

**The Broadway, a Division of Carter Hawley Hale Stores, Inc. and United Food and Commercial Workers Union, Local 770, Chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC, Cases 31-CA-11556, 31-CA-11670, and 31-CA-12314**

25 August 1983

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND HUNTER

On 30 March 1983 Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, the Charging Party filed limited exceptions and Respondent filed an answering brief.

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 brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>1</sup>

### 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 Respondent, The Broadway, a Division of Carter Hawley Hale Stores, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> We note that only a limited exception has been taken to the wording of the Administrative Law Judge's recommended Order and notice.

The Administrative Law Judge found that Respondent violated Sec. 8(a)(1) of the Act by soliciting grievances and impliedly promising to redress them. The Charging Party contends that, absent some reference to union activity or employee concerted activity, the prohibition against soliciting employee grievances in par. 1(a) of the recommended Order appears to require Respondent to ignore employee grievances, even where no union or concerted activity is being carried on. Contrary to the Charging Party, we find that par. 1(a) of the Administrative Law Judge's Order properly remedies the corresponding violations. However, we shall substitute the attached notice for that of the Administrative Law Judge so as to conform the notice to his recommended Order.

### APPENDIX

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

WE WILL NOT interfere with, restrain, or coerce our employees in their rights to engage in union or other protected concerted activity, by engaging in unlawful surveillance of employees; prohibiting employees in the store on their day off from wearing union T-shirts, while permitting other employees in the store on their day off who were not wearing union T-shirts to remain in the store; and/or soliciting employee grievances and impliedly promising to redress those grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

THE BROADWAY, A DIVISION OF  
CARTER HAWLEY HALE STORES,  
INC.

### DECISION

#### STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at Los Angeles, California, on September 7, 8, 9, and 30 and October 1, 1982, pursuant to an order consolidating cases, consolidated amended complaint, and notice of hearing issued on December 15, 1981, by the Acting Regional Director of the National Labor Relations Board for Region 31, and pursuant also to a further order consolidating cases and amending the complaint issued on August 19, 1982, by the Regional Director for Region 31.<sup>1</sup> The charge in Case 31-CA-11556 was filed on September 29 by United Food and Commercial Workers Union, Local 770, chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC, herein called the Union. Thereafter, on October 30 the Union filed a charge in Case 31-CA-11670, and on July 9, 1982, the Union filed a charge in Case 31-CA-12314. The respective charges were timely served on Respondent. Respondent timely filed answers to the complaint, the consolidated amended complaint, and to the consolidated complaint as further amended. Moreover, at the hearing Respondent further amended its answer in light of amendments to the consolidated complaint granted pursuant to the motion of counsel for the General Counsel made at the outset of the hearing, and in further light of stipulations achieved by the parties. Respondent admits certain factual allega-

<sup>1</sup> Unless otherwise specified the dates herein refer to the calendar year 1981.

tions of the complaint and others were denied. The General Counsel and Respondent were represented by counsel at the hearing, and the parties were accorded full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to make opening and closing statements, and to file briefs with me. Counsel for the General Counsel and counsel for Respondent timely filed briefs.

Upon the entire record in this proceeding,<sup>2</sup> and briefs filed herein, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

The Broadway, a Division of Carter Hawley Hale Stores, Inc., herein called Respondent, has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of California with an office and principal place of business located at 10250 Santa Monica Boulevard, Los Angeles, California, where it is engaged in the business of operating a retail department store.

In the course and conduct of its business operations, Respondent annually purchases and receives goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California. Similarly in the course and conduct of its business operations, Respondent annually derives gross revenues in excess of \$500,000.

Upon the basis of the foregoing facts, which are not in dispute, I find that at all times material herein, Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

Respondent concedes, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Issues*

###### 1. The substantive allegations

The General Counsel contends that in violation of the Act and to influence its employees in the choice of a collective-bargaining representative Respondent: (1) engaged in surveillance of employees' union activities; (2) created the impression among employees that their union activities were under surveillance; (3) instructed security personnel to engage in surveillance of employees' union activities; (4) told employees that their union activities were under surveillance; (5) impliedly promised employees to redress grievances; (6) implemented a low cost lunch program for employees; (7) enforced an impermissibly broad no-solicitation and no-distribution rule which had been effectuated and promulgated prior to the commencement of the Union's organizing effort; and (8) in a disparate manner ordered off-duty employees to leave

<sup>2</sup> Certain errors in the transcript are hereby noted and corrected.

the store premises because they were wearing union T-shirts while permitting off-duty employees who were wearing outer garments other than union T-shirts to remain on store premises. Further, the General Counsel alleges that, following a Board-conducted representation election at which the employees voted not to be represented by the Union, Respondent, in violation of Section 8(a)(1) and (3) of the Act, issued a written and an oral warning to employee Andrew Villanueva because he had supported and assisted the Union in its organizing efforts.

Respondent denies the commission of any unfair labor practice and contends, in substance, that the credible evidence of record does not support the contentions of the General Counsel. Specifically, Respondent asserts that certain of the alleged incidents of surveillance did not transpire, that the actions of management and security personnel which may have served as the basis for the General Counsel's allegations of increased or closer scrutiny of employee activities coincidental to the beginnings of the Union's organizing effort, did not relate to that undertaking but evolved from established, longstanding, and ingrained management activities and procedures which antedated any union activity, or from security measures and staffing considerations which were business-based and unrelated to any employee organizing activity. Moreover, Respondent denies that any of its agents impliedly promised to redress employee grievances, and asserts that the low cost lunch program for employees which was effectuated during the course of the Union's organizing efforts had its origins in a business decision reached by management prior to the advent of the organizing effort. Further, Respondent asserts that its decision to forbid off-duty employees to wear union T-shirts on store premises was based on considerations recognizing the commercial nature of the union T-shirt enterprise and was a valid application of its no-solicitation rule and represented a permissible exercise of its management prerogatives. Finally, Respondent contends that it reprimanded Andrew Villanueva solely because of the content of his assertedly intemperate and insubordinate remarks to a high management official.

###### 2. The trial notes ruling

Respondent ascribes as prejudicial error warranting a new hearing my refusal to direct counsel for the General Counsel to produce notes which she had taken during the course of pretrial meetings with six separate witnesses called to testify in support of the complaint, or, in the alternative, my refusal to undertake in-camera review of said notes to determine whether they fall within the provisions of Section 102.118(d) of the Board's Rules and Regulations, Series 8, as amended, encompassing relevant portions of the Jencks Act, 18 U.S.C. § 3500 (1982).<sup>3</sup> In support of this contention, Respondent cites

<sup>3</sup> Sec. 102.118(d) of the Board's Rules and Regulations provides *inter alia*:

(d) The term "statement" as used in subsections (b) and (c) of this section means: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription

*Continued*

*NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967); *NLRB v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974 (9th Cir. 1967); and *Wallace Detective & Security Agency v. NLRB*, 335 F.2d 749 (9th Cir. 1964).

In the course of the cross-examination of each of the witnesses encompassed within the instant ruling, it was established that each had met with counsel for the General Counsel in preparation for trial and that counsel had taken notes of the conversation. Counsel for Respondent was accorded full opportunity to cross-examine concerning the circumstances of these meetings and fully develop the record with respect thereto. The interviews were uniform, in that, in no instance did counsel for the General Counsel disclose to the prospective witness the content of the notes she had taken, and no witness was shown to have read, adopted, signed, or to have otherwise verified the accuracy of the contents of the notes. At the hearing, in a timely fashion, at the conclusion of direct examination, counsel for the General Counsel proffered the pretrial affidavits in her possession which had been signed or otherwise adopted by the witness on the stand. In response to demands and inquiries lodged by counsel for Respondent, counsel for the General Counsel represented to and before me that her case file contained no other documents meeting the specific requirements of Section 102.118 of the Board's Rules and Regulations. Additionally, she stated on the record that she had personally taken no notes qualifying as "statements" within the definition of Section 102.118(d) thereof. She reiterated these positions throughout the course of the proceeding.

Nevertheless, at appropriate times during the course of the cross-examination of certain of the General Counsel's witnesses, counsel for Respondent demanded production of those pretrial preparation notes which cross-examination had disclosed were in possession of counsel for the General Counsel. In light of the record which had been developed, I declined to order production of the notes. In each instance, counsel for Respondent requested, in the alternative, that I undertake an in-camera review of the notes for the purpose of determining whether the notes constituted substantially verbatim recitals of the witness, which would bring the notes within the purview of Section 102.118(b)(2) of the Board's Rules and Regulations. I affirm my ruling refusing to order production of the notes, and to undertake an in-camera inspection of them.

In *Coca-Cola Bottling Co.*, 250 NLRB 1341, 1342 (1980), the Board stated:

First, contrary to Respondent's contention, we find that the record does not conclusively support the conclusion that a "statement" within the meaning of Section 102.118(d) of the Board's Rules was taken at the time Davis apparently visited the Regional Office. The testimony established only that Davis spoke to a Board agent who was writing

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thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

something while Davis was talking. Clearly, this does not qualify as a statement by the witness as defined by Section 102.118(d). Nor, without further evidence, does it constitute a statement "adopted or approved" by Davis. [Footnote citations deleted.]

