Seven-Up Bottling of Phoenix, Inc. *and* **Leonard Stock.** Case 28-CA-6086

August 20, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On October 22, 1981, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and an answering brief in reply to the General Counsel's exceptions and in support of its cross-exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge that Leonard Stock, whose discharge is the subject of the complaint, is a managerial employee, and that the complaint should be dismissed. While we do not accept all of the Administrative Law Judge's discussion of what constitutes protected activity and when the discharge of a supervisor or managerial employee may be remedied under the Act, we see no basis in the case for extending the protection of the Act to Stock as a managerial employee. See *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982).

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge: Upon a charge filed on September 15, 1980, by Leonard Stock, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, Phoenix, Arizona, duly issued a complaint and notice of hearing on October 29, 1980, against Seven-Up Bottling of Phoenix, Inc., herein called the Respondent, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended, herein referred to as the Act. On November 6, 1980, the Respondent, by counsel, duly filed an answer denying the material allegations in the complaint and setting forth therein the following affirmative defense:

> . . . that at all times material herein Leonard Stock has been excluded from the protection of the Act by reason of his duties as a statutory supervisor and/or managerial employee.

A hearing was duly held before me in Phoenix on March 12 and 13, 1981. At the close of the General Counsel's case the Respondent moved to dismiss the complaint for the reason that Stock had not engaged in any "concerted activities." I denied this motion.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, the General Counsel[1] and the Respondent filed briefs. In its brief the Respondent renewed its motion to dismiss the complaint and realleged its affirmative defense that "at the time of his discharge Stock was excluded from the protection of the Act by reason of his duties as a statutory supervisor and/or managerial employee." For the reasons appearing hereinafter I grant the Respondent's motion to dismiss the complaint in its entirety.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material herein, has been a corporation organized under and existing by virtue of the laws of the State of Arizona, maintaining its principal office and place of business at 3880 East Wier Street, Phoenix, Arizona, where it is, and has been continuously, engaged in the business of bottling and distributing soft drinks. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of the operations at all times material herein, the Respondent purchased goods and materials valued in excess of $50,000, which were transported in interstate commerce and delivered to its place of business in the State of Arizona directly from States of the United States other than the State of Arizona. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The General Counsel in his brief moved to correct the record in this proceeding. Most of these corrections concern misspelled names, incorrect numbers, or obvious inaccurate transposition of words and do not affect matters of substance. Therefore the General Counsel's post-hearing motion to correct the transcript is approved.

II. THE UNFAIR LABOR PRACTICES

The complaint alleges, in substance, that the Respondent violated Section 8(a)(1) of the Act by discharging its employee Leonard Stock, and failing and refusing to reinstate him because he engaged in protected concerted activities for the purpose of collective bargaining and mutual aid and protection. The Respondent denies these allegations.

A. *Background*

Pursuant to a collective-bargaining agreement between the Respondent and the Brotherhood of Beverage Workers affiliated with United Cannery and Industrial Workers of the Pacific, AFL–CIO,[2] herein referred to as the Union, effective February 3, 1978, to September 14, 1980, the parties negotiated a "Memorandum of Understanding" regarding the implementing of a new retirement plan and the distribution of moneys contributed to the then existing plan.[3] The Respondent's operations, at the times material herein, were directed by its president and general manager, John Furnas, with its sales operations being directed by Donald Kurtenbach, director of sales and marketing. Beneath the above in the hierarchy of supervision were George Bofetta, the field sales manager, and Dick McAllister, the assistant field sales manager.[4] Next in line as supervisors beneath the above were route supervisors, Dave Chantry, Bill Clark, George Larson, Harry Skelton, and Timothy Keltgen, each of whom was responsible for the supervision of the activities of an assigned number of route salesmakers. Also reporting to Bofetta and McAllister were Leonard Stock, the Charging Party herein, and Bill Burchett, merchandise managers.[5]

B. *The Evidence*

1. The employment of Leonard Stock

Leonard Stock commenced his employment with the Respondent in January 1968 as a route salesmaker (route salesman).[6] After having been employed in that capacity for approximately 2-1/2 to 3 years, Stock was advanced to the position of merchandise helper. Approximately a year and a half later, when the then merchandise manager, Ted Reed, resigned, Stock was promoted to the merchandise manager position. Originally, in assuming this position, Stock was assigned a helper to assist him in his job duties. When the helper resigned, the Respondent did not replace him, but instead "put another merchandising man on with the same authority that I had," Bill Burchett. Approximately 2-1/2 to 3 years after his appointment as merchandising manager, the Respondent "dispensed with the Merchandising Department" and Stock and Burchett were transferred to the sales department and made route supervisor/merchandise managers.[7] The parties herein stipulated that Stock was a supervisor within the meaning of Section 2(11) of the Act when he functioned in the job of route supervisor/merchandise manager.[8]

On July 30, 1979, Stock was transferred from the position of route supervisor to the position of merchandise manager.[9] Stock testified that his duties as merchandise manager were:

> . . . in creating sales for the company, but it was done by directing and the availability of space in the market place for the individual Seven-Up packages. This entailed going into the market place and talking to the managers to obtain . . . additional space in the market place.[10]

Stock testified that a pertinent part of his job as merchandise manager was to keep the stores within his territory under surveillance "to see that no space was lost,"

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[2] The Union represents for purposes of collective bargaining the Respondent's production employees, those responsible for bottling the soft drinks, and route salesmakers, those employees responsible for the distribution of the Respondent's products to stores in the Phoenix metropolitan area.

[3] See Resp. Exh. 1 (A and B).

[4] The complaint alleges, the Respondent admits, and I find that John Furnas, Donald Kurtenbach, and George Bofetta are supervisors within the meaning of Sec. 2(11) of the Act, and have been and are now agents of the Respondent acting on its behalf.

[5] Stock and Burchett were also referred to in the record as account representatives and merchandisers, these job titles all being synonomous and interchangeably used. While the Respondent's table of organization lists four positions of "merchandiser" under the account representatives (Resp. Exh. 9), Stock testified uncontradictedly that these positions were never filled. He stated,

> Mr. Bofetta mentioned to us at the time that our position was a trial thing at the time. And if we could prove that the work we did and could accomplish out in the market place merited extra help, then we could get extra help, within the Merchandising Department.

[6] Stock's duties as a route salesmaker were "to go around to the different accounts in the Phoenix area and replenish the merchandise that had been sold from the previous delivery. Also, the duties consisted of trying to obtain special displays which may be in the form of bulk promotional displays or putting up display racks in the various market places. Route salesmakers are paid on a commission basis.

[7] Stock testified that his duties in this job were to create and achieve sales:

> And this was done by the training, the overseeing, the motivation of the route salesmakers assigned to me.

It should be noted that all of the above concerning Stock's employment history with the Respondent is gleaned from his own uncontradicted testimony thereon.

[8] Stock testified in substance that in this position he had the authority to effectively recommend the termination and discharge of route salesmakers assigned to him. He also trained, directed, and supervised their work.

The evidence shows that Stock, while a route supervisor, received biweekly salary increases on August 1, 1977 ($25); April 10, 1978 ($25); and March 26, 1979 ($43).

[9] Burchett was also transferred similarly to the position of merchandise manager. Each of the merchandise managers has a geographic area of responsibility with Stock's area roughly conforming to the eastern half of the Phoenix distribution area, while Burchett's area covered the western half. Also at this time both he and Burchett received badges stating their names and the title "Merchandising Manager" which "identified me in the marketplace in my position."

[10] Stock's last evaluation describes his job responsibilities as,

> Has the direct responsibility for achieving additional shelf space, proper positioning and brand array for Company Products. The position requires technical selling skills and customer diplomacy. Because of his dedication, the Company products have increased in market share and space to sales.

However, Stock testified that he had no authority to grant merchandise discounts to stores in return for additional or better space without the express authorization of Bofetta, and that he had to obtain Bofetta's approval for the purchase of materials needed in remodeling and display projects.

or sales diminished, and that this also included surveillance of route salesmakers in the stores to ensure that they were "taking advantage and using all space to his ability in relationship to sales."[11]

As shown above Stock's primary duties as merchandise manager were to obtain either additional space or better positioning, generally, in supermarkets for the placement of the Respondent's products.[12] In this connection he testified that he regularly visited supermarkets (accounts) in his assigned area and spoke to store managers and backroom (stock) supervisors to establish and maintain good public relations and to secure if possible additional space, improved marketing positioning, or the approval to set up promotional display material for Seven-Up products.[13] Stock stated that he also regularly consulted with the route salesmakers as to any problems they encountered in the supermarkets they serviced such as resistance to increasing display space or the loss thereof. He related that when he was successful in acquiring additional space he would physically move the Seven-Up products or set up displays, etc., himself, but that when this work required more than one person to accomplish it he requested additional assistance from Richard McAllister, the assistant sales manager, who then would assign one or two utility employees to work with him on the job when they were available.[14] Stock added that, while he instructed these employees in their duties when they were at the store site, he actually worked along with them performing the same tasks as they did; i.e., washing and/or adjusting shelves, moving Seven-Up products, and setting up displays.[15] Stock also testified that at times he was assisted on display jobs by route supervisors, as well.

Stock testified that the Respondent's policies are disseminated to employees at departmental meetings held every Thursday morning attended by the sales supervisors, route salesmakers, utility helpers, merchandising managers, "anyone connected with the Sales Department or any co-function of it like ourselves, the merchandising."[16] According to Stock at these meetings Bofetta would mention "different promotions that were coming up," discuss conditions that were observed in the marketplaces, and present this to the route salesmakers involved. Both the route supervisors and he and Burchett, the merchandising managers, would also address the route salesmakers at these meetings as to sales and merchandising problems, etc., respectively.[17] However, Stock recounted that all employees, including route salesmakers and utility employees, were encouraged to report about their observations in the marketplace at these meetings. He added that Bofetta regularly instructed the route salesmakers at these meetings to follow any orders issued by him or Burchett when they encountered each other in the marketplace concerning "job activities on functions in facing merchandise."

Stock related that the Respondent also held supervisory meetings each week usually on Fridays, attended by the Respondent's management and supervisory employees, including Bofetta, McAllister, the route supervisors, and the merchandise managers, but the latter only when requested to do so. Stock stated that this occurred approximately once a month when merchandising problems were discussed.

Stock continued that during his visits to the various stores within his geographic area he would observe and survey the conditions present[18] therein and on the occasion when the route salesmakers were not performing their duties properly would proceed as follows: First, Stock would speak to the route salesmaker himself about the infraction of company policy; if this persisted he would subsequently report these infractions to the route

[11] Stock's report of his "Merchandising Activities" submitted to Bofetta for the period ending February 1, 1980, states:

> The activities listed are reported as overall store chain gains and shelf positioning accomplishments as well as specific package facing breakdown and rack placement per individual stores. They constitute gains realized by my active participation, and do not reflect gains made by the route salesmakers through my advice and suggestions.
>
> The other activities of continued store surveillance, handling of consumer complaints, advertising placement and especially the constant education of the salesmakers in good merchandising practice and procedure can only be felt or realized by future space accomplishments and sales.

[12] This included ensuring that there was sufficient merchandise on hand and that the Respondent's products were correctly and attractively displayed and were clean, and also included keeping a good rapport with the store.

[13] Stock testified that he randomly selects an area within his geographic territory and spends the day canvassing approximately 10 to 15 stores in the area, rotating the areas so that within a period of approximately 3 to 5 weeks he has covered all the stores in his entire territory. From the testimony herein it appears that Stock decided where and how he spends his time on the job unless Bofetta or McAllister has a special assignment for him to perform.

[14] Stock related that the utility employees are normally assigned to the sales department under the route supervisors, "they ride with the regular route salesmakers in a training capacity and as a helper, they also go out and help build displays in the marketplaces for promotional ads." He stated that the utility helpers spend most of their time working primarily for the route supervisors and the merchandise managers and that as a merchandise manager he at times evaluated those utility helpers who had worked with him. Stock testified:

> Q. They spent a minimum of time with Bofetta and McAllister, and they had to rely upon the Merchadise Manager and the Route Supervisors for whom they worked, to make an evaluation and a decision as to whether they stayed or were let . . . .
>
> A. I would have to say yes."

Stock continued that while he was never formally told to evaluate the utility employees he felt he should do so when they were doing a good job and when he was asked by Bofetta, McAllister, or the route supervisors about the employees' work. He admitted voluntarily reporting about the quality of utility employees' work regularly. However, Stock also testified that the utility empoyees only worked with him for "one or two hours, roughly, maybe three at the most," "roughly about once a week," during the employees' 48-hour workweek. He indicated that when the utility helper completed his work with Stock he either returned to the Respondent's plant or went to another job assignment as dictated by McAllister. Stock added that, if McAllister could not supply the requested utility employees, Stock either performed all the work himself or postponed it to another time.

[15] Stock testified that he had no authority to hire or fire, transfer, suspend, lay off, recall, promote, reward, discipline, or adjust the grievances of the utility employees.

[16] These policies, according to Stock, were to obtain the best positioning in the marketplace for Seven-Up products, to appropriately array these products therein, and to regularly and properly rotate the stock.

[17] Stock testified that he gave lectures at these sales meetings to route salesmakers as to "good merchandising practices" and additionally made suggestions and gave advice to them about this.

[18] Stock testified that this included surveillance with regard to the status of the Respondent's competitors such as Pepsi-Cola and Coca-Cola and how they were faring in the marketplace. He added that route salesmakers and route supervisors also did this.

salesmaker's immediate supervisor, the route supervisor; then if this did not bring results Stock would apprise Bofetta of the situation.[19] He recounted one situation where Bofetta had recommended that he "write up" an employee who was "really hindering my doing my job as a Merchandiser" and Stock then spoke to the employee's immediate supervisor about it.[20] Stock also related that he had reported employee Bob Plank, a route salesmaker, to McAllister for bypassing stores within Plank's route causing the loss thereby of marketing space for Seven-Up, and McAllister told him to "write up" this employee and give it to Tim Keltgen, the employee's supervisor, for possible action.

Stock testified that he reported to Bofetta at the end of each workday "what I had accomplished all day, where I had been, what I had found in relationship to the salesmaker." Further, as Stock related, at the beginning of each day before he left the plant to visit stores in an area he asked Bofetta if there were any assignments he could accomplish therein and Stock would then perform these tasks.[21] He stated that he had no input into the pricing, advertising, or promotional policies of the Respondent nor its labor relations policy. However, he did testify that he made suggestions about merchandising to Bofetta which Bofetta at times implemented.

Stock testified that he received the same salary as the route supervisors and the same "fringe benefits."[22] While Stock related that he never considered himself a supervisor while working for the Respondent as merchandising manager, on cross-examination he also testified:

> I was in the Merchandising Department as a Merchandising Manager. The name Merchandising Manager—in some aspects I considered myself as a manager.

There is also testimony by Stock that he attended various luncheon and dinner meetings with representatives from the Respondent's parent Seven-Up company who had come into Phoenix, Arixona, from the main office in St. Louis, Missouri, and that only the Respondent's management and supervisory employees were present at these.[23] Additionally, in a letter sent to Frantell, president and chief executive officer of the "parent Seven-Up Company," sometime in July 1980 after Stock's discharge on June 24, 1980, Stock stated:

> The way they went about my firing is what hurts. I have done nothing but foster 7Up for the last 12-1/2 years of which 9 were in management.[24]

2. The discharge of Leonard Stock

Stock testified that sometime in 1971 or 1972, when the Respondent's operations were owned by the Whitt Brothers and he was a salaried employee he enrolled in the Seven-Up Bottling of Phoenix, Inc. Employees Retirement Plan.[25] Stock stated that, at approximately the same time that he joined, Fred Windell, a spokesman for the plan, and Robert Monk, the sales manager at the time, advised the Respondent's predecessor employees including Stock at a meeting that the Company's plan was a profit-sharing pension plan having the following conditions: that any employee dropping out of the plan was subject to a 1-year waiting period before he or she could rejoin it; that employees could borrow moneys from the plan; that employees in the plan could retire at age 65 at which time they would receive the lump-sum value of the "full vested amount"; and that in the event that the plan was ever dissolved "all monies, everyone in the plan, remaining employees, were supposed to be 100 percent vested and the monies returned to them."[26]

Stock continued that, a year or two later, the Company was acquired by the parent Seven-Up Bottling Company headquartered in St. Louis, Missouri. He related that a year or two after such acquisition he had signed a written request to withdraw from the "retirement pension fund" and was informed by Gene Sears, the plant manager at the time, that he could not do so. Stock stated that he advised Sears that this was contrary to what the employees in the plan had previously been told when they joined and pointed out that "four or five other Seven-Up employees who had left the plant, took

[19] Stock testified that this occurred approximately once or twice a month. However, Stock also testified that Bofetta had instructed him at one time not to speak directly to the employees themselves but to report any problems to the employee's supervisor for action.

[20] Stock testified that he had heard that Burchett had "written up" an employee who was thereafter discharged due to Burchett's action.

[21] According to Stock, both Bofetta and McAllister assigned him on occasion to deliver Seven-Up products where the Respondent had made a "donation" or in exchange for "faulty merchandise" which Stock was to pick up at somebody's home "or whatever it may be," to assist route supervisors in constructing displays, to operate forklift trucks to move merchandise, and also to deliver extra cases of Seven-Up products or deliver material wherever needed, and "stuff like that."

[22] Stock testified that as a merchandising manager he was covered by the Respondent's accidental death and dismemberment plan which membership is limited to management/supervisory personnel. He and Burchett also received a $12 monthly telephone allowance while employed as route supervisors and this was continued when they became merchandise managers. Stock additionally testified that during his employment as a route supervisor he worked occasional Saturdays, once every 4 weeks, for which he was paid $100 above his normal salary. When he became a merchandise manager this continued for "maybe three times" whereupon Bofetta discontinued it because Furnas did not consider them in their capacity as merchandise managers as "a supervisor in relationship to the men. And we had no business being in there under that supervisory capacity, or, say, as a Sales Supervisor, where we were to go in on Saturday and make sure that all the routes were out and handling calls, complaints, and things of that nature."

[23] Generally, Furnas, Bofetta, McAllister, Stock, "supervision personnel," and the various visitors such as "Mr. Frontell, the President and Chief Executive Office of the parent Seven-Up Company," and Gary Martin, its "Executive Vice-President of Seven-Up," attended these meetings.

[24] In connection with this letter Stock testified:

> A. Yes, I had written the whole thing.
>
> Q. Is it true that you considered yourself a part of management for the last nine years of your employment by Seven-Up?
>
> A. I considered myself. I would liked to have thought that I was, and I, myself, would say Yes. I would like to think that I was, and I probably was.
>
> Q. And you did think you—of yourself as management, didn't you, Mr. Stock?
>
> A. I thought of myself as management.

[25] It would appear from the evidence herein that only salaried employees are eligible to join the plan; thus, the route salesmakers who are paid on a commission basis are excluded from the plan.

[26] According to Stock, employees contributed 4 percent of their paychecks "into the plan with a guaranteed return by the company of five percent."

all monies, remained out the required amount of time and then rejoined the plan, and they also remained working at Seven-Up Bottling Company." He related that he also spoke to Sales Manager Monk about this and according to Stock both Sears and Monk said that they would check into it. Stock added that "possibly two to three days later," Monk advised him that after speaking to Sears they had checked with "the attorneys in St. Louis" and learned that Stock could not withdraw his moneys from the plan unless he quit his employment, although he could borrow from the plan, which he did at that time.

Stock testified that in approximately 1976, "a year and a half to two years after the conversation with Mr. Sears," he was called into the office of Rhoda Virvich, assistant office manager under Donald Kurtenbach, director of sales and marketing, who asked him to sign a form which in effect gave the Respondent "permission to amend or change the [retirement] plan in any way based as [the Respondent] saw fit."[27] Stock stated that when he looked the form over and discovered that it contained a waiver of his rights under the pension plan he refused to sign it. He added that when he continued to refuse to sign the document, although Virvich assured him it was for the purpose of updating his beneficiary designation information, Kurtenbach was apprised of this and Kurtenbach then tried to obtain Stock's signature on the form. Stock related that Kurtenbach told him that he had previously signed such a form which Stock denied and Bofetta was called into the discussion. According to Stock, while Bofetta also alleged that Stock had signed such a form previously, Stock again denied it, refusing to sign the document, and left the office.[28]

Stock testified that after he left the plant he encountered Isaiah Lane, Jr., the assistant production manager, who asked him if he had signed the form.[29] He stated that he told Lane that he had not and the reasons for his refusal and Lane said, "Well, I'm going in and I'm going to try to retract my statement, get it back, my signature." He continued, "I also encountered Michael Kempton who was a Fleet Manager there, and he mentioned to me that he read it and refused to sign it for the same reasons that I had stated." Stock added, "Previous to this there was a lot of confusion in Seven-Up Bottling Company after it was found out that you could not quit the plan and get your monies out without leaving your job. There was a lot of tension at this time."

The evidence herein shows that the Phillip Morris Tobacco Company acquired the Respondent's parent company, the Seven-Up Bottling Company on June 1, 1979. Stock testified that, in January 1980, Sharon Ribeske, the Respondent's personnel director, presented him again with the same form as he had previously refused to sign authorizing the Respondent to make unilateral changes in the pension plan and designating beneficiaries, requesting that he sign it. Stock related that he took the form home but never signed it. He stated that, approximately 2 weeks later while in Bofetta's office, Bofetta presented him with another similar form and said, "Either sign the form or don't sign the form. One or the other . . . so I can [get] Sharon off my back." Stock recounted that after he refused to sign this form Bofetta said, "Well, you go tell Sharon [Ribeske]."

Stock continued that he went to Ribeske's office and advised her that he would not sign the form and the reason for his refusal. After some discussion it was agreed that Stock would sign the document regarding the designation of beneficiary and cross out the rest of it and "add my own conditions to it," which he did. He related that, after he had signed the form and changed the document as agreed, Ribeske told him, "It doesn't really matter too much at this time . . . because Phlllip Morris is coming out with a different retirement program." Stock added that when he asked Ribeske for any written material on the new plan she advised that she had nothing on it "at this time," promising to give Stock any information she subsequently received on the new retirement plan when she received it. Stock stated that Bofetta now entered Ribeske's office and joined the conversation and agreed that the employees should have an "option" as to what should be done with their accrued moneys under the new plan.

In connection therewith Stock testified that 1 or 2 days after this conversation with Ribeske he mentioned to employee Leonard Boehler, a receiving clerk, that the Respondent was planning on instituting a new retirement program. According to Stock, Boehler asked him about the disposition of "the other program" and the moneys contained therein but Stock responded that he had no information thereon at the time. He stated that in and about this time he also had a similar conversation with Fleet Manager Kempton.

Stock related that towards the end of April 1980 he again spoke to Ribeske about the new retirement plan and Ribeske informed him that Phillip Morris intended to introduce their new retirement plan sometime between September 1980 and the end of that year. He testified that Ribeske told him that "all company monies at that time were going to be rolled over into the new plan" and employee contributions returned to the respective employees, with no option on the employees' part to "join or not join" the plan. Stock stated that he again requested a copy of the plan but Ribeske said she had not received copies as yet and when she did she would meet with the employees and "explain it to us."

Stock testified that in May 1980 he had several conversations with various employees concerning the new proposed retirement plan.[30] He related that in a discussion with Isaiah Lane, Jr., Lane complained about the Respondent's plan to "roll over" the Company's contributions from the old retirement program into the new plan, contrary to what the employees had been previously told when they joined the plan, and asked Stock if the

[27] Stock related that when Virvich had presented him with this form for his signature she had folded it over so that only the signature section was viewable by Stock. He testified that she told him at the time that his signature was needed for your beneficiaries for the retirement program."

[28] Stock testified that, when he asked to be shown the previous form he allegedly had signed, Kurtenbach sent Virvich to secure it but she was unable to locate it stating, "I don't know if they're misplaced or lost."

[29] The parties herein stipulated that Lane is a supervisor within the meaning Sec. 2(11) of the Act.

[30] Stock testified that he had spoken to Isaiah Lane, Jr., Harry Skelton, Leonard Boehler, Clyde Macon, and Michael Kempton about the new proposed retirement plan.

Respondent could do this. Stock stated that he next encountered Leonard Boehler who also expressed his concern about the proposed new retirement plan and the disposition of the Company's share of the contributions in the old plan and also asked Stock if the Respondent could do it. Stock added that he told both Lane and Boehler that he did not know if the Respondent could "legally do this."

Stock continued that shortly thereafter he visited the Board's Regional Office in Phoenix, Arizona, where he related what had occurred, as above, and was told that retirement program problems were not within the province of the Board's jurisdiction. He was then referred to "ERISA, an office handling retirements in California." Stock stated that he called "ERISA's" office in Los Angeles[31] and, after explaining the Respondent proposed retirement plan change, was advised that no definitive answer could be given to his question without a copy of the existing retirement plan but that, however, "companies can legally roll monies over into new retirement programs." He added that he was told to obtain a copy of the "old plan to see what is provided within that contract."[32] Stock related that approximately 2 days later he requested a copy of the "old plan" from Furnas, the Respondent's president, who told him that while he did not have a copy handy to give Stock at the time he assured Stock that he would get him one.

Stock testified that towards the end of May or early part of June 1979, shortly after he had spoken to ERISA, he again spoke to Lane and Boehler advising them that the Respondent could "legally roll the monies over." Stock related that Boehler told him that some other employees had been discussing this among themselves, mentioning that Rita Rangle and another production employee, whose name he could not remember, who were in the retirement plan, desired to leave the plan and withdraw their moneys.[33] He stated that Boehler wanted to hire an attorney to represent the employees but Stock advised that since the Respondent could legally "roll over the monies" hiring an attorney would be a waste of money and "cause nothing but trouble and tension concerning this matter." Stock continued that he volunteered to speak to Furnas to see if Furnas would "try to get us an option of whether to join the plan, whatever it may, or receive our monies back as agreed to when we had got into this previous plan." Stock added that he additionally "encountered" Harry Skelton, a route supervisor, and mentioned that he was planning "to see if Mr. Furnas could get us an option concerning the program." According to Stock, Skelton "thought it was a good idea and to see what I could find out concerning this matter."[34]

Stock testified that during the first week of June 1980 he went to see Furnas in his office but since Furnas was not in at the time he waived for him in the outer room next to the "sales manager's" office. He stated that Bofetta happened to enter the room in or about the same time that Furnas was returning to his office and Stock mentioned to Bofetta that he wanted to speak to Furnas about the "pension program, the retirement fund." Stock continued that Bofetta then told him:

> Mr. Furnas has not received at this time anything concerning the plan, and he mentioned he would get with you when he did so. And if I didn't drop the matter concerning this program, I wouldn't be around there that much longer.[35]

Stock testified that approximately 5 minutes later he approached and spoke to Furnas outside the production manager's office and the conversation continued as the two men walked down the hall and the steps down to the "lower level." Stock stated that he told Furnas:

> We were wondering if we could get you to see if you would get us an option concerning the program, either to join the program and accept the policies as whatever they may or the plan, whatever it may be or to withdraw our monies like we were entitled, or we felt we were entitled to under the old plan and join the new plan which was coming into effect and was supposed to be a noncontributing plan, join in with day one with everybody else.

Stock continued:

> John, at that time, says he could not do that. And he asked myself, he said, "Well, what do you want?" I said, "Well, it's not what I want. It's what we want. That's why I'm talking to you. Could you get us—" And he said, "No. Personally, what do you want? What would you want?" And I asked him what he meant. And he said, "Let's put it this way. If I could get you all your monies back and the company's monies back out of that retirement program, would you sign a waiver that you would have nothing to do with any future Seven-Up retirement programs?"

[31] The Employee Retirement Income Security Act (ERISA). This statute is administered in pertinent part by the U.S. Labor Department.

[32] Stock testified that he spoke to Duane Peterson at ERISA.

[33] Rita Rangle, employed by the Respondent as a "Filler Operator" on the production line, testified that she is a member of the bargaining unit represented by the Union, a shop steward in the plant, and a participant in the Respondent's retirement pension plan. She stated that she had been advised by Isaiah Lane, Jr., and Harry Skelton that the Respondent was considering a change in the retirement plan and "would probably put all our money into that new plan that they had." She related that she had said that the employees in the plan should have the right to decide whether they wanted to remain in the plan or not and "get our money back if we wanted to get out." She added, "Everybody was talking about that" in the plant. Rangle continued that Skelton had informed her about a meeting attended by supervisory employees concerning the pension plan and she replied, "Well, I'm a member of the plan . . . and nobody mentioned anything."

Rangle additionally testified, "There was a lot of talk going around the plant, and somebody mentioned something about a lawyer." She denied that she had ever authorized anyone to "talk to Mr. Furnas on [her] behalf," nor had anyone ever spoken to her about an employee representative speaking to management concerning the retirement plan on her behalf.

[34] The parties herein stipulated that Skelton is a supervisor within the meaning of Sec. 2(11) of the Act.

[35] Stock testified that there were route supervisors also present in the room when this conversation occurred but he could not recall "specific names."

Stock related that he told Furnas he would have to "think about that, and also, I wouldn't want to lose my job over signing some stipulation like that." He added that Furnas told him that he should never have "gotten into the plan in the first place" since Stock would rather have "a dime today than a hundred dollars tomorrow . . . something to that effect" and that this plan was set up as a retirement program. Stock recounted that when using the terms "we" and "us" in his conversation with Furnas he was referring to all the employees who were affected by the plan. However, in a prior affidavit given to a Board agent during the investigative stage of this proceeding, Stock had stated, "The lone employees who would be affected by my actions with Mr. Furnas would have been Rita [Rangle] and about five other line employees." Stock also stated in his affidavit, "At no time did I discuss my actions with any of the line employees."[36]

Stock stated that the day following his conversation with Furnas he spoke to Lane informing him that Furnas "would not try to get us an option in that respect," and about Furnas' offer to allow him personally to get all his moneys back. He testified that Lane responded, "This doesn't seem right . . . I hate to think I'm going to have to quit my job to get the monies." Stock added that he also "encountered" Boehler and Skelton, having similar conversations with them, and according to Stock they both informed him that they were considering leaving the Respondent's employ in order to obtain their moneys back from the pension plan. Stock related that he returned to the Board's offices during the second week in June 1980 and was again referred "to ERISA over in California" but that this time he did not contact them at all.

Stock continued that on June 19, 1980, after experiencing "some financial problems" he went to see Furnas and asked Furnas if he could still accept the offer to sign "a waiver and get all monies out of the retirement program," to which Furnas responded:

> . . . no, he says that would be illegal and I couldn't do that. He said, "The only reason I proposed that to you in the first place was that I would have said and done anything to keep you away from the other employees."
>
> He also mentioned, at that time, that I was nothing but a trouble maker and that he understood I was going around the plant and telling everybody that he was . . . a bastard, and the plan was a bastard.

Stock added that he told Furnas that he had never made any such statements. Stock also denied making such statements in his testimony at the hearing as well.

Stock testified that on June 24, 1980, soon after he had arrived at the Respondent's plant for work at 5:45 a.m., Bofetta asked to see him in his office at 7 a.m. Stock related that he continued his regular work routine and then went up to "Bofetta's outer office where he met McAllister" who asked him to deliver "some promotional cases out to Sun City." He stated that Bofetta, overhearing this, advised McAllister that he needed Stock that morning and it was agreed that Stock would "take care of [McAllister's] business after" Bofetta was through with him. Stock added that shortly thereafter McAllister advised him that Bofetta wanted to see him in Kurtenbach's office.

Stock continued that he met Bofetta outside Kurtenbach's office and they entered together. He testified that with Kurtenbach present Bofetta told Stock that he and Kurtenbach had returned from a "Seven-Up meeting in California" the previous day, Monday, and that "his office was completely overrun all day long by employees of the company stating that [Stock] had told them that Seven-Up was a no-good place to work for and that Pepsi was a better place to work for and that they should all go over there and work. He also mentioned that the morale around Seven-Up was poor at the time and sales were down and he couldn't have this going on." Stock related that he denied ever making any such comments and asked Bofetta "to produce the person" who said this about him, or name him, to which Bofetta replied, "As far as you're concerned, I don't have to tell you anything other than I heard it and that's it."

Stock recounted that he now asked Bofetta if what was happening had anything to do with his conversation with Furnas on June 19, 1980, and Bofetta said no. Stock related that he then told Bofetta and Kurtenbach about his conversations with Furnas on June 11 and 19, 1980, and they both said, "Look, its out of our hands. We can't do anything about it. . . . You're being terminated." Stock added that Kurtenbach now produced a previously prepared paycheck which included "two days that I had coming plus three weeks' vacation from the previous year," and which Kurtenbach gave him. Stock continued that Kurtenbach also mentioned that "he would process the papers that were needed for my monies for the retirement program." He related that he then left and on the way out encountered McAllister in the parking lot who told him, "I didn't know what they were going to do to you. I even was going to send you out on a job. I had nothing to do with this."

Stock testified that "approximately a month and a half" after his discharge on June 24, 1980, Harry Skelton visited him at his home and during a conversation between them and after Stock had mentioned that he felt hurt about "the way I was terminated" and that he had not made the statements attributed to him allegedly by fellow employees, Skelton told him:

> Lennie, if it will make you feel any better, Bill Burchett told me Mr. Bofetta, who is the Sales Manager at Seven-Up Bottling Company, he told Bill the real reason you were terminated, because you would not keep your mouth shut about the retirement program.

[36] The parties herein stipulated that, at the time, there were at least four nonsupervisory employees covered under the plan: Rita Rangle, Leola Satchell, Gary E. Fiori, and Cecil Query. They further stipulated that the Respondent's contributions made into the plan for each of these employees as of December 31, 1979, were, respectively, $5,950, $5,200, $2,500, and $1,200. All these employees were enrolled in the pension plan when Stock was terminated on June 24, 1980.

Stock denied at the hearing that he had ever told any employee that "Seven-Up was a lousy company to work for" or that "they should go to work for Pepsi."

Tim Keltgen, employed by the Respondent as a route supervisor and called as a witness for the Respondent, testified that sometime in July 1980, about 3 weeks before Stock was discharged, while having lunch with utility employee Bill Kessel, he was advised that Stock had told Kessel that Pepsi-Cola had "better pay and better benefits, and better working conditions . . . that it would be better if [Kessel] went to Pepsi." Keltgen stated that he told Kessel that although he knew nothing about Pepsi-Cola benefits Kessel was better off remaining with the Respondent. Keltgen continued that later that afternoon he apprised Dave Chantry, another of the Respondent's route supervisors, as to what Kessel had told him.

According to Keltgen the very next day he asked Kessel to repeat to Chantry what Kessel had previously told him, which Kessel did.[37] Keltgen testified that the next day he went to see Sharon Ribeske, the personnel director, and told her, "I think Mr. Stock is telling people to go to other plants to work and that's a little too much." Keltgen stated that he had known Stock "about 15 years," worked under him when Stock was a route supervisor, and considered Stock to be a friend. He related that after hearing Kessel's story he was hurt to find out that Stock was making derogatory remarks about the Respondent. Keltgen added that he also had heard rumors that Stock had conversations with other employees concerning another company but "didn't hear them personally."

Additionally, Keltgen, in relating his duties and responsibilities as a route supervisor, testified that when he receives complaints about the route salesmakers under his supervision he first investigates the facts and circumstances thereon and then confronts the employee with what he has learned to determine the merits of the complaint before any disciplinary action is taken.

Stock denied ever telling Kessel that Pepsi-Cola had better benefits than Seven-Up or that he urged Kessel to leave the Respdndent's employ and go to work for Pepsi-Cola.[38] Stock also testified that no one from the Respondent's management or any supervisor ever asked him if he had made those remarks. It shold be noted that the parties herein stipulated that Chantry and Ribeske were still in the Respondent's employ at the time of the hearing but that Kessel was not.[39]

Additionally, it was stipulated that the Respondent's contributions to the pension plan on behalf of Leonard Stock as of December 31, 1978, totaled approximately $12,000. The parties herein also stipulated that the following employees are supervisors within the meaning of Section 2(11) of the Act; were in the pension plan "up through the time" that Stock was terminated; and the Respondent had made contributions into the pension fund as of December 31, 1979, on their behalf in the amounts set forth opposite their names as follows:

Leonard Boehler	$7,800
Harry Skelton	$14,000
Isaiah Lane, Jr.	$11,000
Daniel Coronado	$4,000
David Cotch	$3,700
James R. Murphy	$8,000

The record also shows that, although there was no agreement between the parties as to the supervisory status of Clyde Macon, the Respondent's contribution into the pension fund on his behalf as of December 31, 1979, was $5,000.

As concerns two other employees Michael Kempton and Elvin Payne with whom Stock had conversations concerning the pension plan, the parties stipulated that Michael Kempton is a statutory supervisor and the evidence herein indicates that so is Payne. It was further stipulated that Kempton terminated his employment with the Respondent sometime in 1979 and received in excess of $10,000 Respondent on June 24, 1980, when Stock was discharged. Payne terminated his employment with the Respondent in 1979 and received the amount of $1,700 (the Respondent's share of the pension fund contribution) and was rehired before Stock's termination.

ANALYSIS AND CONCLUSIONS

Section 2(11) of the Act provides:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisors are excluded from coverage of the Act.[40]

[37] According to Keltgen, Kessel told Chantry that Stock had said, "[Kessel] would be better off if he went to work for Pepsi because the benefits and the wage earnings are better."

[38] Stock, however, did testify that he had a conversation with Kessel prior to Stock's discharge during which Kessel had told him that some employees had left the Respondent's employ to work for Pepsi-Cola and that Kessel was thinking about doing the same. Stock continued that Kessel asked his advice as to what to do about this and Stock told Kessel that he would have to decide this himself. Stock added that Kessel had previously worked for Stock on occasion and that there was severe competition between Seven-Up, Pepsi-Cola, and Coca-Cola for sales in the marketplace and that at the time this happened the Respondent's sales were "down." Keltgen in his testimony confirmed that at least two employees had left the Respondent's employ to "make more money elsewhere," one went to work for Pepsi-Cola, the other went to Coca-Cola.

[39] However, counsel for the Respondent Kennedy stated for the record, but not while under oath as a witness, that Ribeske's child was having ear surgery that day, March 13, 1981, and therefore Ribeske was not available as a witness. I offered to adjourn the hearing upon request in order for the parties to produce any additional witnesses they felt necessary to the presentation of their case but no request for any adjournment was made.

[40] Sec. 2(3) of the Act provides:

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The status of supervisor under the Act is determined by an individual's duties, not by his title or job classification.[41] It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.[42] To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status.[43] And, while these enumerated functions in Section 2(11) of the Act are to be read in the disjunctive, that Section also "states the requirement of independence of judgment in the conjunctive with what goes before."[44] Thus, the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate an employee into the supervisory ranks.[45] Further, the existence of independent judgment alone will not suffice; "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act."[46] In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former."[47] Moreover, in connection with the authority to recomnend actions, Section 2(11) requires that the recommendation must be effective.[48]

The Board has also excluded from the Act's coverage, with approval by the courts,[49] managerial employees. The Board has defined "managerial employees" as those who formulate and effectuate management policies by expressing and making operative the decisions of their employers, and those who have discretion in the performance of their jobs independent of their employer's established policy.[50] As concerns "managerial employees," the Supreme Court in *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*,[51] stated:

> Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actull job responsibilities, authority, and relationship to management.

The Board itself citing *General Dynamics Corporation, Convair Aerospace Division, San Diego Operations*, 213 NLRB 851, in *Bell Aerospace, A Division of Textron, Inc.*, 219 NLRB 384, (1975), stated:

> . . . managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.

With this in mind, the General Counsel alleges that Leonard Stock was neither a supervisor within the meaning of the Act nor a managerial employee as defined by the Board and the courts. However, the Respondent asserts that "by reason of his duties" Stock was a "statutory supervisor and/or managerial employee." At the time of his discharge Stock held the position of merchandise manager and the initial issue to be resolved therefore is whether, when terminated, Stock, in the performance of his duties, was a statutory supervisor and/or managerial employee.

The evidence shows that on July 30, 1979, Stock was transferred from the position of route supervisor, wherein the parties agree that he functioned as a statutory supervisor,[52] to the position of merchandise manager, the status of which as "supervisory" or "managerial" is in question. It should be noted that, while Stock was employed in the position of route supervisor, he was unequivocally excluded from the bargaining unit as set forth in the collective-bargaining agreement between the Respondent and the Union. As a merchandise manager his exclusion from the unit apparently continued. It should also be noted that upon his transfer from route

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(3) The term "employee" shall include any employee . . . but shall not include. . . any individual employed as a . . . supervisor . . . .

Sec. 14(a) of the Act provides:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to the Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

See *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974); *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974).

[41] *New Fern Restorium Co.*, 175 NLRB 142 (1969); *Food Store Employees Union, Local 347* [*G. C. Murphy Co.*] v. *N.L.R.B.*, 422 F.2d 685 (D.C. Cir. 1969); *N.L.R.B.* v. *Bardahl Oil Company*, 399 F.2d 356 (8th Cir. 1968); *N.L.R.B.* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

[42] *N.L.R.B.* v. *Southern Bleachery & Print Works, supra.*

[43] *N.L.R.B.* v. *Edward G. Budd Manufacturing Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

[44] *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 216 F.2d 798 (5th Cir. 1954).

[45] *N.L.R.B.* v. *Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967); *N.L.R.B.* v. *Lindsay Newspapers, Inc.*, 315 F.2d 709 (5th Cir. 1963).

[46] *N.L.R.B.* v. *Brown & Sharpe Manufacturing Co.*, 169 F.2d 331 (1st Cir. 1948).

[47] *N.L.R.B.* v. *Security Guard Service, Inc., supra.*

[48] It should be noted that the burden of proving that one is a "supervisor" rests on the party alleging such status to exist. See *Commercial Movers, Inc.*, 240 NLRB 288 (1979); *Benson Wholesale Company, Inc.*, 164 NLRB 536 (1967); *Local 560, International Brotherhood of Teamsters, etc. (Riss & Co., Inc.)*, 127 NLRB 1327 (1960); *Local No. 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, et al. (The Detroit Edison Company)*, 123 NLRB 225 (1959).

[49] *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974); *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980).

[50] *Eastern Camera and Photo Corp.*, 140 NLRB 569 (1963); also see *Lockheed-California Company, a Division of Lockheed Aircraft Corp.*, 217 NLRB 573 (1975); *General Dynamics Corporation, Convair Aerospace Division, San Diego Operations*, 213 NLRB 851 (1974).

[51] 416 U.S. at 290, fn. 19.

[52] As a route supervisor Stock directed the work of four route salesmakers assigned to him with the authority to discharge and/or discipline them and to affect their working conditions.

supervisor to merchandise manager he was afforded the same salary and "fringe benefits" as before.[53]

That Stock considered himself to be part of management is clear from the record despite his initial denial thereof. Stock himself testified, "I thought of myself as management." Of additional persuasion in this connection is the letter Stock wrote to the Respondent's president after his discharge on June 24, 1980, in which he stated regarding his years of employment with the Respondent that the last 9 years thereof "were in management."

Moreover, that the Respondent considered Stock as part of management and held him out to the public as such is even more indicative of his "managerial" status. As defined by the Respondent, Stock's duties were to "create sales for the company" by achieving additional shelf space in retail stores, better positioning of shelf space obtained, surveillance of all stores within his assigned territory "to see that no space was lost" or sales diminished, this including surveillance of route salesmakers to ensure that they were properly "taking advantage and using all space to his ability in relationship to sales." Additionally, Stock handled consumer complaints, advertising placement, and "especially the constant education of the salesmakers in good merchandising practice and procedure." Both Stock and Burchett wore prominent "badges of authority" in the marketplace identifying them as "Merchandise Managers," and while Stock at various times in his testimony sought to downplay the importance of his status, obviously to strengthen his case herein, yet he was admittedly responsible for "customer diplomacy," as the Respondent's higher level representative in the field, above the route salesmakers and even the route supervisors in this connection, merchandising.

Additionally, Stock attended supervisors' meetings as a merchandise manager at least once a month.[54] Moreover and of particular note, Stock testified that Bofetta regularly instructed the route salesmakers at the weekly sales meetings held for all employees in the sales department that they were to follow any orders issued by Stock and Burchett when they met in the marketplace concerning "job activities on functions in facing merchandising," a clear indication to its employees that Stock was not merely just another "rank-and-file" addressed the employees. At these weekly sales meetings Stock also lectured employees on "good merchandising practices" and gave them suggestions and advice. Notably at these meetings Bofetta and the route supervisors also addressed the employees.

Furthemore, on the occasions when officials from the parent company visited Phoenix, Stock was included among the management and supervisory employees who attended the luncheon and dinner meetings with these officials at which no rank-and-file employees were in attendance.

In summary, Stock had the responsibility to provide effective management of all accounts within his assigned territory. He had the responsibility to schedule his own activities to ensure that the Respondent's policies were effectuated in the stores within his assigned area and that other employees were complying with and fulfilling these policies. He was the Respondent's management level representative in the field and dealt with the store managers accordingly. In enhancing the Respondent's image in the stores, in increasing sales, in developing rapport with the Respondent's customers diplomatically, Stock exercised in many respects independence of judgment.

In view of the above and the evidence in the record as a whole, I am convinced that Stock, as a merchandise manager, was more aligned with management than with rank-and-file employees and was therefore a managerial employee falling within the Board's definition thereof, "formulating and effectuating management polcies by expressing and making operative the decisions of their employer."[55]

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[53] Significantly Stock continued to be covered by the Respondent's accidental death and dismemberment plan which by its terms confines membership to the Respondent's supervisory and management employees.

While stock testified that, upon his transfer to the position of merchandise manager he subsequently lost occasional Saturday work supervising employees at the plant which he performed while employed as a route supervisor, his own testimony indicates that the reason therefor was, because as a merchandise manager, he no longer had any responsibility or authority concerning the direct supervision of the employees who worked those Saturdays, assumedly, route salesmakers, utility employees, and/or production employees. Albeit it seems that the Respondent no longer considered him a supervisor as it had when he was a route supervisor, it did consider him a managerial employee as will be discussed in detail hereinafter. Further, there is no evidence to the effect that the Respondent desired to and did demote Stock when it made this transfer. In fact, the evidence herein is to the contrary. As a route supervisor Stock had received several increases in salary, had never been disciplined, and apparently had performed his work well. Therefore, there appears no reason for the Respondent to have demoted him and this is not alleged herein. The reason for the transfer seems to be that the Respondent was either expending or changing its operational setup and having created a merchandising aspect thereof picked the two men with experience in the area. Stock and Burchett, to initially staff it.

[54] While Stock again sought to minimize his attendance at such meetings by indicating that the merchandise managers were merely invited to do so only when the Respondent felt that merchandising matters were to be discussed, the monthly regularity with which this occurred leads me to believe that his and Burchett's attendance at these meetings was not haphazard but a part of the Respondent's management and supervisory operational functions. There was no evidence presented that route salesmakers or other nonsupervisory or nonmanagement employees ever appeared at these meetings for any reason. If the Respondent did not consider the merchandise managers as managerial employees it could have just as well confined them to attendance at the weekly overall sales meetings at which both management, supervisory, and nonsupervisory employees regularly attended.

[55] Having found that Stock is a managerial employee on the basis of the above it need not be decided if he also was a statutory supervisor other than to indicate that in this connection the record shows that Stock had no authority as merchandise manager to hire, fire, transfer, suspend, lay off, recall, promote, reward, discipline, or adjust the grievances of either the route salesmakers or the utility employees. While the evidence herein indicates that he occasionally evaluated the utility employees who worked with him at the Respondent's request it appears that this was merely additional input into evaluating these employees with the route supervisors having the main responsibility for such evaluation as the employees' supervisor.

Furthermore, while there is testimony that on occasion Stock "wrote up" route salesmakers for deficiencies in their performances, he was directed to bring these to the attention of the route salesmaker's own supervisor for disposition rather than for any direct action which Stock could engage in such as disciplining the employee. In fact Stock had no authority in this connection. Although there is, additionally, testimony that Stock had heard that Burchett's "write-up" of an employee led to that employee's discharge, the circumstances of that incident were not elabo-

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Having found that Leonard Stock is a "managerial employee" as defined by the Board and the courts the other issue to be considered is whether his discharge by the Respondent constituted a violation of Section 8(a)(1) of the Act as alleged in the complaint.

That Stock's activities in complaining to the Respondent, particularly to its president, Furnas, about the proposed changes in the pension plan and his attempt to effect a change thereof constituted "protected concerted activities" is clear from the record. The Board has consistently found that employee conduct is protected concerted activity under the Act if the employee's complaint concerns a matter of common concern to other employees in the same circumstances.[56] Moreover, the Board has held that even a complaint made for oneself constitutes protected concerted activity if the effect of the complaint is to better conditions for all employees.[57] The Board has also held that direct personal authorization from other employees is not necessary to a finding that activities were concerted.[58]

According to Stock's uncontradicted testimony he knew that other employees both supervisory and rank-and-file were covered under the existing pension plan and would be affected by whatever was decided as to the distribution of the moneys therein contributed by the Respondent on the employees' behalf when he spoke to Furnas about this matter.[59] That both supervisory and managerial employees and the rank-and-file employees in the plan were concerned about the Respondent's disposition of the moneys contributed by the Respondent on their behalf into the pension plan is also clear from the record.[60] Additionally, in his conversation with Furnas Stock made it abundantly clear that he was not speaking solely for himself, but rather on behalf of all the employees covered under the plan.[61] From all of the above I find and conclude that Stock's activities in complaining about the proposed pension plan and his efforts to have the Respondent give employees the option of withdrawing the moneys contributed on their behalf by it from the existing pension plan as an alternative to having these moneys "rolled over" into the new plan constituted "concerted activities."[62]

That Stock was discharged because of his concerted activities set forth above is also clear from the record despite the Respondent's assertions that he was discharged for cause. Stock complained to the Respondent's management about the proposed change in its existing pension plan concerning the disposition of moneys contributed by the Respondent into the plan on behalf of member employees. This was of some concern to the employees

rated upon and there was no evidence that Stock's written reports concerning route salesmakers have ever resulted in any disciplinary action against any of them. However, just the fact that Stock was encouraged to "write-up" infractions observed by him committed by employees in the marketplace and that his evaluation of employees was at times sought is additionally supportive of his status as a "managerial employee."

While there is also evidence in the record that Stock directed the work of utility employees when they assisted him on jobs, it appears that after telling them what was to be accomplished he would work side by side with them performing the same kinds of work and therefore this work would not necessarily confer supervisory status upon Stock within the meaning of the Act, nor alternatively detract from his status as a managerial employee.

[56] *Timet, A Division of Titanium Metals Corporation of America*, 251 NLRB 584 (1980), and cases cited in fn. 29 therein; *Hanson Chevrolet*, 237 NLRB 584 (1978); *Air Surrey Corporation*, 229 NLRB 1064 (1977), reversed on other grounds 601 F.2d 256 (6th Cir. 1979); *Key City Mechanical Contractors, Inc.*, 227 NLRB 1884 (1977); *Empire Gas, Incorporated*, 224 NLRB 628 (1976), enfd. 566 F.2d 681 (10th Cir. 1977); *Ross Valley Savings & Loan Associations*, 194 NLRB 270 (1971). The Board has included within the ambit of protected concerted activities a single employee's protest that other employees were performing work that should be performed by his craft (*Key City Mechanical Contractors, Inc., supra*), questioning the order in which employees are called for weekend work (*Fall River Savings Bank*, 247 NLRB 631 (1980)), complaints about safety conditions (*Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975)), or complaints about the employer's profit-sharing distribution (*Hugh H. Wilson Corporation*, 171 NLRB 1040 (1968)). The court in *Pacific Electricord Company* v. *N.L.R.B.*, 361 F.2d 310 (9th Cir. 1966), defined "concerted activities" as activities "engaged in with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself."

[57] *Hansen Chevrolet, supra.*

[58] *Transportation Lease Service, Inc., et al.*, 232 NLRB 95 (1977); *Alleluia Cushion Co., Inc., supra.*

[59] While the evidence shows that Stock did not have direct contact with the rank-and-file employees in the pension plan nor personally spoke to them about this, he was told that Rita Rangle and another of these employees wanted to get their money out of the plan and had registered concern about what was happening. Rangle confirmed in her testimony that she was concerned about the disposition of her moneys in the pension plan and of her desire to withdraw the moneys from the plan.

[60] Stock testified without contradiction that Boehler had informed him that Rangle and another employee desired to withdraw their moneys and leave the plan. He also testified that Boehler, Skelton, and Lane mentioned their consideration of leaving the Respondent's employ in order to obtain their moneys from the pension fund. Additionally, both Stock's and Rangle's testimony show that there was "a lot of talk going around the plant" concerning this very issue, with the suggestion by the employees that a lawyer be retained to protect their interests in the pension fund.

