from a productivity standpoint, it was atrocious. It seemed like nothing was getting accomplished other than union and non-union activity. It was very hard to stay productive during that period

The admitted remark by Rickard that if the Union got in all benefits would have to be negotiated or renegotiated appears to be quite innocuous considering the extensive and overall activities during the campaign. Moreover, there were only two employees involved in this instance, both of whom were leaders of the union organizing committee who presumably, and by reasonable inference, were strong supporters of the Union and not easily persuaded otherwise, and there is no evidence on the record that they repeated Rickard's comments to any other employees. Further, it is clear from the testimony that neither Massey, Bezio nor Rickard understood any real distinction between negotiate and renegotiate in the collective-bargaining context. When asked to articulate the distinction between the two, Massey stated:

When you negotiate for something you originally ask for it. All right? I think When you negotiate you talk about it. Okay? And it's either given to you or not. When you renegotiate for something you bring it back in and rediscuss it.

Rickard offered a similar definition:

Q. What does the word negotiate mean to you?

A. Negotiate to me would mean to sit down and collectively agree on something.

Q. What does the word "renegotiate" mean?

A. Just about the same thing except that you're reagreeing on something that was already agreed on.

Based on the above-credited testimony of Rickard, it is clear that he did nothing more than convey to Bezio and Massey the basic requirements of Sections 8(d) and 8(a)(5) of the Act. In the final analysis, there is no evidence that the admitted comments by Rickard were improper or had any coercive effect under the prevailing circumstances here.³¹ It is also recommended that the allegations be dismissed.

It should be specifically pointed out and noted that all facts found are based on the record as a whole and on my observation of the witnesses. The credibility resolu-

tions have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, the weight of the evidence, admitted facts, reasonable inferences, and the teaching of *NLRB v. Walton Mfg Co.*, 369 U.S. 404 (1962). As to those testifying in contradiction of the findings their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.* As I have indicated Respondent's supervisors, managers, and other witnesses impressed me as candid, frank, straightforward, and believable witnesses who recalled with considerable clarity, consistency, and specificity what they said and heard during the discussions and events here in question, and in my evaluations made no attempt to fabricate their descriptions of what occurred as indicated in several instances by their open and frank admissions.

On the other hand, I have found several of the witnesses for the General Counsel to be hesitant, evasive, and unconvincing witnesses, and in answers given on cross-examination this becomes quite obvious, as I have already indicated in various instances. Therefore, on the basis of the above, on my observations of the demeanor of the witnesses, the inherent probability of the testimony and events in all the relevant circumstances, and on the basis of the record as a whole, I have credited the testimony of the witnesses for the Company where it is in conflict with that of the witnesses for the General Counsel.

In view of my findings that there was no violative conduct by Respondent within the allegations of the complaints, I will not consider the 8(a)(5) majority card issue as there is no basis whatsoever for setting aside the election and/or for a *Gissel* bargaining Order, as requested by the General Counsel in his proposed remedy.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to sustain its burden of proof for any allegation in the complaints.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation³²

ORDER

The complaint is dismissed in its entirety.

³¹ There is no allegation or testimony that Rickard told Bezio and Massey that negotiations would "start from scratch," and the General Counsel was unsuccessful in his attempt to attribute such remark to Rickard, and it is quite obvious that Bezio and Massey drew no such inference

³² If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes