

The All American Gourmet and Service Employees International Union, Local 579, AFL-CIO
Cases 10-CA-22144-1, 10-CA-22144-3, 10-CA-22144-5, 10-CA-22305, 10-CA-22339, and 10-RC-13308

February 14, 1989

**DECISION, ORDER, AND
CERTIFICATION OF
REPRESENTATIVE**

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

On February 9, 1988, Administrative Law Judge Howard I Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions,² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The All American Gourmet, Atlanta, Georgia, its officers, agents, successors, and as

¹ The Respondent asserts that the judge's resolution of credibility findings of fact and conclusions of law are the results of bias. After a careful examination of the entire record we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v Pittsburgh Steamship Co*, 337 U.S. 656, 659 (1949): "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact. Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions 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 note that the judge erroneously stated that the Respondent's work rules permitted rather than prohibited distribution of literature in working areas or during working time.

² In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by threatening to call the police on an employee if he did not quit handbilling on the Respondent's premises, we distinguish the instant case from *Nice Pak Products*, 248 NLRB 1278 (1980), cited by the Respondent in support of its contention that no unfair labor practice should be found because its manager subsequently told the employer that he was allowed to handbill in that location. In *Nice Pak*, unlike here, the employer did not threaten to call the police. Further, the employer's conduct in *Nice Pak* was not analyzed under the standard for repudiations of coercive conduct set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

³ In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Respondent's objections in Case 10-RC-13308 and to certify the Union's status as the collective bargaining representative of the Respondent's employees in the unit found appropriate.

signs, shall take the action set forth in the Order as modified.

1 Substitute the following as paragraph 1(g)

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

2 Substitute the following as paragraph 2(h)

"(h) Offer full and immediate reinstatement to the following employees listed below who have not yet been reinstated to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges and make them whole with interest for any loss of earnings or benefits they may have suffered by reason of the Respondent's unlawful layoffs of them on February 23, 1987

| | |
|------------------|-------------------|
| Ethel Hill | Kinh Tua Nguyen |
| Linda Wright | Dieu Minh Hoang |
| Paulette Ellison | Minh Pham Hoang |
| Valerie Berry | Charles Boyd |
| Scedro Williams | Veester Murphy |
| Mary Davenport | Celstine Lawrence |
| Sherry Nelson | Penny Stenbridge |
| Charlanda Wyser | Ida Howell |
| My Diep | Canetra English |
| Arthur Thomas | Gwen Wright |
| Patricia Jones | Brenda Parks" |

3 Substitute the attached notice for that of the administrative law judge.

**CERTIFICATION OF
REPRESENTATIVE**

IT IS CERTIFIED that a majority of the valid ballots have been cast for Service Employees International Union, Local 579, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that we will call the police on them because they are engaged in protected concerted activities.

WE WILL NOT prohibit employees from discussing the terms and conditions of their employment with anybody except our supervisors

WE WILL NOT discourage membership in Service Employees International Union, Local 579, AFL-CIO, or any labor organization, by discharging employees because of their union or other protected concerted activities

WE WILL NOT unilaterally change our disability policies or our policy on periodic raises to employees, nor will we unilaterally lay off employees, without first giving the above-named Union notice thereof and an opportunity to bargain over these matters

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL offer Ricky Reeves and Mike Collier immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful discharges of them, with interest

WE WILL remove from our personnel records all references to our unlawful actions concerning Ricky Reeves and Mike Collier, and notify them in writing that this action has been taken and that evidence of such action will not be a basis for future personnel actions against them

WE WILL withdraw our rescission of our former policy of paying disability pay for the first 3 days of disability, reinstate such policy, and make whole with interest any employees who suffered losses because of our unilateral change in such policy on June 16, 1986

WE WILL offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed to any of the following employees who we unlawfully laid off on February 23, 1987, that we have not yet reinstated, and make them whole with interest for any loss of earnings or benefits they may have suffered as reason of the Respondent's unlawful layoffs of them on February 23, 1987

| | |
|------------------|-------------------|
| Ethel Hill | Kinh Tua Nguyen |
| Linda Wright | Dieu Minh Hoang |
| Paulette Ellison | Minh Pham Hoang |
| Valerie Berry | Charles Boyd |
| Scedro Williams | Veester Murphy |
| Mary Davenport | Celstine Lawrence |

| | |
|-----------------|------------------|
| Sherry Nelson | Penny Stembridge |
| Charlanda Wyser | Ida Howell |
| My Diep | Canetra English |
| Arthur Thomas | Gwen Wright |
| Patricia Jones | Brenda Parks |

WE WILL give the above named Union notice and an opportunity to bargain before we institute any future changes in our disability or periodic raise policies, or before we lay off employees

WE WILL notify Amelia Thompson in writing that, on her return to employment with us, if any, she is free to discuss the terms and conditions of her employment with anybody

THE ALL AMERICAN GOURMET

Victor Alan McLemore Esq for the General Counsel
Richard R Boisseau and David P Phippen Esqs (Kilpatrick & Cody) of Atlanta, Georgia for the Employer and the Respondent
Robert Sarason Regional Coordinator and *Linda Riggs* International Field Representative, for the Petitioner and the Charging Party

DECISION

STATEMENT OF THE CASE

HOWARD I GROSSMAN, Administrative Law Judge
The petition in Case 10-RC-13308 was filed on 7 April 1986 by Service Employees International Union Local 579 AFL-CIO (the Petitioner the Charging Party or the Union) Pursuant to a Stipulation for Certification on Consent Election Agreement an election by secret ballot was conducted on 23 May 1986 among the employees in the appropriate unit to determine the question concerning representation¹ On conclusion of the balloting the parties were furnished a tally of ballots which shows that of approximately 371 eligible voters, 201 cast valid votes for the Petitioner 131 cast valid votes against the Petitioner, and 12 cast challenged ballots The challenged ballots are insufficient in number to affect the results of the election

On 2 June 1986 the All American Gourmet Company (Employer or Respondent) filed timely objections to the election and a copy was served on the Petitioner After an investigation of the issues raised by the objections the Regional Director for Region 10 on 1 July 1986, found

¹ The stipulated appropriate unit in the representation case was

All production and maintenance employees employed by the Employer at its Atlanta Georgia facility including all maintenance mechanics maintenance crew leaders tool crib attendants tool crib leaders sanitation aides sanitation crew leaders food preparers food preparer leaders cooks cook leaders material handlers material handler leaders production assemblers machine operators line attendants qc inspectors and line leaders but excluding all other employees temporary employees office clerical employees guards and supervisors as defined in the Act

In the unfair labor practice proceeding the pleadings as amended at the hearing add the Employer's street address so that the stipulated unit is All production and maintenance employees employed by the Employer Respondent at its 5475 Bucknell Drive facility in Atlanta Georgia

that the objections raised no material or substantial issues affecting the results of the election. On 16 July 1986 the Employer timely filed exceptions to the Regional Director's Report on Objections. On 5 March 1986 the Board found that substantial and material issues of fact and law had been raised regarding the conduct described in the Employer's Objections 1-6 and 8 which could best be resolved at a hearing.

The original charges in Cases 10-CA-22144-1 -3 and -5 were filed on 10 November 1986 by the Union, the original charge in Case 10-CA-22305 on 11 February 1987 and the original charge in Case 10-CA-22339 on 24 February 1987. After previous issuance of a consolidated complaint, an amended consolidated complaint issued on 27 March 1987. As further amended at the hearing, it alleged that the Respondent threatened its employees engaged in distribution of union literature in nonwork areas during nonworktime and prohibited its employees from discussing terms and conditions of employment with anyone but Respondent, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleged that the Respondent discharged employees Ricky Reeves and Mike Collier because of their activities on behalf of the Union and because they engaged in concerted activities with other employees for mutual aid and protection, in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaint alleged that the Respondent unilaterally changed its disability pay policy without consulting the Union, refused to bargain with the Union over its denial of a wage increase to employees, and unilaterally laid off various employees without consulting the Union—all in violation of Section 8(a)(5) and (1) of the Act.

On the same date as the complaint, 27 March 1987 pursuant to the Board's aforesaid Order in Case 10-RC-13308, the Regional Director for Region 10 issued orders consolidating the representation and unfair labor practice cases for hearing.

A hearing was held before me on the aforesaid matters on 12-15 May 1987 in Atlanta, Georgia. Thereafter, the General Counsel, Petitioner/Charging Party and Employer/Respondent filed briefs. Subsequently, the Employer/Respondent submitted a letter objecting to certain statements in the General Counsel's brief. On the entire record and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I JURISDICTION

The Employer/Respondent is a Delaware corporation with an office and place of business located at Atlanta, Georgia, where it is engaged in the production and distribution of food items. During the calendar year preceding issuance of the amended consolidated complaint, a representative period, the Employer/Respondent sold and shipped from its Atlanta, Georgia facility food products valued in excess of \$50,000 directly to customers located outside the State of Georgia. The Employer/Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III THE OBJECTIONS TO THE ELECTION

A Summary of the Objections

The Employer's objections are basically that union agents engaged in unlawful electioneering in and around the polling area, that the Union circulated campaign materials containing forged signatures, that completed ballots were improperly exposed to employees, and that the union agents in general acted improperly and interfered with the process of the election.²

A threshold question raised by the Employer is whether individuals who assertedly engaged in such conduct were union agents so that their conduct is attributable to the Union. The Employer bases its argument that such attribution can be made on its contention that certain of the individuals who allegedly engaged in objectionable conduct were members of an in-house organizing committee (IHOC), and that some were also union observers at the election.

² The Employer's brief in support of exceptions to the Regional Director's report on objections, RD Exh 1(i) at 2-3. As condensed in the Employer's brief, Objections 1, 2, 3, 4, and 6 are as follows:

1 [O]ne of Petitioner's organizers engaged in impermissible electioneering, campaigning, and conversation with prospective voters who were in line waiting to cast ballots to vote for Petitioner. He also entered the polling area to survey the situation there and spoke to one of the Petitioner's observers in the polling area while several prospective voters looked on.

2 [T]wo of Petitioner's observers communicated and conversed with each other with prospective voters and with representatives of Petitioner in the polling area itself.

3 [O]ne of Petitioner's observers who was assigned to release voters repeatedly engaged in improper electioneering and campaigning and encouraged numerous prospective voters to vote for the Petitioner as they left their work stations to vote.

4 [S]everal employees, including one of Petitioner's organizers, openly displayed to numerous prospective voters in the polling area election ballots marked with an X in the yes box. Further, one employee in the polling area boisterously called the attention of prospective voters to his ballot and created a significant disturbance. Also, one of Petitioner's organizers voted in the morning polling period but returned to the polling area in the afternoon and had to be ordered to leave the area by the National Labor Relations Board agent in the presence of numerous prospective voters as they prepared to cast ballots.

6 Petitioner, through its representatives and supporters, circulated a piece of campaign literature containing a number of employee signatures indicating that the listed employees had signed the document, were voting yes, and had authorized Petitioner to use their names on the document. In fact, numerous employees whose signatures appeared on the document had not signed the document or authorized the use of their names, and their signatures on the document constitute forgeries. Many of the listed signatures were of names of former employees [ID at 3-4].

Objections 5 and 8 are conclusory allegations that Petitioner, by this conduct, considered individually and cumulatively, interfered with employees' rights to freely select a bargaining representative (RD Exh 1(f)).

B The Organizational Campaign and the Establishment of the IHOC and its Functions

The chief organizer of the campaign was Linda Riggins International field representative. She was assisted by other union officials—Orah Bilmes, another International field representative, Robert Sarason regional coordinator and Nancy Lenk Riggins held meetings, passed out authorization cards and did leafleting in front of the plant.

Riggins testified that the IHOC consisted of any workers who attended meetings passed out leaflets, and got other employees to sign union authorization cards. Its employee members distributed leaflets including some to the Employer, solicited employees to sign authorization cards and petitions, obtained employee addresses and telephone numbers, participated in union skits at meetings and, with a Union rep, visited employees at their homes. Riggins testified that IHOC members did not call meetings or make major campaign decisions. Some of them signed the tally of ballots after the election.

Riggins and another union official prepared a document with the words Organizing Committee at the bottom. It contains 25 signatures. The document states that the signatories are on the Organizing Committee and that they had authorized the Union to use their names to show their support for the Union. The document contains various arguments favoring the Union. It also contains a reminder of a forthcoming union meeting.³ The Union distributed copies of this document to employees at a union meeting.

The Employer submitted union documents distributed subsequent to the election not to prove improper electioneering, but to establish that the IHOC was the Union's agent. One document states that SEIU Local 579 and the Organizing Committee are fighting for guaranteed wages and another document links the two together. Several documents with IHOC's name announce forthcoming union meetings. One with the Union's name shows several raised fists, said by the Employer to be a union symbol. The Union and the Committee for a Fair Contract otherwise unidentified are shown to have the same telephone number.⁴

C Alleged Objectionable Conduct During the Election

1 Summary of the evidence

a Arrangements for the election

There were two voting sessions one in the morning and one in the afternoon. Employer Official Rick Shannon testified that the parties were concerned that noise in the plant might prevent employees from hearing an announcement on the public address that it was time to vote. Accordingly the parties agreed that the releasing observers would carry a sign saying Time to Vote.

There is conflicting evidence on the number of signs carried by the releasing observers. The Company had the

same observers for both voting sessions and Anthony Chapman was the Company's releasing observer. Chapman asserted that there were two signs and that he carried one of them.

The Union had different observers for the two sessions. The Union's releasing observers for the morning and afternoon sessions, Precious Jones and Frances Young, testified that there was only one sign and that they, the union observers, carried the sign. Young said that it was possible that the Company observers carried a sign. Company Official Shannon testified on cross examination that there was only one Time to Vote sign.

There is further conflicting evidence whether the releasing observers were authorized to say anything to the voters. Company observer Chapman contended that, if the voters did not see the sign the observers were authorized to say the word Attention. Company Official Shannon contended that various words were bantered about, and that the Board agent finally agreed on the word, Attention. Union observer Precious Jones denied that the observers were allowed to say anything. Union observer Frances Young affirmed that he said nothing while releasing voters and so far as he knew, no one else did either.

The Board's written instructions, given to the observers, admonish them not to help any voter or electioneer or to argue during the election.⁵

b Alleged objectionable conduct of union observer Precious Jones—Objection 3

Precious Jones was a union observer during the morning session and signed the tally of ballots. What purports to be her signature appears on the Organizing Committee document. There is no other evidence of union activities by Jones except Riggins' general testimony about the activities of IHOC members.

Company observer Chapman testified that he had been actively opposed to the Union's campaign since it started. Chapman and Jones together released voters during the morning session. According to Chapman he and Jones were releasing voters in the Blancher area about 30 feet from the voting area. Chapman could not recall whether he and Jones shouted Attention. The sound would have carried into the voting area. Chapman testified that employee Grady Langford asked Jones

How's it going? Jones nodded affirmatively. Chapman then turned to show his sign to voters and, when he turned back Jones was flashing hand signals to give a count of how the election was going. Asked to describe what Jones did, Chapman fully extended his right hand and fingers partially extended his left hand shook his right hand, and pointed at himself with his index finger. As indicated Chapman contended that he and Jones each had a sign.

Jones denied that Langford asked her how it was going or said anything else to her. She denied that she gave any signals or flashed her hands. Langford did not testify.

³ Emp Exh 1

⁴ Emp Exh 13

⁵ P Exh 11

Jones, as indicated, affirmed that there was only one 'Time to Vote' sign. It was a large sign, and she held it with both hands. Jones further declared that she did not try to keep track of how the vote was going. The voters placed their ballots in the ballot box, and she does not have X-ray vision. She acknowledged that the cooks had voted by 6-14, but denied that she knew the cooks were strongly for the Union. Consistent with her testimony about general instructions, Jones denied that she and Chapman said "Attention"—they were not allowed to say any words.