[61] Stock testified that in his discussion with Furnas he consistently used the terms "we" and "us" and in response to Furnas' asking him as to what he personally wanted concerning the pension moneys said, "Well, it's not what I want. It's what we want." It should be noted that Furnas did not testify at the hearing.

[62] At the hearing and in its brief the Respondent argued that Stock's activities were "in derogation of the recognized bargaining representative," the Union, and therefore additionally unprotected. In asserting this theory, the Respondent relied on *Emporium Capwell Company* v. *Western Additional Community Organization*, 420 U.S. 50 (1975). In the *Emporium* case, the union representing employees of the Emporium filed grievances alleging that the Emporium had engaged in racially discriminatory practices. Several employees who had refused to participate in the grievance process and who were dissatisfied with the union's course of conduct held a news conference wherein they announced their intention to deal directly with the management of the company. Thereafter, *contrary to the express policy of the union*, the employees picketed the Emporium to protest its alleged racial policies. The court, relying on the particular facts of the case, held that the employees were attempting to engage in separate bargaining with their employer.

However, the facts in the instant case are clearly distinguishable from those present in the *Emporium* case. There is no evidence herein that Stock engaged in a course of action inconsistent with that of the Union. The evidence shows that the Respondent and the Union did negotiate a memorandum of understanding executed sometime after Stock was terminated, covering the establishment of a new retirement program, which provided for the relief requested by Stock (Resp. Exhs. 1(a) and (b)), but the status of the parties' dealings concerning this as of May and June 1980 is not reflected in the record. Moreover, there is no evidence to support an inference that Stock otherwise attempted to derogate the Union's representative status.

Additionally, when Stock spoke to Furnas his statements were in the nature of a request for assistance in obtaining for the employer the option desired. There was no demand, no threat of action if the Respondent did not pursue the requested course. This appears more as a situation where an employee took a problem of mutual concern to other employees to management. Such conduct is clearly protected under the Act. See *Villa Care, Inc., d/b/a Edmonds Villa Care Center*, 249 NLRB 705 (1980).

in view of the amounts involved and as the evidence strongly infers was affecting the morale of the Respondent's employees, particularly its supervisors, some of whom were considering leaving the Respondent's employ because of this. As Stock's testimony shows, after making inquiries about the pension plan and commenting about it, he was told by Field Sales Manager Bofetta that if he did not drop the matter "he wouldn't be around there that much longer," clearly a threat of discharge if he continued his activities concerning the pension plan.

Despite this clear warning from Bofetta, Stock spoke to Furnas seeking to obtain his assistance in securing an option for the employees regarding the moneys in their pension plan accounts. According to Stock's uncontradicted testimony which I credit, and although Stock was approaching Furnas on behalf of all the employees covered by the plan, Furnas tried to "buy him off" by offering to let him withdraw his moneys from the plan. Stock refused the offer. Subsequently, on June 19, 1980, when Stock again approached Furnas this time to discuss Furnas' offer, Furnas told him that the Respondent could not allow Stock to withdraw his moneys as Furnas had proposed, "that would be illegal," and added significantly, "The only reason I proposed that to you in the first place was that I would have said and done anything to keep you away from the other employees." Furnas also told Stock that he was a "trouble maker" and had been "going around the plant and teling everybody that [Furnas] was . . . a bastard, and the plan was a bastard." Neither Furnas nor Bofetta testified at the hearing and their undenied statements unequivocally establish the extent of their animosity towards Stock because of his concerted activities.

Moreover, Stock was discharged on June 24, 1980, and given as the reason therefor that employees had informed Bofetta and Kurtenbach, the director of sales and marketing, that Stock was telling other employees that Seven-Up was not a good place to work and that they should seek employment at Pepsi-Cola as a better employer. In carefully examining the reasons advanced by the Respondent for Stock's discharge I am inexorably lead to the conclusion that such were pretextual and that the real motive for the discharge was Stock's concerted activities.

Aside from the aforementioned statements made by various of the Respondent's management employees, fraught with animus against Stock because of his concerted activities, is the fact that Stock was abruptly discharged a few days after his last conversation with Furnas, without warning and without his being given the opportunity to "defend" himself with regard to the accusations made against him.[63] Stock was apparently a valued employee. His employment record shows evidence of continued promotion up through supervisory and managerial positions with regular wage increases and satisfactory or better work evaluations, hardly the type of employee meriting summary-type discharge. In this context the Respondent's apparent failure to investigate the accusations against Stock or to give him the opportunity to answer the charges leveled against him, Stock being an employee of longstanding and a part of management to boot, only serves to reinforce this conclusion.[64]

Additionally it should be remembered that neither Furnas, Kurtenbach, nor Bofetta was called as a witness at the hearing to deny any of the above.[65]

The Respondent called as its witness Tim Keltgen, a route supervisor, who testified that an employee, Bill Kessel, had told him approximately 3 weeks before Stock was discharged that Stock had advised him to leave the Respondent's employ and go to work for Pepsi-Cola because Pepsi had better working conditions, with Keltgen apprising the Respondent's personnel manager of this the very next day. Assuming *arguendo* this to be true, although Stock denied advising Kessel to quit Seven-Up, no action was taken against Stock at that time because of his alleged disloyalty to the Respondent. Subsequently, Stock spoke to Furnas about the pension plan on two occasions, these conversations with Furnas happening after Stock had been pointedly warned by Bofetta to "drop the matter," which clearly indicated to the Respondent that Stock was not about to heed Bofetta's warning. Significantly, it was not until after Stock thus continued to pursue his inquiries into the pension plan with Furnas that the Respondent decided that his "disloyal conduct" now warranted his immediate discharge.[66]

Finally, of additional persuasion is Stock's again uncontradicted testimony that, after his discharge, Harry Skelton, an admitted statutory supervisor, told Stock that the actual reason for his discharge was that Stock "would not keep [his] mouth shut about the retirement program."[67]

From the above I find and conclude that Leonard Stock was terminated because of his concerted activities and not for the reasons advanced by the Respondent.

As set forth hereinbefore, the Board with court approval has excluded managerial employees from cover-

[63] The abruptness of a discharge and its timing may be persuasive evidence as to an employer's unlawful motivation. See, e.g., *N.L.R.B.* v. *Sutherland Lumber Company, Inc.*, 452 F.2d 67 (7th Cir. 1971); *N.L.R.B.* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996 (10th Cir. 1977); *T. C. Bukas and Sons, Inc.*, 232 NLRB 571 (1977).

[64] According to Stock's uncontroverted testimony thereon Bofetta had told him on June 24, 1980, when he was terminated that the employees who had complained about Stock's oonduct in advising them to quit the Respondent's employ and work for Pepsi-Cola had done so only the previous day, Monday.

[65] The Board has consistently held that, where relevant evidence is not produced by a party and the failure not satisfactorily explained, an inference may be drawn that such evidence would be unfavorable to that party. *Publishers Printing Co. Inc.*, 233 NLRB 1070 (1977); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 (1977); *Broadmoor Lumber Company*, 227 NLRB 1123 (1977)

[66] In this connection it is interesting to note that the Respondent also failed to call Kessel, Ribeske, or Route Supervisor Dave Chantry, to whom Kessel repeated his story, at Keltgen's request, as witnesses to support Keltgen's testimony. While Kessel no longer worked for the Respondent at the time Keltgen testified herein, Ribeske and Chantry were still employed by it. As to Ribeske's unavailability as a witness I offered the Respondent the opporturity to call Ribeske at a later date which was not availed of. Adverse inferences to Keltgen's testimony might well be reasonably considered under the circumstances. See cases cited in fn. 65, *supra*.