In *Philips Medical Systems*, 243 NLRB 944, fn. 1 (1979), the Board stated:

Respondent excepts to the Administrative Law Judge's failure to order the General Counsel to produce a typewritten document which Respondent asserts contains a statement transcribed by the General Counsel from her original notes which were destroyed prior to the witness' appearance. We find that the original notes (which were not signed) did not constitute a "statement" as defined in Sec. 102.118(d) of the National Labor Relations Board Rules and Regulations, Series 8, as amended; therefore, *a fortiori*, the General Counsel's typewritten transcription of those notes does not constitute a "statement" that must be produced under this section.

In *Palermo v. United States*, 360 U.S. 343, 352-353 (1959), in considering whether certain memoranda constituted "statements" of the kind required to be produced under the Jencks Act, § 3500, (e)(2) (1982), after which Section 102.118(d)(2) is patterned, the Court stated:

It is clear that Congress was concerned that only those statements which could properly be called the witness' own word should be made available to the defense for the purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinion or impressions. It is clear from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so . . ." that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with the legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions. In expounding this standard we do not wish to create the impression of a "delusive exactness." The possible permutations of fact and circumstance are myriad. Trial courts will be guided by the indicated standard, informed by fidelity to the congressional purposes we have outlined.

. . . Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts. [Footnote citations deleted.]

In my view, and on the strength of the authority above cited, Respondent errs in its contention that *forthwith* production of the trial notes of counsel was mandated.

Moreover, in light of the Board's holdings in *Coca-Cola*, *supra*, and *Philips Medical Systems*, *supra*, in-camera inspection of notes admittedly selectively recorded by counsel for the General Counsel during the course of pretrial preparation meetings becomes, in the context of the instant record, a discretionary and not a mandatory procedure left to the "good sense and experience" of the administrative law judge influenced by the oral testimony of the participating witnesses given under oath, describing the procedures followed by counsel in formulating the notes, as well as by the representations of counsel herself, in her capacity as an "officer of the court."

Moreover, as the Board does not interpret Section 102.118(b)(2) as encompassing trial notes of counsel, in-camera inspection of that class or category of document perforce becomes a discretionary act and not a mandatory procedure. E.g., *Philips Medical Systems*, *supra*; *Armitage Sand & Gravel*, 203 NLRB 162 (1973); *The Stride Rite Corp.*, 228 NLRB 224 (1977); and *Hadley Adhesive & Chemical Co.*, 202 NLRB 946 (1973). See *Campbell v. United States*, 365 U.S. 85, 92-93 (1961); *Palermo v. United States*, *supra* at 353-355; *Goldberg v. United States*, 425 U.S. 94, 109-111 (1976). Cf. *NLRB v. Safway Steel Scaffolds Co.*, *supra*; *Saunders v. United States*, 316 F.2d 346, 349-350 (D.C. Cir. 1963); *Wallace Detective Security Agency v. NLRB*, *supra* at 756. *NLRB v. Seine & Line Fishermen's Union of San Pedro*, *supra* at 981.

No due-process question arises from the refusal to resort to in-camera inspection of the unsigned trial notes of counsel, bearing no imprimatur of witness adoption when no basis in the record exists for impugning the representations of the General Counsel's trial counsel that the notes are a nonproducable work product protected by the recognized evidentiary shield. *Hickman v. Taylor*, 329 U.S. 495, 512-513 (1947); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1974). Upon a showing of special need, or in a circumstance wherein substantial basis in the record exists for believing a disputed document may qualify as a substantially verbatim recital or an oral statement made by the witness testifying in substantiation of the General Counsel's case, in-camera inspection of the disputed document should be undertaken by an administrative law judge. *NLRB v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974 (9th Cir. 1967); *Wallace Detective & Security Agency v. NLRB*, 335 F.2d 749 (9th Cir. 1964); *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967); cert. denied 390 U.S. 955. But when unrestricted cross-examination, and the record generally, forms a substantial basis for concluding that the disputed trial notes constitute privileged work products of counsel, no issue of full disclosure or fair play

arisen. Rather, the duty of an administrative law judge to regulate the course of the hearing, to prevent undue delay in or extension of the hearing process, and to preclude mere fishing expeditions becomes the superseding consideration. Cf. *Colton Sportswear Mfg.*, 182 NLRB 825 (1970). In writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able to "assemble information, [and] shift what he considers to be relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Under Respondent's theory of a *per se* obligation on my part to review trial notes of Government counsel, without regard to the fundamental state of the record formulated on the basis of cross-examination of the witness, and the record representations of Government counsel, uttered in recognition of his or her status as an attorney, and as a "officer of the court," the teachings of *Hickman v. Taylor* and the work product concept become strongly diluted and forces the General Counsel's representative to prepare for trial with the certain knowledge that every note made or handwritten jot recorded in the presence of a prospective witness will, with certainty, become the object of scrutiny by an administrative law judge. Such is not the law. *Coca-Cola Bottling Co.*, *supra*; *Armitage Sand & Gravel*. Nor do the court decisions in *Wallace Detective & Security Agency v. NLRB*, *supra*; *General Engineering, Inc. v. NLRB*, 311 F.2d 570 (9th Cir. 1962); *NLRB v. Seine & Line Fishermen's Union*, *supra*; or *NLRB v. Safway Steel Scaffolds*, *supra*; hold that in-camera inspection by an administrative law judge is a nondiscretionary act to be undertaken in all circumstances.

#### B. Pertinent Facts

##### 1. Background facts

##### a. Organization structure

The events here pertinent transpired at the Century City retail establishment of Respondent, a division of Carter Hawley Hale Stores. The Century City facility is one of 41 stores comprising the Broadway Southern California division of the parent company.

At pertinent times Paul Chevalier has been employed by the parent company in the position of vice president of employee relations. In his position of responsibility, Chevalier and his staff provide assistance in collective-bargaining negotiations, grievance handling, management response to union organizing campaigns, and litigation before regulatory or governmental agencies as may be required by individual stores or divisions.

At the Century City store during pertinent times, the following individuals served in the managerial and/or supervisory capacities indicated:

Sue Nave	store mgr.
Richard Gieser	asst. store mgr., operations
Chris Huntsman	asst. store mgr., personnel
Holly Johnson	asst. store mgr., merchandise
Craig Rotan	asst. store mgr., merchandise
Frank Capilupo	grp. mgr, womens access.

Bonnie Honore special agent, security

Throughout the Southern California division of Respondent, a security operation is maintained with responsibility for loss prevention and shoplift apprehension. The security function at the Century City store is provided by security agents, security inspectors, shoplift detectives, and investigators. On a theoretical basis, all security personnel work out of a central location and are assigned to various stores. In practical application, however, a security agent and a number of inspectors are regularly assigned to specific stores. Virginia (Jenny) Hartman and Patricia (Pam) Johnson were employed by Respondent at all times material herein in the capacity of security agents, while Richard Larimor was employed as an inspector. They, like other security personnel, reported directly to Bonnie Honore during the times they performed duties at the Century City store. Honore, in turn, reported to Charles Neer who was assigned to and maintained an office at a facility known as the service building, situated at a location in Los Angeles, separate from the Century City location. Neer reported to Sanford Weeks, chief special agent for stores, who maintained an office at the service building and had responsibility for the security function at 40 of Respondent's stores.

Inspectors are responsible for preventing theft and carry out their duties wearing a red coat, which renders them highly visible within the confines of the store. Shoplift detectives are responsible for detecting and apprehending shoplifters. Investigators are responsible for investigating internal and external theft, and those pertinent to the instant proceeding reported directly to George Sweitzer. The clothing worn by detectives and investigators is not distinctive in the sense of readily identifying them as security personnel. In the parlance of the profession they work "undercover," in that they wear street clothing.

At pertinent times, normal staffing authorization at the Century City store provided for the employment of Bonnie Honore as special agent, a day female inspector, a day male inspector, a night female inspector and a night male inspector. In August 1981 an authorized part-time position was vacant. Crystal Rinehart served as a night female inspector and Richard Larimor served as the day male inspector. Detectives and investigators also occasionally served at the Century City store, as needed. Two hundred hours of security time was budgeted to the Century City store and was sufficient in amount to cover the proposed allocation of red coat positions. However, in the normal evolution of operations, while assignments to security positions within the Century City store would from time to time become necessary in order to fill vacancies created by vacation, illness, reassignment or resignation of personnel; increased staffing by red coats, shoplift detectives, and investigators would also be utilized to meet potential security needs resulting from special sales promotions, after-hours sales, and theft activities. In addition, to meet exigencies, including a defined increase in thefts and inventory loss as reflected in a variety of reports and control devices employed by Respondent, saturation coverage might be ordered. A saturation drive would involve increased utilization of securi-

ty personnel at the target store for a period of time.<sup>4</sup> Richard Larimor testified without contradiction that two saturation drives were conducted at the Century City store during the year he was employed there.

#### b. *The organizing campaign*

In August 1981 the Union commenced an organizing campaign among Respondent's employees at the Broadway facility. The campaign was under the direction of Steven Nickelson and Victor Ochoa, special representative organizers for the Union. The initial organizing activity at the Century City facility commenced on August 24, and on October 27, 1981, a representation petition was filed in Case 31-RC-5236. During the organizing campaign which followed, employee meetings were held, an organizing committee was formed, and campaign leaflets were prepared and distributed. The names and addresses of 30 employees identified as comprising "The Committee to Organize the Broadway" appeared on some of the leaflets distributed in the proximity of the south entrance to the store, the door through which employees entered and left the store. In addition, a table was maintained in the employee lounge during the campaign at which organizing efforts were carried out on behalf of the Union. The Union's effort to organize the store became a matter of common notoriety on or about Tuesday, August 24, when the public distribution of leaflets commenced outside of store entrances. During the morning of August 24, Nickelson and Ochoa entered the store and circulated throughout the store. They had coffee and lunch in the restaurant and spoke with many employees. As the campaign progressed union organizers Nickelson and Ochoa entered the store several times a week. Following a hearing, a unit determination was made by the Regional Director and an election was conducted in the unit held appropriate for the purposes of collective bargaining on May 28, 1982. The Union lost the election and a certification of results of that election was issued on June 14, 1982.<sup>5</sup>

During the course of the organizing campaign, Respondent conducted employee meetings at which its position with respect to unionization was present. Paul Chevalier spoke at these meetings.<sup>6</sup>

### 2. The alleged unlawful conduct

#### a. *Increased visibility of management personnel*

At all pertinent times prior to and during the organizing campaign, Respondent followed a policy known as the good-night policy whereby at store closing a member of senior management would be at the employee exit door to bid exiting employees good night and verify that, (1) all employees were leaving by the door; (2) that any

<sup>4</sup> The foregoing is based on the credited testimony of Bonnie Honore, Sanford Weeks, and documentary evidence of record.

<sup>5</sup> Documentary evidence of record, a stipulation of the parties, and unrefuted evidence of record establishes the foregoing. I find insufficient basis in the record to support Gieser's passing assertion that the union organizers left union literature on countertops, either on August 24 or thereafter.

<sup>6</sup> The testimony of Christine Huntsman and Richard Gieser supports the foregoing findings which are not in dispute.

packages or purchases in their possession had been properly sealed in accordance with company policy; and (3) that the sealing ticket was properly removed from packages as the employee left. In addition to senior management, a member of the security staff would usually be present. Nave, Gieser, and Honore each participated in this procedure on nights when they worked until 9 p.m. closing. When two members of senior management were working, both would on occasion be present at the door at closing time. In addition, for a period of time prior to August 24, an aspect of the good-night procedure was applied to the 6 p.m. change of shift. Two members of the security staff would stand at the employee exit and Gieser would join them. However, approximately a week following the commencement of overt organizing activities at the store, Nickelson confronted Gieser with the concept that Gieser was spying on organizing activities going on outside the store. This caused Gieser to cease his personal participation but the 6 p.m. procedure continued throughout the organizing effort, using security personnel.<sup>7</sup>

In appearing as a witness called on behalf of Respondent, Gieser testified as follows:

Q. Now, after organizing activities started, were there every more members of senior management at the door than before activities started?

A. I would say for the most part, yes.

Q. Why is that?

A. We were working more hours within the store, just being at the front door, saying goodnight to the employees.

Q. Do you know why you were working more hours?

A. Not really. No.

Regional Vice President Kalkstein and Vice President of Employee Relations Paul Chevalier both appeared at the Century City store during the course of the organizing campaign, but this was not an unusual occurrence. Employees Schlaff and Frederickson gained the impression that Kalkstein was in the store more frequently after organizing efforts commenced than prior thereto.

#### b. *Scrutinizing of nonemployee organizers*

Richard Gieser, who, as found, served as assistant store manager in operations at the Century City facility, testified credibly that during the organizing campaign he

<sup>7</sup> The credited testimony of Sue Nave, Richard Gieser, and Bonnie Honore supports the foregoing findings. I have also considered the testimony of John Schlaff and credit it only to the extent that it is consistent herewith. I reject his testimony to the effect that on occasions, at 9 p.m. closing, neither security nor management personnel was present at the employee exit participating in the good-night procedure. I do not credit the testimony of Andres Villanueva to the effect that, prior to August 24, the night manager on duty, and not Sue Nave or Richard Gieser, participated in the good-night procedure. Villanueva's testimony on this subject was imprecise, based on speculation and generally not credible. I reject his testimony to the extent that it bears an implication that only after union organizing efforts commenced did Nave and Gieser participate in the procedure. I do not adopt any implication that may be drawn from Villanueva's testimony to the effect that prior to the organizing effort the participation of security personnel was infrequent and limited to week-ends.

personally observed security personnel following the nonemployee union organizers through the store. The security personnel were instructed that they should make certain that nonemployee organizers were not distributing literature in the store or leaving it on countertops.

The senior management staff of the Century City store was responsible for following union organizers Nickelson and Ochoa while they were in the store. The avowed purpose of this procedure was to insure that they did not engage in solicitation of employees or pass out literature to employees or leave it on countertops.

#### c. *Increased security personnel*

In August, Sanford Weeks ordered a saturation at the Century City store. The saturation commenced on August 11 with the assignment of three detectives to the store. During the succeeding 5 days an average of three detectives were assigned to the store. Additionally, during this period of time the security force was augmented by detailing an additional investigator (red coat) to the store on August 12 and 13, and two on August 14. The saturation was ordered by Weeks in response to theft occurrences as disclosed by known loss reports and reports of major theft occurrences coming to his attention and by conversations with buying office, store management, and security personnel reflecting trends in inventory shrinkage and theft occurrences. The saturation was terminated on August 16.<sup>8</sup> On August 17, 18, and 19 the regularly assigned security staff carried out the security functions at the store. In addition, Virginia Hartman, a detective, in training under Respondent's target store concept, spent a portion of the workday at the store. In addition, Virginia Hartman, a detective in training under Respondent's target store concept, spent a portion of the workday at the store. On the 3 succeeding days the security coverage at the store was provided entirely by regularly assigned personnel. However, commencing on August 24 and for the ensuing 2-week period the number of red coats and detectives providing security service at the store increased from the coverage level recorded for the final 2 weeks of July 1981, or the first 10 days of August 1981. The utilization of security personnel on special assignment to the store essentially equaled that which was occasioned by the saturation which had been employed during the period of August 11 through August 16. Additionally, during the 2-week period commencing August 24, regional supervision, represented by either Novak or Neer, appeared at the store during 5 of the days. On August 26 and 27 Novak was present in the store, while Neer was in the store on August 30 and 31 and on September 1. Moreover, in addition, during the 5-week period commencing September 7, consistent use was made of additional security personnel to augment the regular security staff, and the consistency of use exceeded to a substantial degree the use level that had been recorded during the last 2 weeks of July and the first 10 days of August.

<sup>8</sup> The credited testimony of Stanford Weeks and documentary evidence of record establishes the foregoing.

Thus on August 24 when union organizing efforts became readily visible at the store, two detectives on temporary assignment were present in the store. The following day three detectives were present. Then, on August 26 two detectives, including Hartman, were present, and Novak made an appearance at the store. Novak worked undercover. During this 3-day period no red coats were brought into the store to augment the regular staff of investigators. In the 4-day period commencing August 27, additional red coats were utilized, and, as found, on 2 of those days regional supervision was present. Then, during the initial 10 days of September an essential balance was maintained between the number of red coats used to assist the regular security staff and the number of detectives employed for that purpose. Some augmentation, either by red coats or detectives, or both, was utilized at the store during the succeeding 4-week period. In this regard, the record shows that one additional red coat was assigned to the store on August 27 and 28. The regular staff of red coats was assisted by three additional investigators (red coats) on August 29; one on August 30; two on September 1; one on September 2; three on September 3; one on September 4; two on September 5; one on September 8; two on September 9; and one September 10 and 12. No additional red coats were used until September 24 when two were assigned.<sup>9</sup>

Weeks testified that there existed at relevant times a divergence of view among senior security supervision over the relative effectiveness and efficacy of using uniformed red coats (investigators), who were readily identifiable by customers and store personnel, or plainclothes detectives for the purpose of deterring shoplifting and theft. Weeks further testified that this divergence in point of view, and subsidiary conflicts over supervision, led to the termination of the saturation which commenced on August 11 and which he initially had intended to have a 2-week duration. He further testified that he attempted during the period commencing August 24 to accommodate both contending facets of the loss prevention philosophy. Evidence of record establishes that dollar loss amounts increased significantly in August 1981, as contrasted to the 3 previous months. These losses subsided in September to the approximate dollar loss levels of July 1981. Moreover, the number of loss preventions reported by red coats during the week August 11-16 coinciding with the saturation declined by approximately two-thirds, only to rise significantly after the termination of the saturation. In the latter period fewer red coats were used to augment the regular staff. On the other hand, the decrease in the loss preventions reported during the first 2 weeks of September coincided with the significant increase in the use of red coats at the store during that 2-week period. A similar correlation between the number of loss preventions reported and the

<sup>9</sup> Documentary evidence of record establishes the foregoing. The testimony of Richard Larimore and Crystal Rhinehart to the effect that there were five additional red coats in the store after organizing commenced is not accepted insofar as it infers the presence of a group of five different red coats in the store on the same day. Moreover, I find on the basis of Sue Novak's testimony that she worked undercover and not as a red coat. I reject the implications of Larimore's testimony that she was identifiable by employees as a "red coat."

utilization or nonutilization of red coats to assist the regularly assigned red coat staff was discernible during the weeks ending September 19 and 26.

On August 24 and for a period of time prior thereto, a vacancy existed in the part-time security position allocated to the Century City store. Moreover, Larimore, the day male inspector, had been granted a promotion and was scheduled to assume a new position at the service building. Larimore assumed his new position soon after the organizing activity commenced. Similarly, at approximately that point in time, Greenwood, the day female inspector, resigned from the company. Patricia (Pam) Johnson, who in August 1981 was serving as security manager at the Panorama City store of Respondent, was detailed on August 29 to serve on temporary duty as a red coat at the Century City store. Johnson worked approximately 4 days at the Century City store. She was instructed to remain in a specified area of the store and patrol the sales floor and check fitting rooms to prevent theft. She was told that her immediate concern should be with shoplifters using trashbags as a method of operation. During the 4-day period she was assigned to the Century City store, Johnson filled in for Honore as security manager of the Century City store.<sup>10</sup> In addition, Gail Joy, a security supervisor at Respondent's Northridge store, was brought into the Century store on a part-time basis, as were one or two other individuals. Gail Joy would also fill in for Honore during the absence of the latter. Honore testified, in substance, that Johnson and Joy were brought to the store to provide coverage and, as supervisors, were in a position to meet other needs, including monitoring of union activity. Honore testified affirmatively that monitoring of union activity was one of the purposes for which Johnson and Joy were brought to the Century City store.

Efforts were undertaken to recruit permanent replacements for Larimore and Greenwood, but no permanent replacements were found during times pertinent herein. Moreover, when Rinehart, the night female inspector, left her employment at the store on September 17, further recruitment efforts were undertaken but not successfully.

Virginia Hartman, who, as found, was employed as a special agent under Respondent's target store concept, was assigned to the Century City store from September 1 through September 7, pursuant to instructions of her superior. Hartman was told that union activity was going on at the store and she was to monitor the customer doors to make certain the doors were not blocked by individuals engaged in union activity. In pursuit of this facet of her assignment, Hartman observed the customer doors from her vantage point on the mall adjacent to the store and from inside nearby shops to which she retreated in order to find relief from the heat of the mall. She carried a two-way radio, as was common practice with security personnel. She observed union organizers Ochoa

<sup>10</sup> I do not credit the implication of Honore's testimony that Johnson served on an ongoing basis as her substitute. Nothing in Johnson's credited testimony suggests that she worked on a recurring basis at the Century City store, and no implication to this effect is admissible from documents in evidence.

and Nickelson passing out literature on occasions during this period of time. While she used the two-way radio to report the entry into the store of suspicious appearing individuals, she did not use the radio for the purpose of reporting ingress of individuals whom she believed to be employees. Although she observed individuals speaking with the union organizers near the entrance in the mall, she had no occasion to report the identity of any employee known to her, as such, because no blockage of the doors occurred as a result of this conduct. Hartman knew none of the employees, either sales or support personnel, and could identify individuals as employees only by reason of the badge which each employee wore.<sup>11</sup>

*d. The alleged unlawful surveillance*

(1) Gieser instructs Larimore

On August 24 when Nickelson and Ochoa made their initial appearance at the Century City premises and commenced distributing handbills outside the employee entrance on the mall, Gieser was on the sales floor and observed that the union representatives were handbilling the store. Gieser spoke with Honore and they in turn spoke with Larimore, the day male inspector. This transpired in the morning hours soon after store opening. Gieser stated that there were some union organizers outside who were engaging in handbilling. He asserted that this activity was permissible but that company rules prohibited the organizers from soliciting employees or distributing literature in the store. Gieser instructed Larimore that if the organizers should enter the store he was to notify management.

Soon after 10 a.m. Nickelson and Ochoa entered the store. Larimore received a call from an operator informing him that they were in the restaurant. Larimore went to the restaurant but Nickelson and Ochoa had left. Larimore notified Gieser informing Gieser that the organizers had proceeded to another department. Gieser asserted he would handle the matter from there.<sup>12</sup>

<sup>11</sup> The credited testimony of Virginia Hartman establishes the foregoing. I have also evaluated documentary evidence of record in determining her period of service at the Century City store between September 1 and 7.

<sup>12</sup> A composite of the testimony of Richard Larimore and Richard Gieser establishes the foregoing. As I observed him testify, Larimore impressed me as a witness who endeavored to recount the events about which he testified with clarity and truthfulness. Gieser similarly impressed me as a truthful witness, but I am convinced he did not have totally accurate recall of this incident. Thus, I conclude that the conversation here pertinent occurred in the morning hours after store opening and not in the evening as Gieser recounted. Moreover, I am convinced that Gieser's instructions to Larimore encompassed both solicitation of employees and distribution of literature. However, I am similarly convinced that Larimore was incorrect in his recollection that Gieser instructed him affirmatively to follow the employees through the store and record the names of employees to whom they spoke. This instruction would have been inconsistent with instructions reflecting company policy subsequently given security personnel by Honore, and it is noteworthy that Larimore recorded no names even though he testified that he had observed the union representatives talking with employees and that he had in his possession writing material with which he could have made such a recordation. Further, Larimore appears not to have "followed" Nickelson and Ochoa through the store on August 24, but his efforts to observe their activity appeared to have evolved from an operator's page rather than a volitional tracing of the progress of the union representatives through the store. Honore could recall no conversation with Larimore involving

(2) Honore instructs security staff

Soon after organizing efforts began, Honore met with the security staff; including Larimore, Rinehart, Greenwood, and Belden. Honore told the staff that union activity was going on in the store and that she had been told from "downtown" that the security staff was not to get involved. She stated that the staff was to perform their normal functions and if problems arose they should alert management. They were also informed that if non-employee union organizers entered the store they should notify store management. The security staff was also told by Honore on this occasion that there was going to be some additional security personnel in the store.<sup>13</sup>

(3) Gieser observes employees

On August 25, Wendy Cano, a store employee, proceeded from her workplace in the store towards the south entrance for the purpose of spending her morning break period in the mall area outside of the store and proximate to the south entrance. In the moderate sportswear department inside the store near the south entrance she observed Gieser leaning on a clothes rack in the department. Cano left the store and joined other employees who were taking their breaks in the mall area. Cano and the other employees engaged Nickelson in conversation while Ochoa engaged in handbilling. As they spoke to Nickelson, the employees were sitting on a wall in the mall and Cano could observe Gieser in the store in the vicinity of the clothes rack in the moderate sportswear department looking out into the mall directly at the group of employees as they spoke to Nickelson. Cano's break lasted 30 minutes. Gieser continued throughout that time period to focus his attention on the group of employees speaking with Nickelson. When Cano entered the store at the conclusion of her break she observed Gieser standing where he had stood when she left to commence her break.<sup>14</sup>

(4) Sue Novak's involvement

In August 1981, Sue Novak was employed as the regional security manager for region I-A with responsibility over five stores. The Century City facility was not

Gieser wherein Gieser instructed Larimore to record the names of employees seen talking to union organizers.

<sup>13</sup> The foregoing is based primarily on the credited testimony of Bonnie Honore. I have also considered the testimony of Richard Larimore and Crystal Rinehart and credit it only to the extent that it is consistent with the foregoing findings. I am unable to accept the anomaly present in the testimony of Larimore and Rinehart that Honore would, on the one hand, instruct the red coat personnel to pursue their normal duties and abstain from discussing the merits of union representation, while, on the other hand, directing them to be acquiescent and obedient to the directions of other security personnel which potentially could divert them from their regular duties and render them promanagement partisans in the organizing efforts. In sum, I reject the interpretations given Honore's remarks by Larimore and Rinehart in their testimony. Rather, I credit Honore's testimony that she, in effort, instructed the red coats to contact management if they observed "a problem."

<sup>14</sup> The foregoing is based on the credited testimony of Wendy Cano. Richard Gieser testified that he could remember no incident of the type described by Cano in her testimony. To the extent that he intended by his testimony to deny the conduct attributed to him by Cano he was not convincing. I found Cano to be a credible and convincing witness.

included within her region. Novak reported directly to Sanford Weeks but was higher in the chain of command than were security agents, five of whom reported to her. Charles Neer, as found, was regional security manager over the region in which the Century City store is located. He was on vacation during the last week of August.

Novak was instructed by Weeks to report to the Century City store and be available to assist in countering potential shoplifting activities. Novak reported to the Century City facility on Wednesday, August 26, and worked the entire day shift. She worked at the Century City store for a portion of the following day, Thursday, August 27. Honore was not in the store on those 2 days. Novak worked undercover during the time she spent at Century City and thus wore no identifying uniform or badge. She devoted the principal portion of her time to patrolling the sales areas and protecting against potential customer and employee theft.<sup>15</sup> Larimore testified that at a point in time after the organizing effort had commenced, Novak spoke to him and other inspectors and informed them that one of the other security agents had been stationed undercover in a store "across the way." Novak did not identify the store but according to Larimore she instructed the inspectors to assist that agent in identifying the employees who were talking with the union organizers. This identification was to be accomplished through use of two-way radios.

Larimore further testified that in a separate conversation which transpired on a Saturday, Novak stated to Larimore, Rinehart, and Greenwood that three employees were having lunch outside the store with the union organizers and that the inspectors were to remain in the store at the employee entrance and obtain the names of the employees. Larimore testified that at the conclusion of the conversation the three inspectors went to the second floor and that he, Larimore, went on break after patrolling a short time.

Novak credibly denied the conduct attributed to her by Larimore. Her demeanor and straightforward manner in testifying concerning these two asserted incidents convinced me that her account and her denials were worthy of belief and entirely more convincing than Larimore's account which appeared to be laced with supposition, confusion, and contradiction. Illustrative of these deficiencies with respect to the second incident is Larimore's testimony that the inspectors were to remain at the employee entrance for the purpose of observing the three employees leaving in the company of the union organizers from an outside restaurant of which there were several. In contradistinction, Larimore testified following the conversation with Novak that he went to lunch and that all of the other inspectors who had assertedly been the recipients of Novak's instruction, immediately left the vicinity of the entrance and pursued patrol duties on the second floor of the store. Similarly, Larimore was confused with respect to the day of the week on which this second incident occurred. Finally, with respect to both incidents, he appeared as I observed him testify, to lack certitude with respect to the details of each of the incidents. I do not credit him. Moreover, in rejecting Lar-

<sup>15</sup> The credited testimony of Sue Novak, as supported by documentary evidence of record, establishes the foregoing.

more's version and crediting Novak, it is noted that Rinehart, whom Larimore identified as being a participant in both conversations with Novak, gave no support in her testimony of Larimore's version of these conversations.

#### (5) Larimore speaks with Schlaff

During the organizing campaign, John Schlaff was employed as night assistant manager—a nonsupervisory position—at the Century City facility. He was active in publishing and distributing newsletters to employees at the store. In the campaign literature that was distributed at the Century City premises he was identified by name as one of the members of the organizing committee. On or about August 25 Schlaff had occasion to speak with Larimore. The conversation transpired in the early afternoon at a time when Schlaff had been speaking with Nicholson, one of the union organizers. Larimore was walking in the mall area outside the store and stopped to speak with Schlaff. He told Schlaff, in substance, that supervision and management had been watching his activities and knew that he was a "ringleader" of the organizing effort and was writing the bulletins. Larimore told Schlaff that management had brought in undercover people from other stores and that one was stationed with a walkie-talkie in the Tot Toggery, a children's clothing store on the mall. Larimore stated that management was noting each person who talked to an organizer and was requesting in-store security to help compile a list of names. Larimore noted that he had refused to record any names and added that he was advising Schlaff of these things because he was afraid that management would "come down hard" on him.<sup>16</sup>

#### (6) The involvement of Virginia Hartman

Soon after the organizing campaign commenced, Honore had occasion to speak with Hartman using a two-way radio. Hartman was speaking from outside the store. She informed Honore that a suspicious appearing individual was entering the store and offered a verbal description of the individual. A detective was assigned to work on the matter.<sup>17</sup> Crystal Rinehart testified that approximately 3 or 4 days after the union activity commenced Honore told her that Hartman was in the Tot Toggery watching the employee entrance. Rinehart further testified that while she was speaking with Honore, Hartman contacted Honore by radio and gave "descriptions of people that were outside by the employee entrance . . ." Rinehart further testified that Honore made notes of this occasion. She could identify the individual speaking with Honore by virtue of the accent which she knew Hartman to possess. Rinehart also testified that on other occasions she heard Hartman giving descriptions of "employees."

Honore credibly testified that she had never instructed Hartman to station herself in the Tot Toggery and ob-

<sup>16</sup> In findings that this conversation transpired, I rely on the testimony of John Schlaff. I have also considered the testimony of Richard Larimore.

<sup>17</sup> The credited testimony of Bonnie Honore establishes the foregoing.

served the activities of employees. In substance, she denied the comment attributed to her by Rinehart.<sup>18</sup>

(7) Honore converses with Rinehart

Shortly after the organizing campaign commenced, Rinehart approached Honore on the selling floor and said that she knew who was involved in the union activity. She added that she was going to take her break and follow her usual routine of sitting outside where the union activists normally gathered. Honore told Rinehart that because of implications that could be drawn she should stay away from that area. Rinehart responded that she just wanted to see what was going on. Honore stated that her lunch and her breaktime was her own but cautioned that in order for the security department to be protected she should stay away from the area in question. Rinehart responded that she was going to go ahead on her break. She did so.

Honore observed Rinehart go outside and sit on the ledge with other employees who were active on behalf of the Union. Nicholson was also present.<sup>19</sup>

(8) Chevalier and Schlaff converse

In early September, Paul Chevalier, vice president in charge of employer relations, conducted a meeting

which was attended by Chris Huntsman and a group of employees, including Schlaff and other employees who had identified themselves as members of the employee organizing committee, as evidenced in the literature distributed by the Union. During the meeting, Schlaff had identified himself as the author of the news bulletins which had been distributed. Chevalier had questioned the accuracy of the bulletins, and Chevalier and Schlaff had an exchange of views as to whether the asserted inaccuracies were deliberate misrepresentations. After the meeting, Schlaff and Chevalier spoke privately. During the course of their discussion, Chevalier stated that the Union was going to lose overwhelmingly. Chevalier further stated that, while unionization would be a bad thing, he felt the union campaign had been beneficial because it brought to the attention of upper management several problems at the Century City store of which they had not been aware. He added that as a consequence upper management would always have "a special eye on Century City" and would have a special ear turned to its problems. Chevalier also noted that there had been no prior organizing efforts in the Broadway chain and that "they would always be aware of Century City's problems."<sup>20</sup>

3. The no-solicitation rule

a. *The rule as promulgated*

At all relevant times Respondent's employee handbook has contained the following rule under the heading "Solicitation:"

It is a violation of our policy for anyone to come on our property to solicit or distribute literature for any purpose which would interfere with the working time of our employees or tend to irritate our customers. Our invitation to the public is to use our store property for shopping and purposes incidental to shopping.

Employees may not solicit or distribute literature to other employees or be solicited or receive literature for any purpose during their working time. Our employees cannot properly perform their work if they are interfered with by solicitation or distribution. Immediately report to your Supervisor or a member of Management if any person, Company employee or otherwise, attempts to solicit you for any reason in violation of these rules.

The handbook contains no textual amplification or clarification of the rule. Each new-hire is presented with a copy of the employee handbook at an orientation session. Copies of the rule are posted at entrances and at employee timeclocks within the store.<sup>21</sup>

<sup>18</sup> Upon a consideration of the credited testimony of Virginia Hartman and Bonnie Honore, and in light of the deficiencies implicit in Rinehart's testimony, I do not credit that portion of Rinehart's testimony attributing to Honore a remark to the effect that Hartman had been stationed in the Tot Toggery for the purpose of observing the union activities of employees. Initially, it is clear from the testimony of Hartman and of Rinehart that there exists in the record no substantial foundation for concluding that Hartman was well acquainted with the employee complement, generally, or had a capacity to identify individuals as employees other than by virtue of the badges which they were required to wear while on duty, and which they generally wear while on break. Moreover, Rinehart's mind set, as revealed by her answer defining how she was able to know that the descriptions being radioed by Hartman were those of employees, discloses a high level of rationalization. Thus, Rinehart testified, "How do I know they were? I guess because, why would they be talking about anybody else?" The record amply establishes that two-way radios were routinely used by security personnel both prior to and during the organizing effort to describe individuals entering the store who had a suspicious appearance. Rinehart's testimony with respect to the foregoing incidents appears highly rationalized, subjective, and based principally on supposition.

<sup>19</sup> The credited testimony of Honore establishes the foregoing. I reject the testimony of Crystal Rinehart to the extent that it is inconsistent with the above findings. The testimony of Honore, and the record as a whole, establishes to my satisfaction that Honore was circumspect in her desire to maintain an independent posture of the security forces in the face of the employee organizing effort and management's legitimate and predictable interest and concern therewith. Honore had instructed the red coats to remain neutral, and I am not convinced that she would have abandoned this policy and inferentially recanted from the instructions which she had given Rinehart and the other red coats just a day or two earlier by encouraging Rinehart to eavesdrop on the union activities of her fellow employees in the manner described by Rinehart. I reject Rinehart's testimony and do so not only upon the conviction that Honore testified truthfully with respect to this incident, but of the further conviction that Rinehart possessed an aberrant memory of salient events, and inter-fused this deficiency with her own subjective interpretations influenced by her inquisitive interest in the activities of the union organizers and her fellow employees to whom she spoke on a daily basis. Indeed, the instruction to engage in surveillance of employee union activity which Rinehart attributes to Honore, stands in stark contrast to the counsel given Rinehart by Honore to the effect that, remaining as a roommate with Leslie Bass, one of the female employees active in the Union, placed substantial strains on Rinehart's capacity to remain neutral in the manner expected of security personnel.

<sup>20</sup> The undisputed testimony of John Schlaff establishes the foregoing.

<sup>21</sup> The credited testimony of Chris Huntsman and documentary evidence of record establishes the foregoing.

b. *The implementation of the rule*

In support of the union organizing effort, T-shirts were printed and distributed to some of the employees. On the front of the shirt integrated with a union logo was the slogan "Help Make The Broadway *Your Way!*" On the back of the shirt appeared the slogan "Support Collective Bargaining." The front and back slogans were in bold lettering and easily discernible to the eye. Efforts were made to raise funds by offering the shirts for sale at \$5 a piece. The sale and distribution were coordinated through Ochoa, Nicholson, and some of the members of the organizing committee.

On or about October 20 an organizing meeting was held, attended by several of Respondent's employees and by Ochoa and by Nicholson. The need for additional signed authorization cards was discussed. T-shirts were distributed to some of the employees in attendance. After the meeting, a group of employees riding together in an automobile agreed to wear their T-shirts on payday when they went to the store to obtain their paychecks.

On October 22 Villanueva and Bass met near the employee entrance. It was a nonworking day for each of them. Each wore a union T-shirt. They entered the store and proceeded to a sales department on the second floor. Bass did some shopping and in the process spoke to a salesperson. They then proceeded to the third floor and browsed in the housewares department. They were approached by Hollie Johnson and Craig Rotman. Johnson asked them to leave the store, stating they were in violation of the store's no-solicitation policy. Villanueva and Bass were told either to leave the store or remove their T-shirts. After further discussion they went to the office of Chris Huntsman and spoke separately with her. She showed each of them the rule regarding solicitation contained in the employee handbook. In substance, Huntsman told Villanueva and Bass that the rule against solicitation prohibited them from wearing their T-shirts in the store on their days off.

Villanueva entered the store the following day wearing his union T-shirt. He was off duty. No member of management or supervision approached him. On Friday, October 23, Sharon Slaughter, Jo Anne Remmes, Desiree Taylor, and Monica Alexander each wore their union T-shirts when they came to the store on their respective days off for the purpose of obtaining their paychecks. Each used the escalators and saw and talked to on-duty employees or customers. Each was instructed by Huntsman either to leave the store or remove their T-shirts. The reason given was the no-solicitation rule. Slaughter was wearing a regular T-shirt under her union T-shirt. She removed the latter and remained in the store. Remmes, Taylor, and Alexander left the store, covered the union T-shirt with other garments, and returned to the store. They were not approached by supervision or management.

On May 13, Wendy Cano wore her union T-shirt to the store on her day off. She entered the store for the purpose of purchasing a pair of jeans. While she was making her purchase, she was approached by Huntsman who informed her that she was in violation of the store's solicitation policy because she was wearing a union T-shirt. Huntsman instructed her to leave the store. How-

ever, Cano had a sweater in her possession and she placed the sweater over her T-shirt and she was permitted to complete her purchase. She did so and proceeded to the third floor personnel offices. She spoke again with Huntsman and discussed the solicitation rule and its parameters. Huntsman told her that if she continued to wear the T-shirt she would have to leave the store. Cano was wearing her sweater over her T-shirt when Huntsman made this declaration.

At some point in time it had come to the attention of Chevalier that employees had commenced the practice of wearing union T-shirts. Chevalier had been told that the employees were purchasing the T-shirts and wearing them in the mall and were entering the store wearing them. As a result, Chevalier recommended to store management that employees be precluded from wearing the union T-shirts into the store. Chevalier testified that he based his recommendation on the fact that the "company has a solicitation rule which does not allow anyone to wear solicitation materials of any kind or distribute solicitation materials of any kind for any purpose in the store." He further testified that he took the position that when employees were off duty "they were like any outsider" and that they "should not be permitted to do anything more than any other outsider would be permitted to do." Respondent did not have, in promulgated form, a no-access rule, and under longstanding practice employees were permitted on their days off to come to the store to shop or to retrieve their paycheck.<sup>22</sup>

During their break or lunch periods, employees were permitted to staff a table in the employee canteen situated on the fourth floor of the store and to distribute campaign literature and handbills from the table. The employees were permitted also to place and maintain a sign on the table in the canteen bearing the slogan "Help make the Broadway your way." Moreover, throughout the entire organizing campaign, employees were permitted to engage in solicitation on behalf of the Union both before and after work and while they were on their break and lunch periods. No limitation was imposed on the freedom of employees to converse about the Union in the store on their break or lunch periods, or to speak with Ochoa and/or Nicholson in the store during their free, nonduty time.<sup>23</sup>

#### 4. Capilupo and Frederickson converse

On August 24, the day on which the Union commenced handbilling at the Century City facility, Frank

<sup>22</sup> The above findings are based on evidence which is essentially undisputed. These findings are based on a distillation of the testimony of Andres Villanueva, Leslie Bass, Sharon Slaughter, Jo Anne Remmes, Monica Alexander, Wendy Cano, Paul Chevalier, and Christine Huntsman. The sum of the testimony gives credence to the general outline of events above-described. Huntsman concedes the accuracy of the attributions of the employee witnesses concerning the application of the no-solicitation rule to the wearing of T-shirts in the store by off-duty employees, and her directive to either leave the store or remove the T-shirts which they were wearing. The finding with respect to the incident involving Villanueva and Bass is based primarily on Bass' testimony. I credit the testimony of Villanueva only to the extent that it is consistent with the above findings.

<sup>23</sup> The testimony of John Schlaff, Leslie Bass, Andres Villanueva, and Christine Huntsman establishes the foregoing.

Capilupo, divisional group manager of fashion accessories at the Century City store, had occasion to speak with David Frederickson, a sales associate, who on August 24 was assigned to the Cartier department under Capilupo's general supervision. Frederickson worked frequently in the Cartier department but his assignment to that operation was not a permanent one. However, both prior and subsequent to August 24 Capilupo and Frederickson had occasion to converse both in the line of duty and with respect to diverse subjects such as music, world events, and general business conditions. Frederickson and Capilupo had a mutual interest in music, and Frederickson had attended the performance of a rock-and-roll band in which Capilupo played.

The conversation on August 24 occurred in context with handbilling by the Union which constituted the first overt organizing activities at the Century City store and the first handbilling effort of a labor organization which Capilupo had ever witnessed. The event had given rise to a degree of confusion on the part of managers and rank-and-file store personnel. Frederickson initiated the conversation which lasted approximately 20 minutes. In speaking with Capilupo, Frederickson observed that he had noticed a "kind of general confusion" characterized by "managers kind of running around." In a conversational manner, the participants spoke of the union's presence outside the store, and Frederickson observed that there had been plans to leaflet the store on the previous Friday but a decision against this had been made. He spoke also of supervision being "stoned faced" and involving in petty practices. Towards the end of the conversation, Capilupo asked Frederickson how he felt about the activities. Frederickson responded that he was definitely for it and added that the question which Capilupo was asking him was an illegal one. This caused Capilupo to laugh because he had never known Frederickson to be quite so formal. Capilupo did not pursue the matter further.<sup>24</sup>

##### 5. Rotman speaks with Frederickson

Approximately a week later, Frederickson had occasion to speak with Craig Rotman, an assistant store manager with supervisory authority over him. The conversation commenced on the sales floor. In the course of the conversation, the subject of employee grievances arose. Rotman noted that he could not do anything about grievances "unless they are written down in black and white." He suggested that they go to his office and talk about the matter. Frederickson and Rotman went upstairs to Rotman's office situated on the third floor in the personnel department. In the office, Rotman sat behind his desk and Frederickson sat down across the desk from him. As he and Frederickson spoke, Rotman recorded notations on a yellow legal-size writing pad. Frederickson specified poor pay, inadequate raises, lack of management understanding of employees, the dress code, and several other matters as employee grievances. The list of grievances as recorded by Rotman filled approximately

<sup>24</sup> The foregoing is based on combination of the credited testimony of David Frederickson and Frank Capilupo. Capilupo conceded that he asked Frederickson how he felt about "what was going on."

two-thirds of one page. As Rotman and Frederickson discussed these matters, Rotman stated that he "couldn't make any promises" and he repeated this statement during the course of the conversation in the office. Rotman added that he would retain the anonymity of the list which he was compiling. In addition, during the course of the conversation, Rotman asked Frederickson to state his opinion of the management personnel. As the conversation drew to a close, Rotman told Frederickson that he would see what he could do about the grievances and stated he would take them up with higher authority. He cautioned that he could not promise anything "because of the legalities."

Frederickson worked in close contact with Rotman for a period of several months prior to this conversation. Over the period of the work relationship, Frederickson had occasion to speak with Rotman concerning a variety of work-related matters and employees generally. Thus, Frederickson had expressed his desire to obtain a commission selling job, his opposition to a proposed dress code policy, an apparent delay in the granting of a raise to one of his fellow employees, the slow manner in which a medical insurance benefit was being processed with respect to a fellow employee, merchandising problems, and deficient staffing. Other employees had spoken to Rotman in a similar vein. Additionally, after the conversation in Rotman's office, Frederickson had occasion to speak with Rotman concerning grievances.

Frederickson was unable to recall whether he informed Rotman on the occasion of the interview in Rotman's office that he supported the Union, or whether this information was imparted to Rotman prior to the meeting.<sup>25</sup>

Respondent's employee handbook which, as found, was distributed to all employees at the outset of their employment contains a written expression of policy as follows:

##### *Open Door Policy*

Once you've actually started working at your job, you may find you have some questions you want to ask or some details you don't understand. Our "Open Door" policy means that you are welcome to discuss your questions in a relaxed way, and know you'll receive an answer.

If you have a job problem or complaint, you should discuss the problem with your Supervisor. If you are not satisfied with the results of your discussion, or you feel uncomfortable discussing it with your Supervisor, go to the Personnel Manager. If you are still not satisfied, talk with the Store Manager or the Regional Personnel Manager. If you wish to put your problem or complaint in writing, you can obtain the appropriate form from Personnel. We assure you that you will never be penalized in any way because you use the Problem Solving-Employee Complaint procedure. It was set up for your pro-

<sup>25</sup> All of the foregoing findings are based on the credited and undisputed testimony of David Frederickson. Craig Rotman was not called to testify.

tection and benefit and you will find that all Supervisors and other members of Management will be more than willing to talk over any matter which is important to you.

Our goal is to continue building The Broadway, based on the standards already established, so that it remains a desirable place in which to work and a pleasant place in which to shop.

Because our people are the most important asset in our business, we are committed to a policy of fair and equal treatment, and to improving the skills of all our employees.

We hope we've made a good impression and provided you with the guidelines for understanding how we function, what's expected of you, and what you can expect from us.

#### 6. The low-cost lunch program

At all relevant times Respondent has operated an employee canteen at its Century City facility. It also operated a restaurant within the store open to the employees and the public. Prior to late 1981, the food and beverages available for employee purchase were dispensed through vending machines. This included sandwiches, canned foods, candy, and soft drinks. In November or December 1981, a freshly prepared sandwich and salad became available to employees at the price of \$1.25.<sup>26</sup>

In the meantime, in September 15, 1980, Sue Nave became store manager of the Century City facility. Two weeks prior thereto she had entered the employ of Respondent and had pursued an orientation program designed to familiarize her with the policies, procedures, and systems of Respondent. The orientation program was conducted at the service building and at two other stores of Respondent. Prior to entering the employment of Respondent, Nave had been employed by Weinstock's and by Federated Department Stores. Employee relations and store maintenance were included in Nave's responsibilities as store manager of the Century City facility. During her initial week as manager of Century City, she toured the entire store to become familiar with the store layout and the physical condition of each of its areas. Her tour included the canteen, the employee lounge, and the employee quiet room which were areas on the fourth floor designated specifically for employee use. She found the employee canteen to be drab, cheerless, and cluttered. She noted that the floor was not clean. In general, she concluded that the employee facilities at the Century City store compared very unfavorably to those at the other Broadway stores with which she had become acquainted, and with the Weinstock's store. Moreover, as Nave toured the store and spoke with employees, she received negative comments concerning the condition of the facilities. These criticisms became more specific and defined at employee meetings conducted by Nave with groups of sales and sales support personnel. During the course of these meetings, employees stated that the food in the vending machines was

not fresh and that the vending and change machines in the employee canteen would malfunction. Additionally, employees complained that the price of available food in areas near the store was "very high."

Nave's initial undertaking designed to improve the employee facilities was to direct the removal of the stock which was stacked from floor to ceiling in the quiet room. Additionally, a broken lampshade in the lounge was replaced. By November 1980 a project to paint the canteen, clean the floors, and to secure new tables, chairs, and pictures for the canteen was initiated. This project was completed by June 1981.

On August 14, 1981, Nave spoke with Colin Flint, who was then regional food service manager with responsibility over food service operations in nine stores, including Century City. Craig Rotman also participated in the discussion. They spoke of the problem of maintaining a consistent level of products available in the vending machines in the canteen. As the conversation evolved, Rotman mentioned an employee lunch that had been served in a competing store in which he had worked. Alternatives to the vending machine food arrangement were explored, and Nave inquired if it were feasible to provide a fresh sandwich and salad to the employees for consumption in the canteen. After considering the matter briefly, Flint stated that he could see no logistical problems. He noted the existence of local health ordinances and stated that he would check the applicability of those. Nave, Flint, and Rotman discussed the equipment which would be necessary, and Flint noted that the following week he would determine whether a salad bar, not presently in use at one of the other store facilities, would be available. The discussion then turned to the type and variety of sandwiches that would be offered. Flint expressed concern whether personnel would be available to prepare the sandwiches and made a note to himself to consult the restaurant manager. The participants discussed but discarded the concept of offering soup in connection with the program. During the course of the meeting, Flint made a notation that if a salad bar were not available in one of the other stores, he should order one. He entered a further notation to the effect that he should advise Tony Gracyk, his superior, concerning Nave's request and get an approval from Gracyk. Flint was aware of the fact that the program of offering fresh sandwiches and salads in an employee canteen in a store having a restaurant facility would create a new precedent within the chain. The meeting ended on this note.

Early the next week, Flint spoke with Gracyk who evidenced no objection to the program but requested that Nave reduce her suggestion to writing.

At the September and October meetings between Nave and groups of employees, Nave made known the decision to offer a lunch of sandwiches and fresh salads and the employees reacted positively. The soup and salad luncheon was first offered in November or December 1981.<sup>27</sup>

<sup>26</sup> The undisputed testimony of Sue Nave, Colin Flint, Wendy Cano, and Richard Larimore establishes the foregoing.

<sup>27</sup> The foregoing findings are based on a distillation of the credited testimony of Sue Nave and Colin Flint and documentary evidence of

Nave testified that she concluded the September 14 meeting with Flint and Rotman comprehending that the luncheon program would be implemented without further action on her part. She further testified that at no time after the meeting did she converse or receive any written communication from Flint or anyone else at the regional level regarding the low-cost lunch program. Flint testified that he had authority to implement the program and that the approval of his superior, Tony Gracyk, was not essential to the full implementation of Nave's request. Nave and Flint both testified that they had no knowledge of any union activity at the store at the time of the September 14 meeting.

Prior to September 14, two of Respondent's stores provided a food service program similar to that which was discussed to the Century City store. However, these were not stores containing restaurant facilities. Moreover, subsequent to September 14, in October 1981 and March 1982, similar food programs were made available to employees at two other stores operated by Respondent.<sup>28</sup>

#### 7. The final warning to Villanueva

On May 28, 1981, a representation election was conducted at the store. After voting had been completed, the ballots were counted. The official count revealed that a majority of the ballots were cast against the Union. Paul Chevalier participated in the ballot count in his capacity as vice president of employee relations. The result of the election became a matter of general knowledge between 8 and 8:20 p.m. Andres Villanueva had learned of the results of the election at the time he commenced his evening break at 8 p.m. Villanueva was scheduled to work the 6 to 9 p.m. shift that evening. His normal break period would last 15 minutes. At the outset of this break, Villanueva left the store through the south entrance. He quickly consumed a beverage and sat for approximately 5 minutes speaking with other employees. He then moved to a position near a tree planter and spoke with Steven Nickelson and Victor Ochoa about the results of the election. Their conversation took place near the escalators. Villanueva was upset over the results of the election and his distress brought him to the point of tears. He observed Sue Nave, Holly Johnson, and some other managers walk past. Soon thereafter, Chevalier departed the store through the south entrance and walked toward the escalators. Villanueva observed Chevalier and stopped his conversation with Nickelson and Ochoa. Chevalier was alone.

record. I reject the testimony of Flint to the effect that the fresh sandwich and salad luncheon was offered within 2 weeks of the September 14 meeting. The summaries of employee group meetings conducted by Nave contain notations suggesting that decision to implement the luncheon was first communicated to employees in September and October and that the actual initiation of the luncheon program did not commence until November and December. Thus the summary of employee group meetings conducted in October and November 1981 by Nave contained no notation suggesting the actual operation of the fresh luncheon program, whereas the summaries for the November-December 1981 period contain a specific notation to the effect that a salad bar had been added. Moreover, the testimony of Wendy Cano tends to support the conclusion that the actual operation of the luncheon program did not commence until the organizing campaign was well underway.

<sup>28</sup> The credited testimony of Colin Flint establishes the foregoing.