Chapman also asserted that, when he and Jones were releasing voters in another area, she raised her hand with the Fist of Unity. Chapman identified this as a sign used by most union supporters. As indicated above, some of the union documents show this sign. Jones was asked whether she was familiar with the salute of raising a clenched fist, and said that it means "Right On." She denied that she ever gave this sign during the election—that's not me, she said.

Chapman further contended that, when he and Jones were releasing voters at the shipping dock, employee Conrad Wells gave the Fist of Unity, and Jones returned it. Wells then asked Chapman whether he was also for the Union. Jones shook her head and touched Chapman's company observer badge. Other employees were present that could have seen this. Jones denied that Wells spoke to her before he reached the voting area. He was talking when he entered the voting area, and Jones put her finger to her lips and said "Sssh." Wells did not testify.

*c Alleged objectionable conduct of union observer
Natasha Kelly—Objection 2*

Natasha Kelly, together with Precious Jones, was one of the Union's observers during the morning session and signed the tally of ballots.⁶ What purports to be Kelly's signature appears on the Organizing Committee document. There is no other evidence of union activities by Kelly except Riggins' general testimony about the activities of IHOC members.

Company observer Chapman asserted that on seven occasions he saw Kelly talking to employees waiting in line to vote. On cross-examination, Chapman admitted that it was the employees who initiated the asserted conversations and that although he could not hear what Kelly said, she was moving her lips. These conversations lasted a few seconds. Although Chapman did not bring these matters to the attention of the Board agent, the latter on "several occasions" told Kelly not to talk. Although not asserted by Chapman, Precious Jones testified that the observers did not talk to one another.

Kelly acknowledged that the Board agent's instructions were that the observers were not to talk to voters. She denied that any voters attempted to talk to her or that she spoke to them. Kelly further denied that she was reprimanded by a Board agent. The Regional Director's

⁶ The third union observer during the morning session was Rosemary Graham.

representative signed a certificate that the voting had been fairly conducted.⁷

d Alleged objectionable conduct of employee Steven Hill (Objection 1)

What purports to be Steven Hill's signature appears on the organizing committee document. According to company observer Chapman, he knew Hill to be a union supporter because, in the breakroom, Hill told employees what the Union could do for them. Company observer Lasanja Williams also identified Hill as a union supporter.

Company observer Chapman contended that Hill, after voting during the morning session, came into the waiting area during second shift voting time and said "Right on, y'all are going to vote my way, aren't you?" The curtain to the voting area then opened, and Chapman assertedly saw Hill talking to employees waiting in line to vote. A few minutes later, Hill came into the voting area and whispered to an observer whom Chapman believed to be Natasha Kelly. After the luncheon recess at the hearing, Chapman changed his testimony and said that the observer was not Natasha Kelly.

After a review of the identities of the Union's afternoon observers, Chapman denied that it was either Ricky Reeves or Frances Young to whom Hill spoke. Chapman therefore concluded that it had to have been Deborah [Wright].

Another company observer Lasanja Williams gave a different version of this asserted incident.⁸ She heard Hill talking through the curtain, but did not hear what he said. Hill then put his head through the curtain a few times and came in. He spoke to a union observer whom Williams identified as Precious Jones. A Board agent asked Hill to leave and he did so, but Williams could hear him talking outside the voting area. There is no mention of this incident in affidavits that Williams submitted to the Employer on 9 June 1986.⁹

Precious Jones and Natasha Kelly were union observers only during the morning session. Both denied talking to voters during that session. The union observers for the afternoon session were Frances Young, Ricky Reeves, and Deborah Wright. Young and Reeves said that they knew Hill but denied seeing him during that session. Wright testified that Hill peeped through the curtain from the outside. When he did so, company observer Chapman jumped up to report the matter to the Board agent. However, before anything further occurred, Hill left. Wright did not hear Hill say "Right on, you're going to vote my way, aren't you?" or anything else.

e Alleged objectionable conduct of employee Barbara Saratt—Objection 4

What purports to be employee Barbara Saratt's signature appears on the organizing committee document. There is no other evidence of her union activities except

⁷ P. Exh. 9.

⁸ The third company observer was Kim Shaw.

⁹ P. Exh. 8.

Riggins general testimony about the function of IHOC members

Saratt voted during the morning session Company observer Lasanja Williams asserted that Saratt placed her ballot inside the ballot box but that Williams could see that she had voted Yes Other employees were present but Williams did not know whether any of them saw this On cross examination, Williams agreed that Saratt's ballot was slightly folded Williams contended that she never heard the Board agent give instructions to fold ballots before placing them in the ballot box Williams further asserted that either company observer Anthony Chapman or Kim Shaw told her that he had seen Saratt's marked ballot Chapman did not corroborate this testimony and Shaw did not testify

Saratt's testimony about her voting is unclear After repeated questions and examination of a diagram of the voting area, she appears to have told Petitioner's counsel that she marked her ballot in an enclosed voting area but folded it just prior to placing it in the ballot box However on recross examination by the Employer's counsel Saratt testified that she folded her ballot at the place marked on the diagram at the enclosed place for voting and then placed it in the ballot box In any event, Saratt denied showing her ballot to anybody The three union observers during the morning session—Jones Kelly and Graham—denied seeing Saratt openly display her ballot

f Alleged objectionable conduct of employee Linwood Barber—Objection 4

What purports to be Linwood Barber's signature appears on the organizing committee document There is no other evidence of his union activity, except Riggins general testimony about the functions of IHOC members

Company observer Chapman testified that Barber after having voted in the morning session returned to the voting area and was told by a Board agent to leave

Barber testified that he was assisting an employee who had been out for 3 weeks because of an injury At about 2 p m he showed this employee to the voting area up to but not through double doors leading to the voting area Barber denied that any Board agent asked him to leave Ricky Reeves a union observer during the afternoon session denied seeing Barber

g Alleged objectionable conduct of employee Ivan Jeter—Objection 4

Employee Ivan Jeter worked on the first shift Company observer Chapman testified that Jeter after voting placed his ballot in the ballot box pulled it back up, and said, I've got to check and see if I done voted right According to Chapman, Jeter then opened his ballot and held it up showing a mark in the Yes box so that other prospective voters could have seen it Chapman agreed that he himself had already voted

Jeter testified that he voted in the voting booth folded the ballot inside the booth and then placed it in the ballot box He denied pulling it back out after placing it in the box Jeter also testified that he did not say anything out of the ordinary Asked to clarify this on

cross examination Jeter stated that he did not say anything except to give his name when asked Union observer Precious Jones affirmed that she knew Jeter, and denied that she saw him openly display his ballot with an

X marked in the Yes box Union observer Natasha Kelly denied that she heard any employee say, I've got to make sure I done voted right Kelly also denied seeing any employee openly display his ballot or pull his ballot out of the ballot box after placing it inside

2 Factual analysis

a Precious Jones

I credit Jones uncontradicted and partially corroborated testimony that she was carrying a long Time to Vote sign with both hands¹⁰ In these circumstances it would have been physically impossible for Jones to have extended both arms in a signal to employee Grady Langford as Chapman contended Further, I note the inherently reasonable nature of Jones testimony that she had no way of knowing how the voting was proceeding In addition Jones appeared to be a more truthful witness than Chapman For these reasons plus the fact that the Employer did not call Langford as a witness I reject Chapman's testimony and credit Jones denial that she engaged in the alleged conduct

For essentially the same reasons, I reject Chapman's testimony that Jones raised the Fist of Unity while releasing voters either independently or in response to such a sign from employee Conrad Wells Although it would have been easier to raise one arm rather than two the fact that Jones required both hands to hold the sign is a factor suggesting that Chapman's testimony is erroneous Jones testimony about the fist — it's not me — was an apparently truthful description of her own reaction to the union salute

Although Jones did not specifically deny that Wells asked Chapman any questions such denial is implicit in her testimony including the description of Wells talking in the voting area¹¹

For these reasons I conclude that Jones did not engage in any of the conduct alleged by Chapman¹²

b Natasha Kelly

I do not credit company observer Chapman's testimony that union observer Kelly spoke to voters on any occasion much less seven occasions, or that the Board agent on several occasions asked Kelly not to talk I base

¹⁰ The testimony of Jones and Young corroborated by Employer Official Shannon tends to establish that there was only one sign and that Chapman's assertion that there were two signs should be rejected However it is not necessary to establish the number of signs because the evidence clearly shows that Jones was carrying one

¹¹ Assuming arguendo that Wells did ask Chapman whether he was also for the Union Jones asserted gesture of touching Chapman's company observer badge did not as the Company argues tend to demean Chapman Rather it would have been a simple nonverbal gesture identifying Chapman's status in the election procedure In any event I note that the Company did not call Wells as a witness and find that Jones did not engage in this conduct

¹² I find it unnecessary to determine whether the observers were authorized to say the word Attention to voters Chapman could not refer member and Jones denied it

this finding in part on Kelly's denial because she appeared to be a more truthful witness than Chapman. I note also that Chapman did not bother to protest this matter to the Board agent and that the latter signed a certificate that the election had been fairly conducted.

c Steven Hill

The Employer's witnesses supplied inherently contradictory testimony whether Hill could be heard outside the voting area saying anything, much less asking voters to vote his way. Although Hill supposedly said this before coming into the voting area, according to Chapman, Williams could not hear what he said. Williams did not mention the asserted incident in a pretrial affidavit. Further, Deborah Wright, who was a more truthful witness than either Chapman or Williams, testified that she did not hear Hill say anything.

The Company's evidence that Hill came in during the afternoon session and spoke to a union observer is even more contradictory. Company observer Williams selected Precious Jones as the union observer. However, this would have been impossible, because Jones was not present during the afternoon session. Chapman's first choice—Natasha Kelly—was also a morning observer not present in the afternoon. Chapman's final conclusion that it had to have been Deborah Wright was reached by a logical process rather than direct knowledge, which does not inspire confidence.

Crediting Wright, I conclude that union supporter Steven Hill, after having voted during the morning session, put his head through the curtain during the afternoon session and then left when company observer Chapman jumped up to protest. There is no credible evidence that Hill said anything.

d Barbara Saratt

I do not credit company observer Williams' testimony that Saratt displayed a "Yes" vote on her ballot because (a) Saratt's testimony, although confusing, finally settles on the voting booth as the place she folded her ballot, after Saratt examined a diagram of the voting area; (b) the three union observers denied that Saratt displayed her ballot; and (c) Williams admitted that Saratt's ballot was slightly folded. Although Williams asserted that company observer Chapman or Shaw also told her about the visibility of Saratt's ballot marking, neither of them corroborated her—Chapman was a witness.

e Linwood Barber

Barber was a more truthful witness than Chapman and I credit his testimony that he helped an employee reach the voting area but did not enter it. I rely also on the fact that Barber's testimony was corroborated by another witness and the fact that the Board agent signed a certificate that the election had been fairly conducted.

f Ivan Jeter

The consistent testimony of Jeter and union observers Kelly and Jones has greater probative weight than Chapman's uncorroborated assertions. I note also the difficulty if not impossibility of retrieving a ballot once it has been

fully placed through the slot into the ballot box—as Jeter did according to Chapman. Relying also on the Board agent's certificate and the absence of any evidence that this asserted incident was protested during the election, I conclude that Jeter did not engage in the conduct attributed to him by Chapman.

D The Alleged Forgeries—Objection 6

1 Summary of the evidence

a The Union's election day campaign leaflet

On election day the Union distributed a large leaflet with purported signatures of over 200 employees on the front and reverse sides. The front side had a diagram and printing at the top, including an authorization to use the signatories' names on a leaflet.¹³

This leaflet was a compilation of numerous other documents characterized as petitions by one union witness. According to Union Official Riggins, the Union started with a petition containing 17 original signatures and the legend at the top described above. Copies of this document were made, and were used to obtain additional signatures on other petitions. These in turn were copied and the process repeated. The petitions are in evidence. The numbers of names on them vary but they all begin with the same names.¹⁴ Although Riggins did not personally observe the solicitation of all the signatures, she testified that, to her knowledge, all signatures were genuine and none was secured without the legend at the top. She told union supporters obtaining signatures to make sure that the employees read the top of the petition.

Some of the petitions contain an irregular line which with some gaps extends across the petition between the legend and the first names. Although this line is lighter on some petitions and darker on others, it has the same contour on all petitions and just touches the top of the first letter of the first name of the signatory in the right-hand column.¹⁵ Other petitions do not have this line. Riggins testified that this line on occasion was made by the Union's photocopy machine, for unknown reasons. On other occasions the machine did not make the line. Union employee Nancy Lenk, who actually produced the leaflet, was unaware of these lines.

Lenk did the layout for the leaflet. She testified that she made copies of the various petitions, cut up the copies and pasted signatures onto two larger pieces of paper. This document is in evidence, and shows the pasting of various signatures onto the larger two pages.¹⁶

¹³ The top of the front page of the leaflet contained the statement "We Are Voting Yes." This was followed by a diagram across the page consisting of raised fists. Thereafter the following statements appeared:

"We Are Voting Yes for Three Simple Reasons: 1) Dignity and Respect 2) Job Security Eliminate the Point System 3) Money"

"We authorize the Union to use our names on a leaflet since we want the All American Gourmet Workers to know that we are voting Yes for SEIU Local 579. We want the All American Gourmet Workers to stick together!" [Emp. Exh. 2.]

¹⁴ Emp. Exhs. 3-12. P. Exhs. 13(a)-(y).

¹⁵ Deborah Wright.

¹⁶ P. Exh. 12.

Prior to pasting them on Lenk checked the *Excelsior* list to make sure that all names appearing on the leaflet appeared on that list. Lenk then created the leaflet by photocopying the two pages of the layout on the front and back of one large sheet of paper.¹⁷ Employer Official Shannon testified that six of the names on the leaflet were those of individuals who were no longer employed at the time of the election, and were thus ineligible to vote.

b. *The Employer's evidence in support of the alleged forgeries*

(1) Todd Pierce

Pierce testified that a signature appearing to be his on the leaflet was actually his signature.¹⁸ He also agreed that a signature purporting to be his, which appeared on a petition, was his signature. This petition contains the irregular line described above.¹⁹ Although Pierce stated that both signatures were his, he contended that he only signed the leaflet and professed not knowing how his signature came to appear on the petition.

(2) George A. Fordham

What seems to be George A. Fordham's signature appears in the second column on the reverse side of the leaflet. On direct examination, Fordham denied that this was his signature, although he agreed that, while in a hospital, he did sign a document for Union Official Sarason.

On cross examination, Fordham could not remember the date that Sarason came to visit him in the hospital. He was then on medication and was concerned about being fired. He agreed that Sarason told him that the Union wanted to see how many people supported the Union, and contended that he signed a blank piece of paper for Sarason. He was shown a petition on which his purported signature appears together with 17 other signatures. Fordham's name appears at the bottom of the right hand column, underneath four other names. The above described irregular line appears on his document.²⁰

Fordham admitted that the signature on the petition was his, but denied that he signed the document. Instead, Fordham maintained, he signed a blank piece of white paper about 8 by 11 inches in size. Although this paper was folded when Sarason took it out of his pocket, the union official completely unfolded it. Fordham held it in his hand and examined it. Fordham said that he placed his own signature on this document somewhat down from the top. There were no other signatures on the document.

Fordham was then asked to sign his name on a blank piece of paper at the hearing and did so.²¹ I conclude

¹⁷ Lenk used a larger copying machine in another office for this purpose.

¹⁸ Pierce's name minus the last three letters of his last name appears near the bottom of the last column on the reverse page of Emp. Exh. 2.

¹⁹ P. Exh. 1.

²⁰ P. Exh. 2.

²¹ P. Exh. 3.

that what appear to be Fordham's signatures as they appear on the leaflet, the petition, and the slip of paper signed by Fordham at the hearing were all signed by the same individual.²² Fordham stated he did not support the Union.