[67] Skelton was never called as a witness by the Respondent to refute this statement nor was Bofetta who allegedly told this to Skelton.

age of the Act.[68] However, while the Board has generally found it not to be unlawful for employers to discipline or discharge supervisors or managerial employees for supporting or engaging in union or protected concerted activities it has also held that there are "limited exceptions" to the rule that such employer conduct does not violate the Act. Where the employer's action in connection with supervisory or managerial employees serves to interfere with, restrain, or coerce rank-and-file employees in the exercise of their rights under Section 7 of the Act, the Board has found the employer to have violated the Act.[69]

The Board has also consistently held that an employer violates Section 8(a)(1) of the Act when it disciplines or terminates a supervisor[70] for refusing to engage in conduct which would have constituted an unfair labor practice;[71] or where such employer action is "an integral part of a pattern of conduct aimed at penalizing employees for their union activities and ridding the plant of union adherents";[72] or where the employer's action constitutes an important element in its total strategy to rid itself of a union;[73] or where the employer's action is in retaliation for providing information or testimony to the Board or to rank-and-file grievants;[74] or where the employer's action is motivated by a desire to discourage employees' concerted activities in general rather than a concern about the supervisor's participation in these activities.[75]

It is obvious from the evidence present herein that the Respondent's discharge of Stock does not fall within the purview of any of the above. More applicable to the facts and circumstances in the instant matter is the case of *Stop and Go Foods, Inc.*, 246 NLRB 1076 (1979), in which the Board held that the discharge of a supervisor who sided with the employees in their dispute with the employer over the delay in repairing air-conditioning equipment was not unlawful. The Board explained its dismissal of the complaint as follows:

> Although the discharge of a supervisor for engaging in union or concerted activity must necessarily affect employees to some extent, we have never held that the discharge of supervisor for such activity violated the Act merely because as an incidental effect employees may fear that the same fate may befall them if they engage in similar activity. In several instances we have found that an employer did not violate Section 8(a)(1) merely by discharging a supervisor for disloyalty for personally engaging in union or concerted activity. In *Sibilio's Golden Grill, Inc.*,[18] a supervisor was discharged for joining employees in concerted activity with respect to a dispute concerning wages. The supervisor was not acting to protect or vindicate the employees' statutory rights, nor was she discharged for refusing to infringe on those rights. Moreover, there was no evidence that the discharge was an integral part of a scheme aimed at discouraging employees from engaging in concerted activity. Rather, the supervisor

[68] See fn. 49 *supra*. As Justice Powell observed in the *Yeshiva University* case, *supra*, "supervisors and managerial employees are excluded from the categories of employees entitled to the benefits" of the Act. Also see *L & S Enterprises, Inc.*, 245 NLRB 1123 (1979).

[69] See, for example, *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043 (1975); *Talledega Cotton Factory, Inc.*, 106 NLRB 295 (1953); *Krebs and King Toyota, Inc.*, 197 NLRB 462 (1972). The finding of a violation in such cases is premised not on the need to protect supervisors or managerial employees as such, but rather on the need to protect the Sec. 7 rights of rank-and-file employees.

[70] This would be applicable as well to managerial employees.

[71] *Talledega Cotton Factory, supra*, enfd. 213 F.2d 209 (5th Cir. 1954) (discharge of supervisors for failure to prevent the spread of unionism). The Board noted in *Talledega Cotton* that the discharge plainly demonstrated to rank-and-file employees the employer's determination not to be frustrated in its antiunion efforts, stating that the "net effect of this conduct was to cause nonsupervisory employees reasonably to fear the company would take similar action against them if they continued to support the union." Also see *Belcher Towing Co.* v. *N.L.R.B.*, 614 F.2d 88 (5th Cir. 1980); *Gerry's Cash Markets* v. *N.L.R.B.*, 602 F.2d 1021 (1st Cir. 1979); *Russell Stover Candies, Inc.*, 223 NLRB 592 (1976), enfd. 551 F.2d 204 (8th Cir. 1977); *Buddies Super Markets*, 223 NLRB 950 (1976), enforcement denied 550 F.2d 39 (5th Cir. 1977).

[72] *Nevis Industries, Inc., d/b/a Fresno Townehouse*, 246 NLRB 1053 (1979). In *DRW Corporation, d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980), the Board defined the meaning of "an integral part of a pattern of conduct aimed at penalizing employees for their union activities" as follows:

> It is, of course, a commonplace that Section 2(11) supervisors are not *per se* accorded protection under the Act from discharge or other discipline for engaging in union or concerted activity and, accordingly, the Board recognizes an employer's prerogative to discourage such activity among its supervisors. Thus, when an employer has discharged a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was "reasonably adapted" to that legitimate end, the Board has found that such conduct is indeed permissible and does not violate Section 8(a)(1) of the Act. The mere fact that, as an incidental effect thereof, employees may fear the same fate will befall them if they engage in similar activity is insufficient to transform otherwise lawful conduct into a violation of Section 8(a)(1) of the Act.
>
> It is quite another matter, however, when an employer engages in widespread pattern of misconduct against employees and supervisors alike. For, under those circumstances, the evidence may be sufficient to warrant a finding that the employer's conduct, as a whole, including the action taken against its supervisors, was motivated by a desire to discourage union activities among it employees in general and thus constitutes what the Board has characterized as a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights. By such acts the employer has exceeded the bounds of legitimate conduct intended to discourage union activity among its supervisors. And, more importantly, it has intentionally created an atmosphere of coercion in which employees cannot be expected to perceive the distinction between the employer's right to prohibit union activity among supervisors and their right to engage freely in such activity themselves. In this context, the coercive effect on employees resulting from the action taken against a supervisor cannot be viewed a unavoidable and "incidental" to the discharge of an unprotected individual. Thus, in recognition of the pervasive atmosphere of coercion intentionally created by the employer's total course of conduct and its direct effect on employees, the Board has found that restoration of the *status quo ante* is required to fully dissipate this coercive effect and must necessarily encompass reinstatement of all individuals affected, including supervisors. [*Id.* at 828–829.]

Donelson Packing Co., Inc., and Riegel Provision Company, supra, VADA of Oklahoma, Inc., 216 NLRB 750 (1975); *Krebs and King Toyota, Inc., supra*; see also, *Pioneer Drilling Co., Inc.*, 162 NLRB 918 (1967), enfd. 391 F.2d 961 (10th Cir. 1968); *Downslope Industries Inc.*, 246 NLRB 948 (1979).

[73] See *East Belden Corporation*, 239 NLRB 776 (1978).

[74] *King Radio Corporation* v. *N.L.R.B.*, 398 F.2d 14 (10th Cir. 1968); *N.L.R.B.* v. *Southland Paint Co., Inc.*, 394 F.2d 717 (5th Cir. 1968); *Oil City Brass Works*, 147 NLRB 627 (1964), enfd. 357 F.2d 466 (5th Cir. 1966).

[75] *Fort Vancouver Plywood Company*, 235 NLRB 635 (1978); Heck's Inc., 170 NLRB 178 (1968).

was discharged for merely "advancing her own and the employees' job interests."[19] Under these circumstances, we concluded that, as a supervisor, her conduct was not protected by the Act.[20]

Similarly, in *Long Beach Youth Center, Inc.*,[21] we found that an employer did not violate Section 8(a)(1) of the Act by discharging its supervisor "solely for siding with the employees in their economic dispute with the Respondent."[22] In neither of these cases did the Board consider the incidental coercive effect these discharges may have had on the employees.

[18] 227 NLR8 1688 (1977).

[19] *Ibid.*

[20] Member Murphy agrees for reasons set forth in her dissenting opinions in *Downslope Industries, Inc.*, 246 NLRB 948 (1979), and *Puerto Rico Food Products Corp., et al.*, 242 NLRB 899 (1979); cf. the partial dissent in *Belcher Towing Company*, 238 NLRB 446 (1978).

[21] 230 NLRB 648.

[22] *Id.* at 650.

In the instant case the evidence clearly shows that Leonard Stock was discharged solely because of his concerted activities in complaining about the proposed disposition of the moneys in the existing pension plan contributed therein by the Respondent and his attempts to change such proposed action. There is no evidence herein that this is a case where a supervisor or managerial employee was terminated for acting to protect or vindicate employees' statutory rights or for refusing to engage in conduct which would have constituted an unfair labor practice or where Stock's termination was an integral part of a pattern of conduct aimed at penalizing employees for their concerted activities or an important element in the Respondent's total strategy to rid itself of a union or motivated by a desire on the Respondent's part to discourage employees concerted activities in general rather than a concern about Stock's participation in these activities.[76]

[76] *L & S Enterprises, Inc.*, 245 NLRB 1123 (1979), and cases cited therein. I am not unmindful of Furnas' statement to Stock that he would "have said and done anything to keep [Stock] away from the other employees." However, I do not find this to change any of the above findings and conclusions nor support a finding of a violation of the Act.

Accordingly, and upon the basis of the foregoing, I find and conclude that, when the Respondent discharged Leonard Stock because of his concerted activities, Stock having been found herein to be a managerial employee, it did not violate Section 8(a)(1) of the Act.[77]

CONCLUSIONS OF LAW

1. The Respondent, Seven-Up Bottling of Phoenix, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act by discharging Leonard Stock because of his concerted activities.

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

ORDER[78]

The complaint is dismissed in its entirety.

[77] *Stop and Go Foods, Inc., supra; L & S Enterprises, Inc., supra; Sibilio's Golden Grill, Inc.* Also see *Hospitality Motor Inn, Inc.*, 249 NLRB 1036 (1980). Moreover, in *Empire Gas, Inc. of Denver*, 254 NLRB 626 (1981), at fn. 1 the Board stated:

> Member Penello notes that finding a violation herein is not incompatible with his belief that an employer may lawfully discharge or otherwise discipline a supervisor for engaging in union or concerted activity. *Indeed, had Respondent merely discharged Gray alone for such activity, no violation would have attached.* [Emphasis supplied.] See, e.g., *Stop and Go Foods, Inc.*, 246 NLRB 1076 (1979); *David-Anna Corporation d/b/a Synder Bros. Sun-Ray Drug*, 208 NLRB 628 (1974). . . .

[78] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.