(3) Carmen E. Head

Head's apparent signature appears on the reverse side of the leaflet. Head denied seeing the leaflet before the hearing and denied that she signed it. She did sign a petition for blue authorization card, allowing the Union to come in, and a few months after the election, a petition for maternity leave.

Head was shown a petition bearing numerous signatures with Head's name appearing in the first column. This document has no irregular line below the legend at the top.²³ On cross examination, Head agreed that this was her signature. On redirect examination, she denied that she signed this document or any document with raised fists authorizing the Union to use her name in a leaflet. On further examination, she affirmed that the signatures on both the leaflet and the petition were hers. Head was asked to sign a blank piece of paper at the hearing and did so.²⁴ I conclude that the signatures purporting to be those of Head appearing on the leaflet, the petition, and the blank piece of paper actually signed by Head at the hearing are all signed by the same individual.²⁵

(4) Marlon V. Baskin²⁶

What seems to be Baskin's signature appears in the second column on the reverse side of the leaflet. Baskin denied that he signed this document but affirmed that it was possible that he had signed another document. Baskin was shown a petition²⁷ and acknowledged that what purports to be his signature on this document looked like his signature. There is no irregular line on this document. Baskin was asked to sign his name on a blank piece of paper at the hearing.²⁸ I conclude that what appears to be Baskin's signatures on the leaflet, the petition, and the blank piece of paper actually signed by him at the hearing are all signed by the same individual.²⁹

(5) Dollie Tigner

What appears to be Tigner's signature appears on the reverse side of the leaflet between the second and third columns. On direct examination, Tigner testified that it looked like her signature but that she did not sign the document. On cross examination, Tigner was shown a

²² Fed. R. Evid. 901(b)(3).

²³ The document was originally identified as P. Exh. 5 but the parties agreed that it was the same document as Emp. Exh. 6.

²⁴ P. Exh. 4.

²⁵ Supra at fn. 22.

²⁶ At the hearing, Baskin spelled his last name Bskin. However, when he signed his name, Baskin inserted an 'a' as the second letter. I conclude that this is the correct spelling.

²⁷ Emp. Exh. 12.

²⁸ P. Exh. 6.

²⁹ Supra at fn. 22.

petition with her apparent signature in the right hand column. There is no irregular line below the legend on this document.³⁰

Tigner acknowledged that the signature on the petition looked like her signature but denied that it was. She was asked to sign her name on a blank piece of paper at the hearing and complied.³¹ I conclude that the signatures on the leaflet, the petition, and the blank piece of paper actually signed by Tigner at the hearing were all signed by the same individual.³²

Tigner agreed that she signed a piece of paper to get somebody to talk about the Union. Employees Deborah Wright and Frances Young gave it to her. Wright testified about this subject, and identified Tigner's purported signature on the petition as Tigner's actual signature, which Wright obtained.

Tigner agreed that her brother, Freddy Watley, was a supervisor that he was opposed to the Union that she talked to Watley when she first saw the leaflet and that he advised her to talk to the Company about it.

2 Factual analysis

a *Petitions bearing the irregular line*

The Employer argues that the irregular line between the legend at the top of the petition and the names below it suggests that the heading was added after signatures were secured. Amazingly, the lines always conveniently go exactly between the heading and the signatures, actually winding [their] way around the signature, as if the heading were already on the paper. The Employer also relies on Riggins' inability to produce a photocopy with this line at the hearing and Lenk's lack of knowledge of the asserted defect in the photocopy machine.³³

The line appears on the petition bearing Fordham's name. However, it does not appear immediately above his name but rather above the topmost names on the petition. Any such documentary alteration, as suggested by the Employer, could not have affected the names below the allegedly added heading of the petition. Fordham admitted that the signature was his but denied that he signed *that* document. Instead, Fordham asserted he signed a blank piece of paper without any signatures. This is unlikely, because other signatures appear *above* Fordham's but *below* the asserted place of documentary alteration. Accordingly, the document probably had other signatures on it when Fordham signed it. An inference that Fordham signed the petition with the heading is buttressed by his admission that Sarason completely unfolded the document and that Fordham examined it. Further, it is unlikely that Fordham would have signed a blank piece of paper given to him by a union official. Finally, Fordham's actual signature at the hearing is the same as that appearing on the petition. Fordham admittedly did not support the Union, and may have been a biased witness.

For these reasons, I find that the evidence is insufficient to establish that Fordham's purported signature on the petition is not his actual signature and it is obvious that it is a photocopy of this signature that appears on the leaflet.

The other petition with the irregular line was that bearing Todd Pierce's name. Unlike Fordham, Pierce did not contend that he signed a document without the heading. Instead, he contended that he signed the leaflet. This is patently false, because the evidence is clear that the leaflet was composed of photocopies of the original signatures appearing on the petitions. In fact, a photocopy of Pierce's original signature may be found on the reverse side of the layout which Lenk prepared for the leaflet—it is a strip of paper about 2 inches by one fourth of an inch, in size.³⁴ Pierce's testimony that both signatures were his but that he signed only one document is unbelievable. I conclude that the evidence is insufficient to establish that Pierce's name on the leaflet is not a photocopy of his genuine signature appearing on a petition.

The record thus does not disclose a complete explanation for the sporadic appearance of the irregular line except for the truism that machines occasionally act peculiarly for unknown reasons. The Employer's theory—that the irregular line represents a heading added to sheets of paper signed in blank by various employees—is highly improbable. There are numerous such petitions but only Fordham asserted that he signed a blank piece of paper. Moreover, it is unlikely that the Union's asserted documentary alteration would have resulted in an irregular line with precisely the same curvature, touching one signatory's name at precisely the same point on different documents. In any event, the only evidence in support of the Employer's theory—Fordham's testimony—is insufficient to establish the validity of that theory for the reasons given above.

b *Petitions without the irregular line*

Carmen E. Head's testimony consists of repeated contradictions both affirming and denying that the signatures on the leaflet and the petition were hers. Accordingly, her testimony has no probative value. Head's demonstrated signature at the hearing establishes that it was she who signed the petition.

Baskin admitted that a signature purporting to be his on the petition looked like his signature and his demonstrated signature at the hearing proves this to be correct.

Like Baskin, Dolly Tigner admitted that a signature on the petition looked like hers but she denied that it was in fact her signature. Tigner's actual signature given at the hearing establishes that it was she who signed the petition with her name on it.

c *Summary*

The credited evidence shows that the Petitioner obtained employee signatures on petitions containing a heading favoring the Union and authorizing the Union to use the signatories' names. The evidence is insufficient to

³⁰ Emp. Exh. 6

³¹ P. Exh. 7

³² Supra at fn. 22

³³ Emp. Br. 14

³⁴ P. Exh. 12

establish that any of the signatures appearing on these petitions were not genuine. The Petitioner then made copies of these signatures and with these copies prepared a leaflet bearing the same heading. Six of the names on this leaflet appeared on the *Excelsior* list but were no longer employed at the time of the election and were thus ineligible to vote. The leaflet was distributed on the day of election.

E Legal Analysis Conclusions and Recommendation

It is well established that an objecting party has the burden of going forward with the evidence and the ultimate burden of proof.³⁵

As indicated, I have found the evidence insufficient to establish that Petitioner engaged in any of the objectionable conduct alleged in connection with the conduct of the election.³⁶ Further, the evidence is insufficient to establish that the Union circulated a leaflet with forged signatures. It did circulate a leaflet with photocopies of employee signatures not proved to be forged and the signatures of six employees who, although their names appeared on the *Excelsior* list, were not employees at the time of the election and were thus ineligible to vote. I conclude that these actions did not interfere with the conduct of a fair election. Accordingly, I shall recommend that the Employer's objections be overruled in their entirety, and that a certification of representative issue

IV THE ALLEGED UNFAIR LABOR PRACTICES

A Alleged Threat to Employees Engaged in Distributing Union Literature

1 Summary of the evidence

On the morning of 2 October, union supporter Ricky Reeves, International Representative Linda Riggins, and Field Coordinator Robert Sarason were distributing literature near the entrance to the plant. Reeves was in the parking lot. According to Reeves, Production Manager Joseph C. Adams³⁷ came out of the plant about 6:30 a.m. with two security guards and told Reeves to get off the property. Reeves replied that he had a right to pass out leaflets in a nonwork area during nonworktime. Adams then threatened to call the police. Employees

³⁵ *Emerson Electric Co. v. NLRB*, 649 F.2d 589 (8th Cir. 1981), enfg. 247 NLRB 1365 (1980); *IDAB Inc.*, 269 NLRB 554, 570 (1984), enf'd 770 F.2d 991 (11th Cir. 1985).

³⁶ In its brief supporting exceptions to the Regional Director's report on objections, the Employer argues that IHOC was the Union's agent. R.D. Exh. 1(i). It is unnecessary for me to decide this issue because IHOC members did not engage in any objectionable conduct. However, I note in passing that those IHOC members who participated in the election did not acquire apparent authority to engage in the alleged misconduct either under the principles of *Bio Medical of Puerto Rico*, 269 NLRB 827 (1984), cited by the Employer, or those of *L & J Equipment Co.*, 278 NLRB 485 (1986), in which the Board accepted a four-part test enunciated by the Court of Appeals for the Third Circuit to determine when actions of IHOC members may be attributed to a union. *NLRB v. L & J Equipment Co.*, 745 F.2d 224 (3d Cir. 1984), remanding 266 NLRB No. 29 (Feb. 9, 1983) (not reported in Board volume).

³⁷ The pleadings appear to establish that Adams was a supervisor. Adams testified that he was responsible for production on two shifts and that seven supervisors reported to him. I find that he was a supervisor within the meaning of the Act.

were present, coming to work for the first shift that began at 7 a.m. Adams went back into the plant, returned to Reeves in about 5 minutes, patted him on the shoulder and told him that Adams was in a bad position.

According to Linda Riggins, while Reeves, Sarason, and she were handbilling, a security guard first told Reeves to get off the property about 6:30 a.m. and the latter asserted his right to be there. The guard then entered the building and returned with Adams and two other supervisors. Adams told Reeves to get off the property or Adams would call the police. Reeves again explained his right to be on the property distributing union literature in a nonwork area during nonworktime. Sarason joined the conversation and suggested that Adams consult Company Official Shannon or an attorney. Adams left, returned in about 5 minutes, and told Reeves and Sarason that they were correct.

Adams testified that a security guard informed him that an employee was handing out literature on company property. The production manager then went out and told Reeves to leave the property. According to Adams, it was about 7 a.m. Adams testified that Reeves complained that the guard had threatened to call the police and denied that Adams threatened to have Reeves arrested. However, he did not deny that he threatened to call the police. According to Adams, Reeves complained that Adams had embarrassed him in front of his peers. On direct examination, Adams said that he did not recall other employees being present. However, on cross examination, he agreed that they could have been there. Adams professed that he did not recall whether Linda Riggins was present.

The company manager of human resources, Rick Shannon, testified that Adams called him about the incident and that Shannon told Adams that Reeves was allowed to engage in such activity. Shannon instructed Adams to apologize to Reeves. Adams called back a few minutes later and said that Reeves claimed to have been humiliated.

Security guard Theron Griffin testified that about 6:50 a.m. he told Reeves to leave the property if he wanted to pass out pamphlets. Reeves said that he was an employee and had a right to distribute pamphlets. Griffin replied that [w]e would have to call the police. The guard admitted that he saw other employees but denied that any were within earshot of Reeves. Griffin returned to the building and saw Production Manager Adams to whom he reported the incident. Adams left the building, approached Reeves, and had a conversation with him that Griffin could not hear. Adams returned to the building, and later went back out to Reeves, telling the latter that he was sorry and that Reeves did have the right to pass out pamphlets on company property.

Respondent's rules, which Shannon asserted, were posted on a bulletin board, permit the distribution of written material of any kind during working time or in work areas and the posting of such material on company premises.³⁸

³⁸ R. Exh. 11.

2 Factual analysis

Respondent contends that there is no evidence that the union proponents were engaged in protected activity because there is no evidence that the literature they were distributing was union literature. This argument borders on the frivolous. It is obvious that the handbilling in which Reeves, Riggins, and Sarason were engaged consisted in the distribution of union literature. Indeed the representation case record includes documents distributed after the election by the union Committee for a Fair Contract introduced by the Employer.³⁹

Riggins had the best recall of these events, and I credit her version of the incident. After a security guard told Reeves to get off company property, Adams came out, repeated the order, and told Reeves to get off company property or he would call the police. This testimony is corroborated by Reeves and not explicitly denied by Adams. Griffin's testimony that *he* told Reeves the Company would call the police is not inconsistent with Reeves' contention that Adams did so.

Respondent contends that there is no evidence that any other employee heard the Adams-Reeves conversation. However, the testimony of Reeves and Riggins, tacitly corroborated by Adams, established that employees were going by when this conversation took place. Griffin's denial that employees were within earshot refers only to *his* conversation with Reeves. Further, Adams testified that Reeves complained he had been embarrassed in front of his peers. Reeves had been humiliated according to Shannon's version of Adams' report to him. On this evidence, I find that other employees did overhear the conversation between Adams and the union advocates. Further, because these other employees were on their way to work, it is obvious that they were not present when Adams returned 5 minutes later with the statement that Reeves and Sarason were correct.

3 Legal analysis and conclusion

Adams' threat to call the police on Reeves for engaging in protected activity, the distribution of union literature during nonworktime in nonwork areas, was patently coercive. Respondent argues that Adams' admission to Reeves and Sarason 5 minutes later that they were correct constitutes repudiation of the threat. However, effective repudiation must include adequate publication to the employees involved, assurances to employees that their employer will not in the future interfere with their Section 7 rights, and, in fact, no proscribed conduct thereafter. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Respondent's purported repudiation fails to meet any of the *Passavant* tests. Other employees were present when Respondent engaged in the unlawful conduct, but absent when Adams made his asserted repudiation. Accordingly, there was insufficient publication of the claimed repudiation. Adams gave no assurance that the Respondent would not in the future interfere with its employees' Section 7 rights, and, as I find, Respondent in fact did engage in such interference. In these circumstances, Respondent's assertedly published rule permit-

ting distribution of written materials did not constitute effective repudiation. If anything, Respondent's conduct was in apparent contravention of the rule.⁴⁰ I therefore conclude that Respondent, by threatening to call the police on an employee because he was engaged in protected activity, thereby violated Section 8(a)(1) of the Act.

B *The Alleged Discriminatory Discharges*

1 The alleged discriminatees' union activities and prior work records

a *Ricky Reeves*

Ricky Reeves' name is the second one on the organizing committee (IHOC) document utilized during the election campaign.⁴¹ The first name on the numerous petitions that formed the basis for the Union's campaign leaflet⁴² and the first name on that leaflet⁴³ He was a union observer at the election. According to Reeves' credible testimony, corroborated by Company Official Shannon Reeves, and 11 other employees, they went to the office of one of Respondent's attorneys where Reeves acted as the spokesperson in protesting the Company's asserted legal games and refusal to bargain with the Union. Union Official Riggins suggested this visit. Further, as indicated, Reeves was the recipient of Respondent's unlawful threat when he was handbilling in the parking lot.

Subsequent to the filing of the General Counsel's brief, Respondent filed a letter protesting the General Counsel's characterization of Reeves as the main, leading, most vocal, or most active union proponent. Respondent asserts that Reeves was no more active than several hundred other employees. Although the Board's Rules do not allow for the filing of reply briefs in these circumstances,⁴⁴ I have considered Respondent's objection and find it to be substantially without merit. Although it may be questionable whether Reeves was the foremost union proponent, the record supports an inference that he was one of the foremost, and that he was the only one shown to have engaged in a confrontation with Respondent because of his union activities.

Reeves was employed by the Company as a cook on the second shift in October 1985 and received a raise after his 90-day probationary period. He received another raise in June 1986.

⁴⁰ Accord *Safeway Stores*, 266 NLRB 1124 (1983). Respondent cites *Ducane Heating Corp.*, 254 NLRB 112, 116 (1981) *enfd.* as modified, 665 F.2d 1039 (4th Cir. 1981). This case is inapposite because there is no evidence of other employees having been affected by the unlawful conduct, and thus no need for publication of repudiation. Respondent also cites *Bellinger Shipyards*, 227 NLRB 620 (1976), in which the employer rescinded a purportedly unlawful no-solicitation/distribution rule and replaced it with a lawful rule. There was no evidence that the employer engaged in other unlawful activity, and the Board concluded that the effect on the employees of the prior rule was so minimal that no remedy was warranted. This case, which preceded *Passavant*, does not support Respondent's position here.

⁴¹ Emp. Exh. 1.

⁴² Emp. Exhs. 3-12, P. Exh. 13.

⁴³ Emp. Exh. 1.

⁴⁴ Board's Rules and Regulations § 102.42.

³⁹ Emp. Exh. 13.

According to Cookroom Supervisor Mike Stiggers Reeves complained of a strained back after lifting a tub of carrots, thus violating Stiggers instructions to employees on proper lifting techniques Accordingly, Stiggers on 29 October wrote a final written warning to Reeves that further accidents would result in 'corrective action possibly including suspension or termination'⁴⁵ Reeves testified that he protested this write up to Company Official Shannon on 3 October, and that the latter promised to tear it up and not place it in Reeves file Shannon denied this, but admitted that he did not rely on the warning in discharging Reeves

Stiggers testified about another asserted conversation with Reeves the following day 30 October, during which Reeves was sitting on the table After Stiggers criticized Reeves the latter replied that everything was in his kettle, i.e. that all his work had been performed Stiggers said that Reeves was there to work Although Stiggers asserted that he talked to Reeves about working harder Reeves testified that he received no verbal warnings There is no mention of this incident in Stiggers pretrial statement

b *Mike Collier*

Mike Collier was employed as a cook on the second shift in October 1985 He signed a union card and passed out leaflets Cookroom Supervisor Stiggers testified that he knew Collier was for the Union

Collier received a written warning for excessive absenteeism or tardiness on 28 March 1986⁴⁶ Thereafter, Stiggers testified that he talked to Collier 10 times about horseplaying at work Collier denied any such conversations Stiggers agreed that another supervisor had advised him to reduce these admonitions to writing However Stiggers did not do so I credited Collier's denial that any such conversations or verbal warnings took place

Stiggers admitted that he saw Collier holding his crotch a month or so after Stiggers assumed his position as cookroom supervisor (August 1986) Richard Sims a second shift cook, testified that Collier had engaged in horseplaying from the time he was hired (October 1985)

On 24 September Stiggers wrote a memorandum that Collier had been counseled for sweeping various work items off a table onto the floor, for insubordination and misuse of company property⁴⁷ Stiggers agreed that he had no direct knowledge of these events and that he had relied on the report of another employee Tony Purdy, a leadman Purdy did not testify

Respondent elicited evidence that on the second shift on 29 October one of the production lines shut down because of a stoppage of sauce for the beef dinners being prepared Collier was one of the cooks in the kitchen at that time The problem was that an agitator in the holding kettle was not running The evidence is conflicting on the identity of the employee responsible for running the agitator Production Supervisor Linda Murphy testified that it is the maintenance mechanic's

function if the agitator was malfunctioning, but the cook's duty if there was no malfunction However Richard Sims, a cook, testified that the cooksheet instructs cooks not to turn the agitator on when the sauce is in the holding kettle and that it is the maintenance mechanic's function to watch the agitator Collier contended that his kettle was full of sauce that the pump was running, and that was the extent of his responsibility He had no way of knowing whether sauce was flowing through the lines to the production area Collier further testified that his supervisor had instructed him not to leave the agitator on when meat was in the sauce—as was the case in this instance—because the agitator shredded the meat There was a dispute among the supervisors in discussion of this matter from which discussion Collier was ultimately excluded Production Supervisor Paul Dolak gave Collier a verbal warning Collier talked with Company Manager of Human Resources Shannon about this subject the next day The latter promised to get back to Collier but never did so

Cookroom Supervisor Stiggers asserted that, on the same day, 29 October, he saw Collier put his hand [on] or hit a female employee and that the latter brushed at Collier as if to say Leave me alone Stiggers said to Collier, Stop the playing around He then wrote a memorandum stating that Collier had been counseled for horseplay, and to be more attentive to his cooking Stiggers labeled this memorandum, Final Written Warning⁴⁸ The cookroom supervisor agreed that he wrote this document after the sauce incident, as described above Production Supervisor Dolak said that he was unaware of this written warning

c *Additional evidence of misconduct*

Maintenance employee Paul H Hollifield testified that he saw Reeves and Collier playing meatball baseball and hammering nail holes into a company table Hollifield said that he complained to supervisors about Reeves and Collier 25 or 30 times However there is no evidence of written warnings concerning these asserted incidents Hollifield admitted that he thought the Union was a bad thing and that he talked against it in the plant Second shift cook Richard Sims a union proponent who worked with Reeves and Collier denied seeing the incidents asserted by Hollifield

- 2 The 31 October sickout and the meeting on 3 November

a *Summary of the evidence*

On 30 October various employees discussed a sick out as a method of protesting what they characterized as company harassment The following days 31 October a Friday five out of the six cooks on the second shift including Reeves and Collier called in sick and did not report for work⁴⁹

⁴⁸ R Exh 5

⁴⁹ The other three employees were Antonio Copeland Richard Sims and Mohammed Haran The sixth cook Yusuf Rashid did not participate in the sickout

⁴⁵ G C Exh 3

⁴⁶ R Exh 14

⁴⁷ R Exh 4

When they returned the following Monday, 3 November, a meeting was called by Production Manager Adams in a conference room. Numerous employees were present. According to the General Counsel's witnesses,⁵⁰ Adams said that such absences could not happen again and that, if they did, the employees would be transferred to the line or terminated. Reeves then stated that the reason for the 'sickout' was the employees' concern over harassment by supervisors, the Company's refusal to bargain with the Union, and the legal games they were playing. We won the election fair and square. Reeves said.⁵¹ Adams did not discuss the union issue and told the employees to go back to work.

Mike Stiggers, cookroom supervisor on the second shift, testified that he had been advised in advance by leadman Tony Purdy that there would be a layout. Stiggers attended the 3 November meeting but denied that there was any discussion that the absences had been a planned layout.

Production Manager Adams, who conducted the meeting, testified that he told the employees that the absences of the second shift cooks had 'put the Company in a bind' and that this was very, very serious to the Company. Although Adams denied saying that employees might be fired if the absences continued, he agreed that he said they might be replaced. Adams acknowledged that Reeves spoke, but asserted that Reeves' comments were that the point system was supposed to take care of absenteeism. Adams denied that any employee stated the reason that he had been absent. The production manager admitted that a question arose in his mind as to the reason for the absences. However, he was doubtful that the matter really concerned him. Cookroom Supervisor Stiggers gave similar testimony about Reeves' statements at the meeting. He asserted that he 'cared' about the fact that five out of six cooks had not reported for work, but never asked them the reason.

Richard Sims, one of the cooks, acknowledged that Reeves spoke about the point system. However, this took place after Reeves told Adams the employees' reasons for staying out and after Adams said employees would be terminated in the event of another layout. Reeves then asked how this could be done under the point system, apparently referring to the disciplinary system because none of the cooks had points. Adams replied that points had nothing to do with it. The next time it happened the employees would be removed or terminated regardless of how many points they had.⁵²

Collier testified that he had to return to the conference room after the meeting to get his cap. When he did so he overheard Supervisor Mike Stiggers engaged in conversation with Ed Kelley, cookroom supervisor for the first shift. Kelley said to Stiggers, 'You have to write these employees up. Write them up a second time. Write

them up a third time. Boom. They are terminated, and your problems are solved. You don't have to worry about them no more.'

On direct examination, Stiggers testified that he discussed disciplinary procedures with Kelley when Stiggers was first assigned to his position (August 1986), but did not recall having any other such conversations. He repeated this position on cross examination but then apparently agreed that he discussed 'problems' concerning his employees with Kelley. Although Stiggers denied that Kelley told him to document charges against employees to terminate them, there is no specific reference in his testimony to any conversation with Kelley in the conference room after the 3 November meeting and, as indicated, Stiggers otherwise admitted that another supervisor had advised him to reduce his warnings to writing.

b. *Factual analysis*

It is undisputed that the sickout was planned and executed as a concerted protest against certain company actions. Further, Adams admitted saying that the absences were serious, and that renewal of them might result in replaced employees. In these circumstances, it is highly unlikely that Reeves, an outspoken union proponent, would have replied to Adams merely with a mild discussion of the point system. It is more likely that Reeves would have stated the real reason for the sickout, followed by a discussion of the point system, when Adams threatened discharge.

Adams' admission that he thought about the reason for the 'very, very serious' absences makes improbable his expressed doubt that the reason concerned him. Stiggers' similar testimony is also unrealistic. The General Counsel's witnesses were apparently truthful, and I credit their version of the meeting.⁵³

Further, I credit Collier's account of the conversation in the conference room between Stiggers and Kelly because of the specificity of Collier's testimony as contrasted with Stiggers' generalized statements because of Stiggers' slight change of position on cross examination, because of his admission that another supervisor advised him to reduce his warnings to writing, and because Collier appeared to be the more truthful witness.

⁵³ Sims and Copeland were current employees at the time of their testimonies and it is therefore unlikely that they were fabricated. *Bohemia Inc.* 266 NLRB 761, 764 fn. 13 (1983).

Respondent asserts contradictions in the General Counsel's evidence, e.g., that Sims said Shannon was not at the meeting whereas Collier affirmed that he was. In fact, Sims merely omitted Shannon's name. Respondent asserts another contradiction in that Sims, unlike other witnesses, supposedly testified that only Reeves spoke. In fact, Reeves was the only speaker named by Sims, but he did not explicitly deny that other employees spoke. Finally, Respondent points to Copeland's denial that Adams asked for a show of hands, whereas other witnesses affirmed that he did. These are minor or nonexistent differences that do not affect the credibility of the General Counsel's witnesses. (R. Br. 60)

⁵⁰ Reeves, Sims, Copeland, and Collier.

⁵¹ Testimony of Reeves and Collier.

⁵² Sims stated on cross examination that his pretrial affidavit does not mention Adams as saying that points didn't matter. However, the affidavit does contain the following statement after a discussion of the meeting: 'The supervisors told us from that day on if any cook didn't show up for work on a Friday they would either be put on the line or terminated regardless of how many points we had.' (R. Exh. 24)

3 The events during the second shift on 3
November

a *Summary of the evidence*

(1) The asserted misconduct

Cookroom Supervisor Stiggers testified that he ran out of sauce during the second shift, but was uncertain as to the number of times. He was unaware of the reason and consulted with Production Supervisor Paul Dolak. Stiggers and Dolak decided to observe Reeves and Collier through ventilation fans on the side of the kitchen. The parties stipulated that it is possible to look through these fans into the kitchen which is on the second floor, or mezzanine while the observers are standing on the adjoining roof of the first floor. The two supervisors did this, according to Stiggers, although Dolak was there only a part of the time.⁵⁴ There were two visits to the roof, according to Stiggers from 7:15 to 7:45 p.m., and from 9 to 9:55 p.m.

Stiggers asserted that he saw Collier open his shirt, display his abdomen, make overtures to female employees and otherwise engage in horseplaying. The cookroom supervisor contended that he observed Reeves talking to employees and doing very little work. Specifically, Stiggers said that he saw Reeves taking 7-8 minutes to empty a gondola of veal into the kettle, a job that can be accomplished in about 30 seconds. Further, it took Reeves 10 minutes to remove a plastic wrap from frozen veal, when this should have been done in 15 to 45 seconds.

Stiggers testified about certain notes of these events. His testimony is unclear, but he appears to have asserted that he made two sets of notes. From his testimony the first set was apparently made on sheets from a small notepad. Stiggers appears to have claimed that he made the notes on this pad while on the roof. Although it was quite dark at the time, Stiggers said that he made the notes in light emanating from the kitchen through apertures in the ventilating fans. On cross examination he appears to have asserted that he made these notes before 12 o'clock. Although I sustained the General Counsel's hearsay objection to receipt of these notes, they appear unaccountably in the official exhibit file and constitute seven sheets about 2 by 4 inches in dimension.⁵⁵ The notes contain various comments on what Stiggers assertedly observed—including Dolak in the kitchen below. Although they are critical of Reeves and Collier, they do not assert the exact details claimed in Stiggers' testimony.

The other notes consist of a copy of a five-page memorandum from Stiggers to Shannon on letter-sized lined notepaper.⁵⁶ This memorandum contains criticism of Reeves and Collier more nearly in accord with Stiggers' testimony. It contains a reference to Dolak's accompanying Stiggers during the second visit, at 9 p.m., but not the first visit.

Stiggers testified that he wrote the memorandum after coming down from the roof the second time. On cross examination, Stiggers could not recall exactly when he wrote the memorandum and conceded that it could have been as late as 12:45 a.m. Nonetheless, Stiggers contended that he read this memorandum verbatim, word for word to Company Manager for Human Resources Shannon at approximately 11 p.m.⁵⁷ After this asserted conversation Stiggers and Dolak suspended Reeves and Collier.

Production Supervisor Dolak testified that the kitchen ran out of sauce, but he could not remember the number of times. He asserted that he went up on the roof to observe the kitchen on two occasions, the first time at approximately 7 p.m., and the second time at approximately 9 p.m. It was pointed out to him that his pretrial affidavit does not mention that he went up on the roof.⁵⁸ Dolak responded that his affidavit states that he had read the attached notes made by Stiggers [sic] [and] observed the cook room.⁵⁹ Dolak agreed that the attached notes mentioned in his affidavit refer to Stiggers' memorandum, and that this document places Dolak on the roof only during the second visit about 9 p.m.

Dolak asserted that he saw Stiggers' memorandum on the night in question. The memorandum contains Dolak's purported signature as a witness. However, Dolak denied that the signature was his. He also testified that he and Stiggers talked to Shannon. When asked whether Stiggers had any notes when talking to Shannon, Dolak replied that Stiggers had notes on a notepad. However, he did not recall whether Stiggers had the memorandum.⁶⁰

Dolak's testimony about the activities of Reeves and Collier in general is similar to that of Stiggers.

Company Official Shannon testified on direct examination that he received a call from Dolak late on the evening of 3 November and that Dolak and Stiggers then related the asserted conduct of Reeves and Collier as set forth above. Shannon said that he concurred in the supervisors' recommendation of suspension for gross negligence in their job performance. Shannon asserted that Stiggers' memorandum⁶¹ was on his desk the next morning, i.e. 4 November 1986 and that he reviewed it with other supervisors. However, on cross examination Shannon agreed that his pretrial affidavit⁶² does not mention a phone call from Stiggers or Dolak concerning Reeves or Collier, any observation of them made from the roof or Stiggers' memorandum being on Shannon's desk the next day. The affidavit contains no reference to any such memorandum from Stiggers and instead lists the charges against Reeves and Collier outlined above.⁶³

Reeves' version of the second shift is that he was assigned to work on preparation of butter sauce on D kettle by Cookroom Supervisor Stiggers. Reeves nor

⁵⁷ Stiggers' pretrial affidavit does not mention this call (G.C. Exh. 10).

⁵⁸ G.C. Exh. 11.

⁵⁹ Id. at 2. As noted above, Stiggers' first notes, perhaps made on the roof, place Dolak physically in the kitchen.

⁶⁰ R. Exh. 7.

⁶¹ R. Exh. 7.

⁶² G.C. Exh. 14.

⁶³ Id. at 8-10.

⁵⁴ Stiggers' pretrial affidavit does not mention that Dolak accompanied him (G.C. Exh. 10).

⁵⁵ R. Exh. 8.

⁵⁶ R. Exh. 7.

mally works on A kettle Reeves started to do this but noted that he did not have enough butter to complete the batch He informed leadman Tom Purdy of this fact and Purdy said that he would go downstairs to get the butter Stiggers came up 2 minutes later and said, I heard you weren't going to make the sauce? No Reeves replied, I don't have enough butter to complete the batch Reeves completed this task and then was assigned to D kettle by Stiggers He started to prepare sauce for this kettle when leadman Purdy approached said that he would kick [Reeves] ass and started putting his hands in [Reeves] face The leadman told Reeves that they were going to get rid of [him] and that [he] wasn't going to be there much longer Reeves protested harassment to Stiggers who rejected the protest Purdy then assigned Reeves to assist Richard Sims on kettle A by emptying 27 boxes of veal into the kettle Reeves did not have enough boxes at the outset but more were provided Meanwhile this job was delayed because of the absence of the veal

Collier testified that he was not even given the responsibility of cooking on 3 November Instead, he was directed to help Sims and Yusuf Rashid another cook Collier was directed to pick up heavy items that the other cooks could not pick up themselves and to load the kettles

Antonio Copeland was a cook on the second shift during these incidents He testified that the supervisors first sent Reeves to kettle C Copeland was next to him on kettle D Copeland heard leadman Purdy ask Reeves whether he was cooking it and Reeves answered Yes Copeland then heard Purdy tell Cookroom Supervisor Stiggers that Reeves was *not* cooking the sauce Stiggers accused Reeves of refusing to do so, and Reeves replied that he was waiting for the last ingredient butter

Copeland contended that Stiggers was in the kitchen continuously for about a 5 hour span and never left it According to Copeland one of Reeves kettles did run out of sauce The kettle of another cook Rashid ran out of sauce three times Rashid was assisted by Collier Rashid was not disciplined according to Copeland⁶⁴

Richard Sims was Reeves cooking partner during the second shift on 3 November from about 4 o'clock until about 9:30 p.m. when Reeves was called to the office Sims testified that Reeves did not work any differently on that shift than he did at other times When Sims was chopping veal over the kettle Reeves was opening the boxes of veal and placing the empty boxes in a rack over the kettle Reeves would open five boxes of veal at a time Sims denied that it took Reeves 10 minutes to open a box of veal Sims also denied that Reeves stood around doing nothing Whenever Reeves walked elsewhere it was to get products such as butter or spices and he did not take an inordinate amount of time to do this

Sims stated on cross examination that Stiggers spent an awful lot of time in the kitchen contrary to his usual policy which was to pop in and out every hour or two Sims noticed Stiggers standing back near the

mezzanine as though he was watching every move Rick Reeves was making Stiggers was in the kitchen most of the second shift although he was absent on occasion Otherwise Sims testimony in general corroborates that of Reeves

Collier worked on the kettle next to Sims The latter characterized Collier as a very good worker On the dinner line the sauce never ran out down there Mike was very responsible as far as keeping up with the sauce Sims further affirmed that Collier would break his neck trying to help you If he was told to clean the floor he'd clean the floor

As indicated Sims testified that Collier had engaged in horseplay since the day he was hired He would sometimes raise his shirt because his belly always lapped over his buckle Sims called this basic teasing On direct examination Sims testified that this was common knowledge throughout the plant, and that supervisors were present Challenged on cross examination, Sims could not affirm that he actually saw supervisors *looking* at Collier However although he agreed that there were areas of the plant with which he was not familiar, Sims maintained that there were many areas where employees saw Collier opening his shirt

(2) The suspensions

Reeves testified that about 10 p.m. or shortly thereafter on 3 November, Stiggers told him to come upstairs Reeves did so, and met Production Supervisor Dolak Supervisor Linda Murphy, and two security guards Dolak told Reeves that he was being suspended for negligence When Reeves asked for more explanation Dolak replied that Shannon would be in touch with him The guards then escorted Reeves out of the plant

Collier stated that Dolak spoke to him at about the same time and said that he was being suspended because of negligence When Collier asked how he had been negligent, Dolak told him to ask Shannon Collier repeated the question to Stiggers He [Stiggers] didn't say nothing He looked down

The record contains apparent written suspensions of Reeves and Collier for gross negligence of job performance signed by Stiggers and dated 3 November⁶⁵ Stiggers contended that he talked with Shannon 3 November before preparing Reeves written suspension However the cookroom supervisor stated that he could not recall whether he gave Reeves a copy or showed it to him Stiggers also said that he did not recall whether he had a copy of Collier's written suspension at the time he met with the employee on the evening of 3 November but affirmed that he promised to get him one

b *Factual analysis*

The issue is whether Reeves and Collier engaged in the conduct alleged by Supervisors Stiggers and Dolak This in turn raises the question of the reliability of Stiggers and Dolak as witnesses I conclude that they were unreliable witnesses because of discrepancies in their own statements and contradictions with the statements of

⁶⁴ As noted Rashid was the one second shift cook who did not participate in the sickout

⁶⁵ R Exhs 9-10

others Neither Stiggers nor Dolak's pretrial affidavit mentions that Dolak went up on the roof Although Dolak claimed that he went up there twice, Stiggers memorandum has him there only once and Stiggers rooftop notes have him at other times actually in the kitchen

Stiggers and Dolak's contention that Stiggers read over his memorandum to Shannon that night is a sheer fabrication Dolak could only identify notes on a note pad as something Stiggers had while assertedly talking to Shannon The rooftop notes do not contain the specific accusations against Reeves and Collier contained in the memorandum⁶⁶

Stiggers could not possibly have read the memorandum to Shannon at 11 p.m., as he contended, if it was not even written until 12:45 a.m. which Stiggers admitted was possible Although Shannon claimed that he received such a call his pretrial affidavit does not mention either the call or Stiggers memorandum, which allegedly was on his desk the next morning Dolak refused to identify his own purported signature on the memorandum These contradictions and inconsistencies establish the unreliability of Stiggers, Dolak, and Shannon as witnesses, at least as to the asserted misconduct of Reeves and Collier

Further, I do not credit Stiggers testimony regarding preparation of the written suspensions Stiggers contention that, although he prepared Reeves' written suspension before talking to the latter, he could not recall giving or showing it to the employee, is implausible The cookroom supervisor's professed lack of memory concerning Collier's written suspension is similarly unpersuasive Neither Reeves nor Collier mentioned a written suspension on the evening of 3 November, and I conclude that none was then given to them I note in passing that Collier's written suspension speaks only of asserted gross negligence and says nothing about horseplaying

Respondent contends in effect that all the General Counsel's witnesses were biased, the alleged discriminates because of self interest and Sims and Copeland because of sympathy with them However Sims and Copeland were current employees of Respondent at the time of their testimonies, and the Board has repeatedly held that the pecuniary interest involved in preservation of jobs makes it unlikely that such testimonies, adverse to the employer's interest are fabricated⁶⁷ Respondent also contends that Sims' testimony that Stiggers was in the kitchen most of the second shift is inconsistent with other evidence that he was elsewhere including the roof This contention begs the question of the accuracy of Stiggers and Dolak's testimonies

All the General Counsel's witnesses appeared to be truthful and I credit their testimonies⁶⁸ The evidence

⁶⁶ Although I sustained the General Counsel's objection to receipt of the rooftop notes they are contained in the exhibit file and counsel for Respondent thereafter directed questions about them to Production Supervisor Dolak after the latter failed to affirm that Stiggers had the memorandum when assertedly talking with Shannon

⁶⁷ *Bohemia Inc* supra at fn 53 and cases cited therein See also *South ern Paint & Waterproofing Co* 230 NLRB 429 431 fn 11 (1977)

⁶⁸ I note a minor inconsistency in the testimonies of Reeves and Copeland concerning the kettle to which Reeves was first assigned but con

sidered as a whole establishes that Reeves worked at his usual pace which did not involving wasting time Although Reeves ran out of sauce on one occasion this was due to lack of materials Rashid—who did not join the stickout—had three such shortages, but was not disciplined Leadman Purdy told Reeves that they were going to get rid of him, and that he was not going to be there much longer

Collier was a responsible worker who did not shirk his duties Although he may have engaged in horseplay, he had done this throughout his employment, occasionally in the presence of supervisors, as noted Collier's suspension did not mention horseplaying

4 The discharges

a Summary of the evidence pertaining to Collier

Collier testified that he saw Shannon on 5 November and asked in what manner he had been negligent Shannon said that he had three statements against Collier signed by upstairs female employees The substance of the asserted statements was not stated Collier asked to see the statements, but Shannon refused Shannon said that he would discuss Collier's case with supervisors and Collier suggested that he discuss it with the employees upstairs Shannon replied that what the employees say doesn't count According to Collier Shannon called Production Manager Adams into the room Adams said that the line went down for 34 minutes and he was not going to take the blame Adams denied that The only other reason given to Collier for the Company's action was that they had been having problems with the upstairs kitchen crew Collier denied that Shannon mentioned horseplaying as a reason Although Shannon did not give Collier a final decision at that time he called later and told Collier that he had decided to go along with the termination

Shannon testified that Collier was separated on 4 November He identified a separation notice and testified that it was prepared and signed by him on 5 November The document is actually dated 4 November and asserts that Collier was discharged for gross negligence and continued horseplay⁶⁹

Shannon agreed that he met with Collier on 5 November He testified that he reviewed the events of November 3rd which included Collier's horseplay and non attendance to his job performance Shannon characterized this as gross negligence and dismissed Collier He denied telling Collier that he would discuss his case with supervisors and get back to him Shannon also denied telling Collier that he had three signed statements from other employees, that he in fact had any such statements or that what employees say did not count However Shannon's pretrial statement affirms that he told Collier without naming names that other employees had complained about Collier's not doing his assigned work⁷⁰ Although Shannon's pretrial statement asserts

sider this to be an insignificant and possibly mistaken identification of kettle C or D

⁶⁹ R Exh 12 The separation notice asserts that Collier had been issued prior warnings on the need to improve his work performance

⁷⁰ G C Exh 13 at 10

his own conclusion based on reports from Stiggers and Dolak, that Collier had engaged in horseplay rather than work the statement does not relate that he accused Collier of horseplaying.⁷¹ Shannon agreed that his own investigation of Collier's case was limited to receipt of reports from Stiggers and Dolak.

b Summary of the evidence concerning Ricky Reeves

Reeves testified that he called Shannon on 6 November and met him at the plant. The company official told Reeves that he was being terminated because his work performance wasn't up to par. Shannon contended that Reeves was not being sufficiently helpful to Sims, his cooking partner. When Reeves asked Shannon whether the latter had talked to Sims about the matter, Shannon replied, "No."

Shannon testified that he told Reeves that the latter had been grossly negligent, and was being terminated. Reeves disagreed and said that he had been doing his job. Shannon did not contradict Reeves' testimony concerning allegations that Reeves had been insufficiently helpful to Sims.

Reeves' separation notice is dated 4 November and asserts that he had been discharged for gross negligence. It further alleges previous warnings for substandard work performance and reluctance to follow instructions.⁷²

c Factual analysis

The principal factual issues concern Collier. Although his separation notice and Shannon's testimony assert that an accusation of horseplaying was made, the absence of affirmation of such accusation in Shannon's pretrial statement and in Collier's written suspension tend to support Collier's denial that Shannon made that accusation. Although Shannon claimed that the discharge was actually made on 4 November—apparently without notice to Collier—the separation notice was not prepared until the next day, when Collier met with Shannon. It may be that the horseplaying accusation was added to the separation notice as an afterthought on 5 November. In any event, I credit Collier's denial that it was made during the discharge interview.

Collier's testimony that Shannon *said* he had signed statements against Collier from other employees is partially corroborated by Shannon's pretrial statement that other employees had made complaints about Collier. However, this does not establish that Shannon actually had made any such statements. Collier was a more truthful witness than Shannon, and I credit his testimony concerning the discharge interview.

I credit Reeves' uncontradicted testimony that Shannon accused him of being insufficiently helpful to Sims and that Shannon admitted not talking to Sims about the matter.

5 Respondent's progressive disciplinary policy and its application to Reeves and Collier

Company Official Shannon testified that the Company has a progressive disciplinary policy consisting of verbal, written and final written warnings.⁷³ As indicated above, Shannon agreed that he did not rely on Stiggers' final written warning based on alleged improper lifting techniques, in discharging Reeves. He also agreed that there is no record of verbal warnings in Reeves' file. The only infraction, Shannon admitted, was Reeves' gross negligence on 3 November. However, despite the progressive disciplinary policy, this infraction was serious enough to warrant Reeves' termination.

With respect to Collier, the final written warning on 29 October is predicated on disputed evidence as to responsibility for the agitator, as well as horseplaying. Further, Collier appears to have been warned twice for the same incident, first by Dolak and then by Stiggers. Shannon never responded to Collier's protest at what he asserted was an improper attempt to blame him for the failure of the sauce to flow on 29 October. In view of the conflicting evidence on this incident, including responsibility for the agitator and Shannon's failure to get back to Collier, the latter cannot fairly be described as culpable in this matter.

6 Legal analysis and conclusions

The General Counsel has the burden of establishing a *prima facie* case sufficient to support an inference that protected conduct was a motivating factor in Respondent's discharges of Reeves and Collier. Once this is established, the burden shifts to Respondent to demonstrate that the discharges would have taken place even in the absence of the protected conduct.⁷⁴

It is obvious that the union activities in which Reeves and Collier participated constituted protected activities. With respect to the sickout, the employees were protesting asserted harassment by supervisors, i.e., working conditions, and Reeves articulated a complaint to Supervisor Adams that the Company was refusing to bargain after the Union had won the election. Although the Board and the courts have held that concerted activity may be unprotected when the employees' conduct violates Federal law or is otherwise indefensible,⁷⁵ no such circumstances exist in this case. Accordingly, I find that the sickout also constituted concerted protected activity.⁷⁶

⁷³ Jt. Exh. 1, sec. 5.

⁷⁴ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test set forth above applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302, fn. 2 (1984). [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

⁷⁵ See authorities cited in *Spencer Trucking Corp.*, 274 NLRB 1444 (1985).

⁷⁶ *Ibid.* See also *Shogun Restaurant*, 273 NLRB 755-763 (1984) (Conclusion of Law 4). Because of these findings, I need not decide whether Reeves' visit to the company attorney's office, together with other employees, also constituted protected activity.

⁷¹ *Ibid.*

⁷² R. Exh. 13.

Inasmuch as Reeves was one of the leading proponents of the Union was threatened by Supervisor Adams while handbilling and was one of five cooks participating in the sickout, it is clear that Respondent knew of his union sympathies and other protected activities. Although Collier was not as outspoken as Reeves, he also participated in leafleting, and Supervisor Stiggers admitted that he knew Collier favored the Union. Further, Collier was one of five cooks who participated in the sickout I, therefore find that the Respondent had knowledge of Reeves and Collier's union sympathies and concerted protected activities.

The Respondent's unlawful threat to call the police on Reeves when the latter was handbilling and Production Manager Adams' statement at the 3 November meeting that another layout would result in replacement or discharge of the cooks, evidences Respondent's animus against union sympathizers such as Reeves and Collier. Accordingly I conclude that the General Counsel has established a prima facie case that Reeves and Collier's union and other protected activities were motivating factors leading to their discharges.

The Respondent's asserted reason for the discharge of Reeves, gross negligence, is not supported by credible evidence for the reasons given above. Reeves did not fail to work nor did he waste time. Although he ran out of sauce once on 3 November this was due to a lack of ingredients, not negligence on Reeves' part. Another employee, Rashid, ran out of sauce three times but was not disciplined. Rashid was the only second shift cook who did not participate in the sickout. Such disparate treatment is evidence of discriminatory motivation under well established Board law.

Reeves had received two raises in the period of slightly over a year which elapsed between his hiring and his discharge. Although he was given a warning on 29 October for assertedly lifting a tub of carrots improperly, Respondent's designation of this as a final written warning was excessive in light of the nature of the claimed offense. In any event the charged offense did not relate to the asserted reason for Reeves' termination—gross negligence. Moreover, Company Official Shannon admitted that he did not take this final written warning into account when discharging Reeves.

Shannon further admitted that Reeves was discharged because of his asserted misconduct on 8 November solely on the basis of supervisory reports without any independent investigation by Shannon or questioning of Reeves. This is a factor indicating discriminatory motivation.⁷⁷ Shannon also admitted that his discharge of Reeves did not follow the Company's progressive disciplinary system leading from verbal to written to final written warnings. This constitutes additional evidence of discriminatory motivation.⁷⁸

Although Collier had more warnings than Reeves they do not support Respondent's asserted reasons for his discharge. Collier's 28 March warning for absenteeism or tardiness is unrelated to the reasons advanced for his dis-

charge, and took place too far in the past to have been a factor. The 24 September warning for assertedly sweeping items off a table was based on hearsay. The 29 October warnings to the extent they were based on Collier's alleged responsibility for the production line running out of sauce were the subject of a supervisory dispute and were not proved to have been substantiated. Shannon never responded to Collier's protest over this incident. As for the supposedly determinative second shift on 3 November Collier was not even assigned to cooking was not responsible for any asserted failures and the credited evidence shows that he was a good employee.

The principal distinction between Reeves and Collier's cases is the latter's engaging in horseplay. However Collier engaged in this activity from the day he was hired occasionally in the presence of supervisors. Cookroom Supervisor Stiggers admitted that he was aware of Collier's activities at least as early as September 1986. Respondent's witness Hollifield contended that he notified supervisors of Collier's (and Reeves') supposedly aberrant activities 25 or 30 times—yet no written warnings were ever issued and, as shown above the evidence is insufficient to establish that Collier was ever given a verbal warning for engaging in horseplay. Finally, Collier was suspended on 3 November, not for horseplay, but for gross negligence. Within 24 hours in his separation notice the next day (not then communicated to Collier) horseplay appeared as an additional reason for the discharge. I conclude that this addition was an afterthought, and that Respondent had condoned Collier's engaging in horseplay.⁷⁹

To these observations must be added the fact that Supervisor Kelley after the 3 November employee meeting, advised Supervisor Stiggers to write up these employees. Write them up a second time a third time Boom They terminated. All the evidence including the unsubstantiated exaggerated or distorted discipline of Reeves and Collier and Stiggers and Dolak's contradictory assertions concerning the second shift on 3 November warrant an inference that the warnings were concocted by the Respondent in an effort to justify the discharges of known union adherents.⁸⁰

For these reasons I conclude that the Respondent's evidence is insufficient to establish that either Reeves or Collier would have been discharged absent the protected activity in which they engaged. Accordingly I conclude that the General Counsel's prima facie case has not been rebutted, and that the discharges were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.

⁷⁷ *Greensboro News Co* 272 NLRB 135 143 (1985) *Beverly Enterprises* 272 NLRB 83 89-90 (1984)

⁷⁸ *St Paul's Church* 275 NLRB 1242 1259 (1985)

⁷⁹ *Downtown Toyota* 276 NLRB 999 1016 (1985) *Limpert Bros* 276 NLRB 364 376-377 (1985)

⁸⁰ *Rikal West Inc* 266 NLRB 551 567 (1983) *enfd* 721 F 2d 402 (1st Cir 1983)

C The Alleged Prohibition Against Discussing Terms and Conditions of Employment with Anyone but Respondent

1 Summary of the evidence

Amelia Thompson was an employee who supported the Union and passed out leaflets and petitions. At some time prior to 1 November, she complained to Union Official Linda Riggins that she and other female employees were being sexually harassed by an inspector for the United States Department of Agriculture (USDA) who was stationed in the plant.

The union attorney called company counsel and was advised that this was a matter that should be raised with Company Official Shannon. Union counsel thereupon called Shannon and reported the matter. Shannon said that he would talk with the USDA official in charge, did so, and secured USDA permission to interview the employees and report back to USDA.

Thompson testified that she and other female employees were called to Company Official Shannon's office on or about 1 November, and were interviewed separately. Shannon told Thompson that he had received a call from Union Representative Sarason informing Shannon that some employees were being harassed by the USDA inspector. Thompson replied affirmatively and said that the inspector had offered to buy things for her and requested meeting her after work. Thompson asked Shannon to get the inspector transferred to another plant. The company official replied that he could not do this but promised to take Thompson's complaint and those of the other employees to the USDA. Shannon concluded by telling Thompson that if she had a problem with the inspector or anyone else in the future, to report the matter to Shannon or Thompson's immediate supervisor but not to talk to anyone else about the matter.

Shannon agreed that he met separately with three then current employees and one former employee. One of the persons he interviewed was Amelia Thompson. Shannon's description of Thompson's complaint against the USDA inspector is similar to Thompson's testimony although he contended that the alleged conduct constituted very unprofessional behavior rather than sexual harassment.

On direct examination, Shannon testified that he told Thompson she should feel free to discuss such matters with him or other supervisors. Thompson agreed that Shannon said this. However, Shannon denied telling Thompson that she should not discuss these matters with anyone else.⁸¹

⁸¹ Errors in the transcript are noted and corrected.

Respondent sought to question employee Charlotta Walker with respect to conversations about sexual harassment she had with company officials. The Union and the General Counsel objected on the ground that there was no complaint allegation concerning Walker and that the proffered evidence was therefore irrelevant. Respondent contended that if Walker testified Shannon did not instruct her not to discuss sexual harassment with others, this would tend to establish that Shannon similarly did not so instruct Thompson. I sustained the objection.

Respondent then submitted an offer of proof that Walker and another employee interviewed at the same time, Sheila Morant, if allowed to testify would assert that Shannon did not instruct them not to talk to other persons about sexual harassment. The same objection was made to prof-

The transcript of Shannon's cross examination reads in part as follows:

Q Mr Shannon, isn't it true that you would have preferred to have dealt with the issue of sexual harassment in house rather than dealing with the Service Employees Union?

A I would have liked for employees to come to me if they had a problem regarding sexual harassment, that's correct.

Q And that they would come to you first rather than going to the Union, isn't that correct?

A Not first or second. I just would prefer them to come to me, period.

Q You were not pleased that you received that phone call from me, were you?

A I don't like any phone call that talks about sexual harassment. I wasn't displeased that you had called me about it. In fact, I was somewhat surprised that you'd call and inform me of some issues.

Shannon reported the results of his investigation to the appropriate USDA official who assertedly said that he would consult with his supervisor and possibly with Union Attorney Sarason. There is no evidence that Shannon himself called Sarason about this matter. The USDA inspector about whom Thompson complained was transferred out of the plant about 2 months prior to the time such transfer would normally have taken place according to Shannon.

2 Factual and legal analysis

Respondent argues that Shannon rather than Thompson should be credited because Shannon (a) would not simultaneously have prohibited Thompson from talking to other persons while telling her to feel free to talk to him or other supervisors about sexual harassment; (b) handled the sexual harassment issue in cooperation with the Union and USDA officials; (c) would have expected continued contact with Mr. Sarason in resolving the sexual harassment problem; and (d) there is no evidence that the statements attributed to Shannon by Thompson were disseminated to other employees.⁸²

Respondent's argument is not persuasive. There is nothing inconsistent in Shannon's telling Thompson to feel free to discuss such matters with supervisors while at the same time prohibiting her from doing so with others. Although Shannon agreed to handle the matter referred to him by Sarason, the company argument that Shannon would have expected further contact with the Union on this issue is speculative, and Shannon did not affirm that he called Sarason back about the matter. When asked whether he preferred in-house handling of the sexual harassment issue rather than dealing with the Union, Shannon replied that he would have liked employees to come to [him] if they had a problem regarding sexual harassment; that's correct. This admission is

ferred testimony from Shannon about his conversations with other employees and was sustained, and the same offer of proof was made. There was no exception to my exclusionary rulings.

⁸² R. Br. at 97-100.

inconsistent with Respondent's contention that Shannon anticipated future cooperation with the Union on this matter.

Rather than cooperating with the Union Respondent had already demonstrated its antiunion animus by threatening Reeves and was, about the time of Shannon's conversation with Thompson engaged in preparation of the above described distorted warnings concerning Reeves and Collier. Further Shannon admitted that he would have preferred in-house handling of the sexual harassment issue. In these circumstances it is not unlikely that Shannon would have told an employee to present such grievances to the Company rather than discuss them with others. Thompson's appearance on the witness stand convinced me that she was a more truthful witness than Shannon and I credit her version of the conversation.

My conclusion would not be otherwise if I had received and credited the proffered evidence that Shannon did not make a similar statement to other employees named by Respondent. Although evidence is relevant if it has a tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence,⁸³ some evidence of unquestioned relevance may properly be excluded if its receipt would involve a waste of time.⁸⁴ That would have been the result in this instance. In civil actions of negligence, the courts have generally excluded evidence of similar prior acts because such evidence would introduce collateral issues.⁸⁵ Respondent proffered evidence is intended to establish a predisposition *not* to engage in the same act in similar circumstances. Wigmore concludes that a *negative habit* may be shown but only if the instances be sufficiently numerous as to indicate a general course of behavior under like circumstances.⁸⁶ The instances submitted by Respondent are insufficiently numerous for this purpose.

The Board has agreed that the layoff of certain individuals may be discriminatorily motivated even though other employees were not chosen for such layoffs.⁸⁷ In another case, the Board stated that the fact that the employer did not choose to compound the wrong by picking out union adherents for layoff (at one plant) can hardly cure the unlawful nature of (the employer's) initial decision causing the layoffs.⁸⁸ As set forth above I conclude that the proffered evidence as detailed in Respondent's offers of proof even if received, would have insufficient probative weight to overcome the likelihood that Shannon did make the statement attributed to him by Thompson, or to overcome the latter's inherent credibility.

Thompson's grievance, asserting sexual harassment at the workplace, concerned her working conditions. As set forth above Shannon told Thompson that if she had a problem with the USDA inspector or anybody else in

the future i.e., a problem involving sexual harassment she would be free to discuss the matter with Shannon or her immediate supervisor, but that she was not to discuss it with anybody else.⁸⁹ This rule was so broad that it precluded Thompson from discussing sexual harassment with other employees in addition to preventing her from bringing it to the attention of the Union. It is clear that such a rule is impermissibly broad and is violative of Section 8(a)(1) of the Act.⁹⁰ Respondent's argument that there is no evidence the rule was disseminated to employees other than Thompson is an insufficient defense because such a statement made to only one employee is violative of the Act.⁹¹ I conclude that Respondent, by Supervisor Shannon's statement to Thompson thereby violated Section 8(a)(1) of the Act.

D *The Alleged Unilateral Change in Disability Pay Policy*

1 Summary of the evidence

The complaint alleges that Respondent unilaterally changed its disability pay policy about 1 June without notice to or consultation with the Union. Respondent agrees that there was a change, but contends that it took place about 1 May and thus prior to the date of the election (23 May) and more than 6 months prior to the filing date of the first charge in this case (10 November). The evidence is both documentary and testimonial in nature.

The parties stipulated that Georgia law provides that employees injured at work are not to be compensated for their injuries for the first 7 days. Respondent's director of human resources Shannon testified that in January 1986 he decided to pay employees for the first 3 days of this 7 day waiting period because he considered it good policy. However the policy was not accurately implemented for various reasons, and Shannon issued a memorandum 6 February explaining that employees were to be compensated for the first 3 days of a work related accident as verified by a doctor's statement.⁹² Shannon identified a list of employees with work related injuries showing that of nine employees with such injuries during the last quarter of 1985, none received compensation for the first 3 days. Thereafter beginning 6 January and continuing for several months some employees received such benefits and some did not.⁹³ Shannon testified that his new policy was not uniformly followed despite his February memorandum because of the advent of new supervisors who did not understand the policy and because of computer and clerical errors.

⁸⁹ The pleadings appear to establish Shannon's supervisory status. On the basis of the pleadings and the record evidence which contains ample indicia of such status I conclude that Shannon was a supervisor within the meaning of the Act.

⁹⁰ *Pontiac Osteopathic Hospital* 284 NLRB 442 (1987); *Scientific Atlanta* 278 NLRB 467 (1986); *The Loft* 277 NLRB 1444 (1986); *A L S A C* 277 NLRB 1532 (1986). There is no evidence that the Respondent considered sexual harassment of its employees to be information confidential to the Company such as comparative wages. Cf. *L G Williams Oil Co* 285 NLRB 418 (1987).

⁹¹ *Flex Plastics* 262 NLRB 651 659-660 (1982) enf'd 726 F.2d 272 (6th Cir. 1984).

⁹² G.C. Exh. 4.

⁹³ G.C. Exh. 5.

⁸³ Fed. R. Evid. 401.

⁸⁴ Id. at 403 and Advisory Committee Note.

⁸⁵ 29 Am. Jur. 2d *Agency* § 315.

⁸⁶ 2 Wigmore *Evidence* § 376 (Chadbourn rev. 1979).

⁸⁷ *Rea Trucking Co* 176 NLRB 520 (1969).

⁸⁸ *Ethyl Corp.* 231 NLRB 431 433 (1977).

Shannon further asserted that Respondent decided to eliminate this 3 day payment at the end of April 1986 because it caused people to stay out of work longer than they needed to do so Accordingly, after meeting with supervisors, Shannon decided to discontinue the policy effective 1 May There is no evidence that Respondent documented this asserted elimination of the 3 day policy with a memorandum as it did the implementation of the policy in February

Respondent's records show that it continued to pay some 3 day benefits and to deny others until 13 June, when the last such payment was made Thereafter beginning with the first nonpayment on 16 June and for the remainder of 1986 and about the first 3 months of 1987 no such payments were made to any of numerous employees with work related injuries⁹⁴ Shannon acknowledged the continued payments after 1 May Some were paid and some weren't The same as had occurred before Shannon claimed that this was not to happen but agreed that he was responsible for the continued payments The director of human resources also agreed that he did not notify the Union of this mid June change of policy which date he later corrected to 1 May

Reeves was one of the employees who was given 3 day disability pay subsequent to the asserted elimination of the policy for an injury sustained on 4 June⁹⁵ Reeves testified that he was injured again about 27 July, and that his supervisor at the time, Dan Rhymer, told him that he would receive disability pay and so marked his time card⁹⁶ Reeves affirmed that he was not compensated for this injury, and protested to Company Official Shannon about the end of July According to Reeves Shannon said that the policy had changed about a month before [Reeves] injury i.e., about 27 June, that Shannon had notified the supervisor and that the latter should have notified Reeves Shannon did not contradict this testimony and Rhymer did not testify

2 Factual analysis

Respondent's records are more persuasive than Shannon's testimony They show two periods of nonpayment (for the first 3 days of work related injuries) the first period being the last quarter of 1985, and the second period beginning on 16 June 1986 and continuing into 1987 Shannon's explanation of the continuation of such payments after 1 May—his asserted date of the elimination of payments—is almost nonexistent About all that he contends is that the same thing happened again i.e. alleged errors However, Shannon gives no explanation of the fact that the second unbroken series of nonpayments began on 16 June, just as the last one ended at the close of 1985 This is consistent with Reeves uncon-

tradicted testimony, which I credit, that Shannon told him that the policy changed about a month before Reeves 27 July accident

For these reasons I find that Respondent changed its disability policy about 16 June so as to eliminate payment for the first 3 days of disability⁹⁷ I credit Shannon's testimony that this change was made without notice to the Union

3 Legal analysis and conclusions

The foregoing discontinuance of disability pay constituted a unilateral change in employees terms and conditions of employment which took place while the Employer's objections to an election were pending I have concluded that the objections are without merit and that a certification of representative should issue The Board has stated the law in such circumstances as follows

The Board has long held that absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made And where the final determination on the objections results in the certification of a representative the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending⁹⁸

I therefore conclude that Respondent, by its unilateral change in disability pay policy on about 16 June so as to eliminate such pay for the first 3 days of disability there by violated Section 8(a)(5) and (1) of the Act⁹⁹

⁹⁴ Ibid

⁹⁵ G C Exhs 5 and 6

⁹⁶ G C Exh 6 A photostat of Reeves' timecard for the period ending 27 July is in evidence and the word Disability although faint appears in the spaces for the last 3 days Reeves' timecard for the June disability also contains very faint markings appearing to show the word Disability However immediately below these faint markings the printed word Disability appears clearly followed by a clearly imprinted but some what illegible word that appears to be pan or pair (pay?) R Exh 17

⁹⁷ Respondent's reliance on the absence of the word pay after the word disability on Reeves' July timecard (G C Exh 6) as contrasted with the asserted addition of that word on the June timecard (R Exh 17) has little probative value because the evidence cited above shows that the policy change was made in mid June and because the June timecard has markings that suggest an addition to it subsequent to the original entries (R Exh 17)

⁹⁸ *Mike O Connor Cheverolet* 209 NLRB 701 703 (1974) rev'd on other grounds 512 F 2d 684 (8th Cir 1975) see also *Master Slack* 230 NLRB 1054 fn 3 (1977)

⁹⁹ Because the change took place in mid June and the Union filed an unfair labor practice charge alleging unlawful changes on 10 November (G C Exh 1(a)) it is obvious that Respondent's tacit argument based on Sec 10(b) of the Act is without merit

E The Alleged Refusal to Bargain over Denial of a Wage Increase

1 Summary of the evidence

a Respondent's wage increase policies

The complaint alleges that the Respondent since about 1 December, refused to bargain with the Union over its denial of a wage increase, thus violating Section 8(a)(5) and (1) of the Act. Much of the evidence pertains to the Company's policies concerning pay increases. The plant opened in 1985, and prospective employees were interviewed in that year.

Irma Jean Ming testified on direct examination that she was interviewed in August 1985 by Supervisor Freddie Whatley and that the latter told her she would get a raise after her probationary period and every 6 months thereafter. On cross examination Ming stated that Whatley told her she would receive a performance evaluation every 6 months and a raise based on her performance. On further questioning however Ming testified that she was not evaluated prior to receiving her first raise in January (after the probationary period), nor her second raise in June. In November, some time before Ming left the Company, Whatley called her into his office and told her that that was her evaluation.

Ming further testified that she attended a meeting of 75-100 employees in October 1985. The meeting was conducted by Company Official Rick Shannon and employees were told that they would receive a raise after the 90 day probationary period and every 6 months thereafter.

Ricky Reeves testified that he had a conversation in October 1985 with Supervisor Whatley. According to Reeves Whatley said that employees would receive raises twice a year in June and December. Reeves also testified that in a meeting he had with Shannon about the same time in the latter's office the company official said the same thing. According to Reeves Shannon declared that Reeves would be making \$10 hourly at the end of the year. On cross examination Reeves testified that Shannon said the same thing to him in Shannon's office in May 1986. Reeves denied that anybody cautioned him about any misunderstanding he might have had about automatic raises.

Reeves also testified that he attended a meeting in a breakroom in October 1985 when a supervisor named Jerry utilizing an overhead camera, showed a projection of two raises yearly.

Linwood Barber a sanitation worker, was hired in November 1985 at \$6.20 an hour and testified that Shannon then told him that he would get a 15 cent raise after 90 days and subsequent raises twice yearly averaging 75 to 90 cents, so that Barber would be making about \$10 an hour at the end of a year of employment. Barber further averred that he received a 15 cent raise at the end of his probationary period. On cross examination Barber agreed that the raises assertedly promised by Shannon would not reach \$10 and stated that he was making \$6.65 at the time of the hearing. Barber denied that Shannon said that the raises depended on an evaluation

Production Supervisor Whatley hired employees before the plant opened. He testified that pursuant to instructions from Shannon he told employees that they would receive raises after their probationary periods and every 6 months thereafter if they qualified. However Whatley agreed that there was no evaluation process at the time he interviewed employees. Although the Company was working on an evaluation policy none had been approved as late as the date of Whatley's testimony (13 May 1987). All employees of whom Whatley had knowledge received raises if still employed at the end of their probationary periods. Whatley identified a company handbook explaining wage policies, but denied that he ever gave it to employees.¹⁰⁰

On 4 June Union Official Linda Riggins wrote Shannon a letter stating that the Union had learned that the Company was refusing to grant the June 1986 wage increase and that the Union would file unfair labor practice charges in such event.¹⁰¹ On 20 June Plant Manager James Beno wrote a memo to employees stating that the June increase would be made pursuant to the promise previously made [but] not because of any threat by the Union.¹⁰²

¹⁰⁰ The handbook states that wages paid by other firms in the area will serve as guidelines for the Company's determination of its wages and that salary surveys will be conducted once a year for this purpose. The handbook further states:

Pay will progress on the basis of merit. Wage and salary increases are intended to reward overall job performance and are not given on the basis of length of service alone.

Finally in a separate subsection the handbook provides for a performance appraisal interview every 6 months after the end of the probationary period.

This is an especially good time to discuss your present and future opportunities with your supervisor. You will be given a copy of your performance appraisal.

If you are a salaried employee you will be given a formal performance appraisal interview and considered for a merit increase once each year. [Jt Exh 1 Compensation Practices]

¹⁰¹ The letter reads as follows:

It has come to the Union's attention that the Company is refusing to grant the June 1986 wage increase. Please be advised that the Union will not file charges if the Company grants the June 1986 wage increase. Please be further advised that the Union will file unfair labor practice charges if the Company refuses to grant the June 1986 wage increases.

Follow the Law Grant the Wage Increase [G C Exh 8]

¹⁰² The memo reads as follows:

When we opened this facility we informed you that there would be a wage review in June 1986. We have completed that wage review and we are pleased to announce that all hourly non exempt employees who have had more than 90 days of service as of June 16 1986 will receive a 4% increase in their next paycheck. Maintenance employees who received an increase in March will not receive this announced increase.

This wage increase is pursuant to the promise we previously made to you. It is not because of any threat by the union which is apparently trying to take credit for the increase. We promised you this wage review before the union came along and we live up to our promises—union or no union. The 4% increase is across the board and does not reflect an individual judgment that an employee's [sic] performance is necessarily acceptable.

Despite this wage increase you should be aware that we continue to have certain problems. Our cost per case remains too high compared to our other facility and the anticipated cost at the planned new facility. We hope that this wage increase will prompt an increase in productivity and a long term decrease in our cost per case. If not we will have to consider other ways to address this problem.

Please see Rick Shannon or me if you have any questions about this [G C Exh 18].

The testimonies of the General Counsel's witnesses Production Supervisor Whatley, and Director of Human Resources Shannon establish that all employees except maintenance mechanics who had completed their probationary periods received a wage increase at the end of such periods and again in June 1986 without any evaluation of their individual qualifications. The maintenance mechanics had received a raise in March.

Although Whatley said that he did not distribute handbooks that stated a merit policy with respect to raises Shannon contended that he did distribute them, but then had to recall the copies because they had not been authorized. Shannon asserted that another supervisor interviewing potential employees was misstating company wage policy, and that Shannon had to correct this. However, it was brought to Shannon's attention in October 1985 that employees still did not understand the Company's policy. Accordingly, Shannon and a supervisor named Gary Grayburn held employee meetings. Grayburn concentrated on production, and told employees that the Company was then losing close to a million dollars per month. Shannon asserted that Grayburn did not discuss wages—Shannon himself did so, and emphasized to employees that raises would be based on performance reviews.¹⁰³ Shannon denied that he promised anybody automatic raises. However, as noted, Shannon agreed that the raises at the end of probationary periods and those in June 1986 were made without performance appraisals.

Plant Manager Beno testified that an across the board raise was given in June because there was no fair method in place to evaluate 400 employees. Beno asserted that the June 1986 increase of 4 percent was based on the amount of money that was in the budget. He also affirmed that the 1987 budget provided for two increases without specifying the existence of a performance appraisal system.

Director of Human Resources Shannon testified about a long and unsuccessful attempt to get higher corporate approval of a performance appraisal form. After two such failures in 1985 Shannon made another attempt in September 1986. After numerous revisions it was put into effect on 24 March 1987 according to Shannon. As noted Whatley on 13 May 1987 denied that there was any such plan in effect. Shannon agreed that his pretrial affidavit¹⁰⁴ states that his intent was to have the evaluation system in place for the December raises. At the hearing, however Shannon denied this and said that his intent was to have the system ready for the December reviews.

b Evidence concerning alleged refusal to bargain over denial of a December wage increase

As set forth above there was employee dissatisfaction with the Respondent's refusal to accept the results of the May election based on the asserted objections thereto. Thus sometime prior to November, Reeves and other employees, at the Union's suggestion protested to Respondent's attorney about legal games and the Compa-

ny's refusal to bargain. Following the sickout Reeves made the same protest to Production Manager Adams at the 3 November meeting. On 10 November, the Union filed an unfair labor practice charge alleging that Respondent had refused to bargain with the Union on or about 23 May and thereafter and had made unilateral changes without bargaining.¹⁰⁵ On 9 December, the Union sent Shannon a memorandum stating that it had learned the Company was refusing to grant the December, 1986 wage increase and advising the Company that, in such event, the Union would file unfair labor practice charges.¹⁰⁶

Linda Riggins credibly testified that the Company did not respond to this memorandum. On 11 February 1987 the Union filed an unfair labor practice charge alleging that Respondent since 1 December had refused to bargain with the Union and had made unilateral changes to discourage union activities.¹⁰⁷ As indicated the complaint alleges that Respondent refused to bargain with the Union on about 1 December over Respondent's denial of a wage increase.¹⁰⁸

Riggins and Plant Manager Beno testified that there was no wage increase in December. According to Beno the reason was that the evaluation system was not yet ready.

2 Factual analysis

The testimonies of the General Counsel's witnesses, corroborated by Respondent's witness Whatley, established that the Company promised its new employees a raise after successful completion of their probationary periods and additional raises twice yearly thereafter. The factual issues are whether Respondent conditioned such raises on an employee's successful performance evaluation and whether it established a practice of giving raises without such evaluations.

With respect to the issue of what the Company promised new employees Barber explicitly denied that a successful evaluation was a condition of a raise¹⁰⁹ and was partially corroborated by Reeves' denial that anybody spoke to him about any misunderstanding concerning automatic raises. Although Ming testified on cross examination that Whatley told her she would receive a performance evaluation every 6 months the importance of this testimony is diminished by Ming's later clarification

¹⁰⁵ G C Exh 1(a)

¹⁰⁶ The memorandum signed by Field Representative Linda Riggins reads as follows:

It has been brought to the Union's attention that the Company is refusing to grant the December 1986 wage increase. Please be advised that the Union will not file charges if the Company grants the December 1986 wage increase. Please be further advised that the Union will file unfair labor practice charges if the Company refuses to grant the December 1986 wage increase.

Follow the Law Grant the wage increase [G C Exh 9]

¹⁰⁷ G C Exh 1(i)

¹⁰⁸ G C Exh 1(p)

¹⁰⁹ Respondent argues that Barber's assertion that Shannon told him he would be making \$10 an hour within a year is unrealistic considering Barber's job classification as a sanitation worker. However Reeves testified that Shannon said the same thing to him and it is entirely possible that Shannon gave some employees an exaggerated estimate of their future earnings.

¹⁰³ Grayburn did not testify.

¹⁰⁴ G C Exh 17.

that Whatley told her some time before Ming quit that a discussion Whatley then had with her in his office was her evaluation Reeves description of Shannon s two explanations of raises in Shannon s office contains no reference to evaluation appraisals and is uncontradicted

It is unquestioned that Respondent held a meeting of employees in October 1985 at which raises were discussed Ming s and Reeves description of that meeting consistently omit any reference to an evaluation as a requirement for raises twice yearly Both Reeves and Shannon mentioned a supervisor who talked to employees—Reeves called him Jerry and Shannon said his name Gary Grayburn I infer that these names refer to the same person I credit Reeves testimony that Jerry [Grayburn] projected raises twice yearly from an overhead camera, and I do not credit Shannon s denial that Grayburn discussed wages

The documentary evidence does not assist Respondent s cause Although Beno s 20 June memo to employees states that the 4 percent across the board raise granted that month did not reflect a judgment that an individual employee s performance was acceptable the document does not even mention performance appraisals much less condition future raises on them Instead, the memo justifies the raise on the basis of the promise we previously made to you

The employee handbook does not help the Company s case In the first place, Whatley and Shannon could not agree whether the handbook was even distributed, and in any event it was not authorized according to Shannon The text of the handbook refers only to formal appraisal interview for *salaried* employees, apparently as a condition for a merit increase once each year Unsalaries employees were to be given performance appraisals every 6 months, not specifically for the purpose of qualifying for a raise but to provide opportunities to discuss their future with the Company

Finally, Beno s description of the rationale for the June 1986 raise and projected 1987 raises shows that these were across the board raises based on budgetary considerations

On the basis of the totality of the credible evidence, I conclude that Respondent promised new employees a raise after the 90 day probationary period and raises twice yearly thereafter in June and December without any condition of a successful performance appraisal

It is unquestioned that the Company granted two raises without any such evaluations at the end of each employee s probationary period and an overall raise in June 1986 Respondent s argument that it did not grant a December 1986 increase because its performance appraisal system was not yet in place is unpersuasive Respondent had previously given two raises without evaluations and its witnesses could not even agree at the time of the hearing whether an evaluation system was then in place—after almost 2 years of trying

I conclude that the raises actually given established a practice of giving employees raises after their probationary periods and periodic raises twice yearly thereafter in June and December based on budgetary considerations Although Respondent contends that such raises were contingent on a successful performance evaluation per

each employee the fact that Respondent gave two such raises without such evaluations at times when there was no performance appraisal system in place establishes, at the least a practice of omitting the evaluation requirement in such circumstances It is undisputed that no evaluation system had been established by December 1986 the time of the asserted withholding of a wage increase Although Respondent s prior practices is established by only two instances of prior raises, these two instances cover the entire period of the plant s existence, and were preceded by explicit promises of such raises by Respondent to new employees I, therefore, conclude that Respondent s failure to grant a December wage increase was a departure from such prior practice ¹¹⁰

The remainder of the evidence is uncontested The employees twice protested the Company s refusal to bargain while the Union sent a memo protesting the failure to grant the December wage increase and filed an unfair labor practice charge alleging both a refusal to bargain and unilateral changes

3 Legal analysis and conclusions

Section 8(d) of the Act sets forth the obligation of the parties to meet at reasonable times and confer in good faith with respect to wages hours and other terms and conditions of employment In addition, the employer may not impose new or different working conditions without first giving the employees representative an opportunity to bargain over them ¹¹¹ Because Respondent s denial of a wage increase in December 1986 constituted a withdrawal of a previously established privilege and thus a departure from past practice as well as a denial of its promise to employees, and because Respondent failed at its peril to consult the Union about these matters pending resolution of its objections to the election ¹¹² it would appear that Respondent thereby violated Section 8(a)(5) and (1) of the Act ¹¹³

However the complaint alleges that the gravamen of Respondent s offense was its refusal to bargain with the Union over its denial of a December wage increase not the unilateral change described above The Board and at least three circuit courts of appeal have held in similar circumstances that a variance of this nature does not deny a respondent due process Thus in *Foss Co v NLRB* 752 F 2d 1407 (9th Cir 1985) enfg 270 NLRB 232 (1984) the complaint alleged and the General Counsel contended that the employer discharged certain em

¹¹⁰ *Plasticrafts Inc v NLRB* 586 F 2d 185 (10th Cir 1978) enfg as modified 234 NLRB 762 (1978) *Memphis Furniture Mfg Co* 252 NLRB 303 (1980) In cases where there is a clearly established departure from prior practice there need be no finding that the withholding of a wage increase was discriminatorily motivated *Plasticrafts* supra Although there is evidence of antunion animus in this case I make no finding whether the withholding was motivated by such animus because of my conclusion that Respondent departed from prior practice

¹¹¹ *A H Belo Corp v NLRB* 411 F 2d 959 970 (5th Cir 1969) cert denied 396 U S 1007 (1970)

¹¹² Supra at fn 98

¹¹³ *Plasticrafts Inc* supra at fn 110 *City Cab Co v NLRB* 787 F 2d 1475 (11th Cir 1986) enfg 273 NLRB 1344 (1985) *Auto Fast Freight* 272 NLRB 561 (1984) enfd 793 F 2d 1126 (9th Cir 1986) *Meilman Food Industries* 234 NLRB 698 (1978) enfd sub nom *Meat Cutters Local 301 v NLRB* 593 F 2d 1370 (DC Cir 1979)

ployees discriminatorily because of their membership in one union (NAIU). However, the Board found that the illegality of the discharges was based on the fact that the employer, after signing a contract with another union (IBEW), discharged the employees without giving them the 7 day grace period provided by Section 8(f) of the Act before requiring them to become members of IBEW. On appeal, the employer contended that its due process rights were violated because it was found guilty of an unfair labor practice that was not charged in the complaint (id at 1411).

In an exhaustive review of the authorities, the Court of Appeals for the Ninth Circuit noted that the Board is not subject to the technical pleading requirements that govern private lawsuits [and that] where the issue is fully and fairly litigated at the administrative hearing, the Board may find an unfair labor practice even though no specific charge is made in the original complaint. Citing *NLRB v Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981), the Ninth Circuit noted the District of Columbia Circuit's willingness to enforce a Board Order when there had been a meaningful opportunity to litigate the underlying issue. The Ninth Circuit characterized the issue before it in *Foss Co.* as largely a technical and semantic distinction. In addition, the Company had ample opportunity to litigate the violation as found by the ALJ (id at 1411-1412). The court concluded as follows:

Finally, even if the Company had not understood the issue at the hearing, it was fully litigated in the sense that there was no more exculpatory evidence that could have been introduced. Although the Company states in its opening brief that it could have proved a number of things to escape liability, it cites no authority for the proposition that the allegedly exculpatory evidence would be a defense to a charge of discharging workers before the grace period expired. [Id at 1412.]

More recently, the Court of Appeals for the Second Circuit has expressed similar views in a case where the Board's findings varied somewhat from the precise allegation in the complaint. *NLRB v Chelsea Laboratories*, 825 F.2d 680 (2d Cir. 1987), enfd. 282 NLRB 500 (1986).

In this case, the issue whether Respondent's refusal to grant a December 1986 raise constituted a departure from past practice was extensively litigated. I therefore conclude for the reasons given above that by such action without notice and an opportunity for the Union to bargain, Respondent thereby violated Section 8(a)(5) and (1) of the Act.¹¹⁴

¹¹⁴ The General Counsel states in his brief that any request to bargain over such refusal (to grant a December wage increase) would have been futile in light of Respondent's action in testing the certification. (G.C. Br. 9). In support of this portion, counsel cites *Sunnyland Refining Co.*, 250 NLRB 1180 (1980) and *Williams Energy Co.*, 218 NLRB 1080 fn. 4 (1975). The tacit premise in this argument—that the Union did not request bargaining—is at least arguable. See e.g., *NLRB v Columbian Enameling & Co.*, 306 U.S. 292, 297-298 (1939); *Barney's Supercenter*, 128 NLRB 1325, 1327 (1960), enfd. 296 F.2d 91 (3d Cir. 1961); *Landers Dump Truck*, 192 NLRB 207, 208 (1971); *Schreiber Freight Lines*, 204 NLRB 1162, 1168 (1973); *Marysville Travelodge*, 233 NLRB 527, 533 (1977), enfd.

F. The Alleged Unilateral Layoff of Employees

Director of Human Resources Shannon testified that he told employees there would be a layoff in February 1987 and asked for volunteers,¹¹⁵ without notifying the Union. Thereafter, on 23 February 1987, 22 employees were laid off without such notification.¹¹⁶

Respondent's witnesses contended that the reason for the layoffs was excessive inventory. Over 40 employees volunteered¹¹⁷ and because this was more than the Respondent needed, a selection was made among the volunteers on a seniority basis. All the laid off employees were back at work within a few weeks, according to Respondent's witnesses.

In a similar case, the Board stated as follows:

Although an employer may properly decide that an economic layoff is required, once such a decision is made, the employer must nevertheless notify the Union, and upon request bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected. By failing to so notify the Union while its objections to the election were pending, Respondent acted at its peril and, since the Union was thereafter certified as the collective bargaining representative of its employees, Respondent thereby violated Section 8(a)(5) and (1) of the Act.¹¹⁸

I reach the same conclusion and find that Respondent's layoff of 22 employees on 23 February 1987 without notification to the Union violated Section 8(a)(5) and (1) of the Act.

637 F.2d 1309 (9th Cir. 1981); *Columbia Engineers*, 268 NLRB 337, 340 (1983); *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985); and *Tile Terrazzo & Marble Contractors Assn.*, 287 NLRB 769 (1987). However, I need not pass on the issues whether the Union made a request to bargain whether such request would have been futile or whether Respondent refused to bargain on the December wage increase issue in light of my finding above that it failed to give the Union notice and opportunity to bargain over its unilateral discontinuance of a wage increase in December 1986.

¹¹⁵ R. Exh. 22.

¹¹⁶ Shannon identified an exhibit containing a list of 24 names as those employees who were laid off (G.C. Exh. 7). However, he later testified that two of the individuals whose names appear on the list (Malline Gleen and Janet Walker) were not laid off because work became available. Without these two employees, the following names appear on the list:

| | |
|------------------|--------------------|
| Ethel Hill | Kinh Tua Nguyen |
| Linda Wright | Dieu Minh Hoang |
| Paulette Ellison | Minh Pham Hoang |
| Valerie Berry | Charles Boyd |
| Scedro Williams | Veester Murphy |
| Mary Davenport | Celestine Lawrence |
| Sherry Nelson | Penny Stembridge |
| Charlanda Wyser | Ida Howell |
| My Diep | Canetra English |
| Arthur Thomas | Gwen Wright |
| Patricia Jones | Brenda Parks |

¹¹⁷ R. Exh. 23.

¹¹⁸ *Clements Wire*, 257 NLRB 1058, 1059 (1981).

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1 The Respondent The All American Gourmet Company,¹¹⁹ is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act

2 Service Employees International Union, Local 579 AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act

3 By telling an employee that it would call the police on him because he was engaging in protective activity, and by telling an employee that she could not discuss terms and conditions of her employment with anybody but Respondent's representatives Respondent thereby violated Section 8(a)(1) of the Act

4 By discharging employees Ricky Reeves and Mike Collier on 4 November 1986 because of their membership in and activities on behalf of the Union, and because they engaged in protected concerted activities with other employees for the purpose of mutual aid and protection Respondent thereby violated Section 8(a)(3) and (1) of the Act

5 The following unit is now and has been at all times material an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

All production and maintenance employees employed by Respondent at its 5475 Bucknell Drive facility in Atlanta Georgia including all maintenance mechanics, maintenance crew leaders, tool crib attendants tool crib leaders sanitation aides sanitation crew leaders food preparers food preparer leaders, cooks cook leaders material handlers material handler leaders production assemblers machine operators line attendants qc inspectors and line leaders but excluding all other employees temporary employees office clerical employees guards and supervisors as defined in the Act

6 On 23 May 1986 in an election conducted by the Board a majority of the employees in the unit described above designated the above named Union as their representative for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment

7 By engaging in the following unilateral actions without notifying the Union and giving it an opportunity to bargain over such matters Respondent thereby violated Section 8(a)(5) and (1) of the Act

(a) On or about 16 June 1986 changing its disability pay policy so as to delete disability pay for the first 3 days of disability

(b) Failing to adhere to its previously established policy and promise to employees to grant across the

board raises twice yearly, in June and December by failing to give such raises in December 1986

(c) On 23 February 1987 by laying off the 22 employees listed above in footnote 116

8 The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices it is recommended that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

Having found that Respondent unlawfully discharged Ricky Reeves and Mike Collier on 4 November 1986 it is recommended that Respondent be ordered to offer each of them immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position dismissing if necessary any employee hired to fill the position and to make each of them whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement less net earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F W Woolworth Co* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)¹²⁰

Having found that Respondent unlawfully changed its disability pay policy on 16 June 1986 to eliminate disability pay for the first 3 days of disability it is recommended that Respondent be required to reinstate such policy forthwith to make each employee affected thereby whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful discontinuance of the policy by paying him or her the amount of money he or she would have received absent Respondent's unlawful change of policy with interest computed as described above¹²¹ to notify the Union prior to any future change in such policy and on request to bargain with it over this matter

Having found that Respondent unlawfully changed its policy of granting periodic raises by failing to give raises to its employees in December 1986 it is recommended that Respondent be required to make its employees employed at that time whole for the loss of earnings they suffered because of Respondent's failure to give such raises by granting them raises retroactively to December 1986 in such amounts as normally would have been granted to them with interest computed as described above¹²² to notify the Union prior to any future change

¹²⁰ Under *New Horizons* interest is computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp* 231 NLRB 651 (1977)

¹²¹ *Master Slack* supra at fn 98

¹²² *Plasticrafts Inc* 234 NLRB 762 768 (1978) enfd as modified 586 F.2d 185 (10th Cir 1978) *Our Way Inc* 268 NLRB 394 421-422 (1983)

¹¹⁹ Although the pleadings in some instances omit the word Company in the Respondent's name the Respondent in its formal pleadings includes that word and I do the same

in such policy and on request to bargain with it over this matter

Having found that on 23 February 1987 Respondent unlawfully laid off the 22 employees listed above¹²³ it is recommended that Respondent be required to offer reinstatement to any such employee it has not already reinstated and to make each laid off employee whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful conduct by paying each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful layoff to the date of his or her reinstatement or to the date of Respondent's offer of reinstatement, less net earnings during such period, with interest computed as described above¹²⁴ It is further recommended that Respondent be required to notify the Union prior to any future layoffs and, on request bargain with it over this matter

Having found that Respondent unlawfully ordered Amelia Thompson not to discuss her terms and conditions of employment with anybody except Respondent's supervisors it is recommended that Respondent be required to notify her in writing at her last known address that this order is withdrawn, and that she is free to discuss her terms and conditions of employment while employed by Respondent with anybody Although Thompson is no longer employed by Respondent she may again be so employed in the future, and this action by Respondent is necessary to dissipate the effects of its prior unlawful conduct against her

It is also recommended that Respondent be required to post appropriate notices to remove from its personnel records all references to its unlawful discharges of Ricky Reeves and Mike Collier, and to notify each of them in writing that such expunction has been made and that evidence of their unlawful discipline will not be used as a basis for future personnel actions against them

The General Counsel has filed an extensive brief recommending that a visitatorial clause be included in their remedial order In *O L Willis Inc* 278 NLRB 203 (1986) the Board in similar circumstances found it unnecessary to include such a clause I reach the same conclusion

On these findings of fact and conclusions of law and on the entire record I issue the following recommendation¹²⁵

ORDER

The Respondent American Gourmet Company Atlanta Georgia its officers agents successors and assigns, shall

1 Cease and desist from

(a) Telling employees that it will call the police on them because they are engaged in protected activities

(b) Telling employees that they may not discuss their terms and conditions of employment with anybody other than Respondent's supervisors

(c) Discouraging membership in Service Employees International Union Local 579 AFL-CIO or any other labor organization by discharging employees because of their union or other protected concerted activities or by discriminating against them in any other manner with respect to their hire, tenure of employment, or other terms and conditions of employment

(d) Unilaterally changing its disability policies without giving advance notice thereof to the above named labor organization or without affording it an opportunity to bargain over such matters

(e) Unilaterally changing its policy regarding periodic raises to employees without giving advance notice thereof to the above named labor organization or without affording it an opportunity to bargain over such matters

(f) Unilaterally laying off employees without giving advance notice thereof to the above named labor organization or without affording it an opportunity to bargain over such matters

(g) In any other like or similar manner interfering with restraining or coercing employees in the exercise of their rights under Section 7 of the Act

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

(a) Offer Ricky Reeves and Mike Collier full reinstatement to their former positions or if any such position no longer exist to a substantially equivalent position without prejudice to the seniority or other rights and privileges of either of them, and make them whole for any loss of earnings either of them may have suffered by reason of Respondent's unlawful discharges of them on 4 November 1986 in the manner described in the remedy section of this decision

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way

(c) Withdraw its rescission on 16 June 1986 of its policy of paying disability pay for the first 3 days of disability reinstate its prior disability policy providing for such payments and publish notices thereof on all bulletin boards maintained by the Company and with the Union's consent bulletin boards maintained by its employees

(d) Make whole any employees who may have suffered a loss of disability pay because of Respondent's unlawful change of its disability policy on 16 June 1986 in the manner described in the remedy section of this decision

(e) Notify the above named labor organization prior to any proposed change in disability pay policy and on request bargain with it concerning such proposed change

(f) Make its employees whole for its unlawful failure to give them a periodic raise in December 1986 in the manner described in the remedy section of this decision

(g) Notify the above named labor organization prior to any change in its policy of giving periodic pay raises to

¹²³ Supra at fn 116

¹²⁴ *Clements Wire* supra at fn 118

¹²⁵ 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

its employees twice yearly and on request bargain with the Union over this matter

(h) Offer reinstatement to his or her former position to any of the following employees not yet reinstated

| | |
|------------------|--------------------|
| Ethel Hill | Kinh Tua Nguyen |
| Linda Wright | Dieu Minh Hoang |
| Paulette Ellison | Minh Pham Hoang |
| Valerie Berry | Charles Boyd |
| Scedro Williams | Veester Murphy |
| Mary Davenport | Celestine Lawrence |
| Sherry Nelson | Penny Stembridge |
| Charlanda Wyser | Ida Howell |
| My Diep | Canetra English |
| Arthur Thomas | Gwen Wright |
| Patricia Jones | Brenda Parks |

(i) Make whole the employees named immediately above for any loss of earnings they may have suffered because of Respondent's unlawful layoff of them on 23 February 1987 in the manner described in the remedy section of this decision

(j) Notify the above named labor organization prior to any proposed future layoff of employees and on request, bargain with it over this matter

(k) Notify Amelia Thompson in writing at her last known address that on her return to employment if any, the prior order prohibiting her from discussing the terms and conditions of her employment with anybody except Respondent's supervisors is withdrawn and that she is free to discuss such matters with anybody

(l) Preserve and, on request make available to the Board or its agents for examination and copying all pay roll records, social security payment records, timecards personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order

(m) Post at its 5475 Bucknell Drive, Atlanta Georgia facility copies of the attached notice marked Appendix ¹²⁶ Copies of the notice on forms provided by the Regional Director for Region 10 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

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

IT IS FURTHER RECOMMENDED that the Employer's objections to the election in Case 10-RC-13308 be overruled in their entirety, and that a certification of representative issue designating the above named labor organization as the representative of the employees in the unit specified above in Conclusion of Law 5

¹²⁶ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"