As Chevalier proceeded from the south entrance toward the escalators, Villanueva left Nickelson and Ochoa and walked toward Chevalier. As Villanueva walked toward Chevalier he addressed some comments to Chevalier which Chevalier was unable to understand. Chevalier knew that Villanueva was addressing him and he stopped. Villanueva approached to within 5 or 6 feet of Chevalier and called Chevalier a "fascist bastard." He added, "I hope you are happy that you fooled most of the people." Villanueva then repeatedly called Chevalier a "fascist bastard." Chevalier made no response and started to walk away. Nickelson and Ochoa were approximately 10 feet away when Villanueva addressed Chevalier. However, Nickelson and Ochoa approached Chevalier, and Nickelson asked him to wait. Chevalier stopped and Nickelson approached Chevalier. Ochoa stood nearby and Villanueva was a few feet further away. Nickelson asked Chevalier what was going on. Nickelson had heard some but not all of Villanueva's statement to Chevalier. Chevalier did not respond to Nickelson's inquiry, and Nickelson placed his hand on Chevalier's arm above the elbow. Nickelson stated that people tend to get "extremely upset during times like this" and that Chevalier should understand this. Chevalier responded, "Don't touch me. Don't touch me." Chevalier spoke in a loud voice and was exasperated. Nickelson released Chevalier's arm and looked toward Ochoa. Ochoa motioned for Nickelson to leave Chevalier alone. Nickelson turned again to Chevalier and again placed his hand on Chevalier's arm. Nickelson commented that emotions run high during an election. Chevalier requested Nickelson to let go of his arm. Nickelson persisted in maintaining his grasp on Chevalier's arm. Chevalier repeated his request to Nickelson to let go of his arm. Nickelson did so, saying, "Take a walk." Chevalier proceeded down the escalator to his parked automobile. He proceeded by automobile to a restaurant. At the restaurant he joined Chris Huntsman and Holly Johnson for dinner. He informed Huntsman that he had had a very disturbing experience. He recounted that Villanueva had approached him and called him a "fascist bastard" several times. He added that he had been "assaulted" by Nickelson and had found both incidents upsetting. He told Huntsman that he wanted to think about what had happened and did not wish to make a recommendation under the emotional impact of the incident. He stated his desire to be objective.<sup>29</sup>

<sup>29</sup> The foregoing is based on a consideration of the testimony of Paul Chevalier, Andres Villanueva, Steven Nickelson, Victor Ochoa, and Christine Huntsman. The findings with respect to the statements addressed to Chevalier by Villanueva are based primarily on the credited testimony of Chevalier. I credit Villanueva only to the extent that his testimony supports the findings above made. Villanueva did not impress me as an entirely credible witness. His testimony concerning the incident in question impressed me as highly selective, and his testimony, generally, revealed a strong bias and compromise with truth in circumstances wherein the General Counsel's case would be furthered by shading the truth or employing selective recall. I have heretofore discredited Villanueva's version of the events surrounding his visit to the store in the company of Bass. In addition, the testimony of Nickelson supports that aspect of Chevalier's testimony suggesting that contrary to Villanueva, Villanueva's comments to Chevalier were not limited to the innocuous statement, "I hope you are happy that you fooled most of the people." In

*Continued*

In the meantime as Chevalier proceeded toward the escalator after his incident with Nickelson, Nickelson joined Ochoa and they made loud remarks such as "lame brain" and "hypocrite." For his part, Villanueva informed Ochoa that he did not feel like returning to work. Villanueva's break period was ending. In response, Ochoa contacted Nave by telephone and inquired if Villanueva could be excused from work for the balance of the evening. Nave declined to give her permission. Accordingly, Ochoa spoke with Huntsman by telephone, explaining that Villanueva "wasn't feeling too well" and thus his work would be adversely affected if he returned. Huntsman gave her permission of Villanueva to leave work for the evening. Villanueva did so.<sup>30</sup>

After evaluating the incident involving Villanueva for several days, Chevalier recommended that Villanueva be given a final warning but not terminated. This recommendation was communicated through channels to Huntsman. Huntsman met with Stuart Levine, director of legal personnel services, and it was decided to put Villanueva on "cause" warning and that he be told that he would be terminated if any further incidents occurred. In evaluating the nature of the personnel action to be taken, Chevalier, Levine, and Huntsman each considered the factual context in which the incident had transpired and the emotions which were present in the aftermath of the election. Thereafter, Huntsman directed to be prepared a written "cause warning," dated June 15, 1982. Huntsman was on vacation at the time and the warning was not presented to Villanueva until June 22, 1982.

Thus, during the workday on June 22 Villanueva was called to Huntsman's office. He met with her and was presented with a cause warning form containing, in pertinent part, the following:

At approximately 8:40 p.m. Mr. Chevalier, vice president of employee relations, exited the store and was spoken to by Andy [Villanueva] in a loud and abusive manner, using obscenities and foul language. This behavior was inappropriate and intolerable.

The recommendation contained on the face of the notice called for Villanueva's termination if any "outbursts of this or similar nature" should occur in the future. In presenting the written warning to Villanueva, Huntsman read the contents aloud and explained that a cause warning was being given to him because management had felt that the emotions of the evening had contributed to Villanueva's actions. Villanueva asked no questions and offered no statements. He refused to sign the notice form. However, he entered the following written comments on the form:

In addition, I credit Chevalier to the effect that Nickelson twice placed Chevalier's arm in his grasp, necessitating Chevalier's repeated requests that he be released. The testimony of Ochoa is essentially consistent with that of Chevalier concerning the sequence of events. It inferentially refutes that element of Nickelson's testimony that is inconsistent with Chevalier's concerning the sequential happenings. Finally, I have considered the testimony of Christine Huntsman with respect to the comments made to her by Chevalier when he joined Huntsman and Johnson at dinner soon after the incident in question. See Rule 803(2), Fed. R. Evid., as amended August 1, 1982.

<sup>30</sup> The credited testimony of Victor Ochoa establishes the foregoing.

I disagree with the reasons given to me for such accusations. He regards to my "foul and abusive language," I was addressing Mr. Chevalier as an exploiter and repressor of Broadway Century City employees. I feel no apology or reprimand is justified by Broadway management and I can only say that this is a mere purging of union supporter, of whom I am well known for [sic] among management.

On June 25, 1982, Villanueva presented to management a document entitled, "Counter-Reprimand and Grievance." In substance, the grievance recounted that on Wednesday, March 19, 1982, he, Villanueva, had approached Sharlene Pearson, supervisor-employee training, at the south entrance of the Century City store while she was distributing "anti-union" literature. The grievance further recounted that after receiving a copy of the literature being distributed, he, Villanueva, asked Pearson to state her reasons and purpose for distributing the literature. The grievance further stated that Pearson responded in a defensive tone, refused to answer any questions, and directed a "foul and abusive remark" to Villanueva. The grievance named Linda Pesich, an assistant manager, as a witness to the incident.

In due course Huntsman interviewed Pesich who informed Huntsman that she overheard Pearson call Villanueva "a creep." Thereupon, Huntsman interviewed Pearson, related the details, and conceded that she had called Villanueva "a creep." Huntsman cautioned against the conduct. She concluded that the incident did not involve the "severity" of Villanueva's comment to Chevalier. No further personnel action was taken. Respondent did not communicate any formal response to Villanueva concerning his grievance.<sup>31</sup>

#### IV. CONCLUSIONS

##### A. *The Surveillance Issues*

The record establishes that from August 24, 1981, until the election on May 28, 1982, the Union and its employees organizing committee carried out a wide range of organizing activities, both within and outside the store, openly and free from employer interference or limitation. Not in dispute is the fact that handbilling and discourse between employees and union organizers Nickelson and Ochoa was conducted publicly on the adjoining mall, in close proximity to the employee entrance to the store, and in full view of employees, supervisors, management, and customers involved in normal pursuits in the selling areas of the store. Additionally, a wide range of organizing activity and contacts were pursued within the employee rest and break areas of the store and this was observed by supervision and permitted by management. The General Counsel tacitly concedes that Respondent accorded the organizers and employees a substantial degree of latitude in pursuing their organizing efforts

<sup>31</sup> The credited testimony of Christine Huntsman, and documentary evidence of record establishes the foregoing. I have also considered the testimony of Andres Villanueva and credit it to the extent that it is consistent with the above findings.

inside the store and on breaktime and in nonwork areas of the store. But it is the General Counsel's view that Respondent transgressed the Act by utilizing the presence and perceptive capabilities of its managerial group and security forces in an inhibiting manner, pursuant to a triadic scheme calculated to convey to employees that their union activities were under scrutiny of management, as well as agents of management in the personia of security personnel. Thus, the General Counsel asserts that Respondent reacted to the beginning of the union campaign by: (1) increasing the visibility of senior management personnel in the store; (2) adopting and following a policy of having a member of senior management follow nonemployee union organizers who entered the store; and (3) increasing the security forces at the store.

The General Counsel is on tenuous grounds in contending that the marginally accelerated participation of management in the good-night program, or the increased presence in the store of regional officials Kalkstein and Chevalier, in the early phases of the organizing effort, were acts of unlawful surveillance, or served reasonably to convey impressions inhibiting the organizing activities of employees.

It is well established that management officials may observe public union activity, particularly when such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary. *Metal Industries, Inc.*, 251 NLRB 1523 (1980). In the face of organizing activities, employers may adhere to past practices and routines with which employees are familiar even though this may result in the routine presence of these officials in the precise area or proximity of openly conducted organizing activities. *Chemtronics, Inc.*, 236 NLRB 178 (1978). Union representatives and employees who chose to engage in their union activities at the employer's premises should have no cause to complain that management observes them. *Milco, Inc.*, 159 NLRB 812, 814 (1966). The good-night procedures carried out over the years by Respondent for legitimate business purposes was one which continued without significant change after the advent of organizing activities. The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. *U.S. Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982). No *per se* violation of Section 8(a)(1) of the Act resulted from the decision of Respondent to continue its good-night policy after management became fully aware of the organizing efforts. See *G.C. Murphy Co.*, 216 NLRB 785 (1975). Continuation of this policy and routine after public, widespread activities of union advocates in and near the premises of the store had highlighted the campaign, could have had no effect reasonably to restrain employees in the organizing pursuits, or to interfere in any improper manner with their participation therein. In my view of the record, the mere presence of *some* additional management personnel at the store at closing hours, on *some* occasions, did not serve

to modify in any substantial manner, a practice with which the employees had become fully familiar, for there is no showing that on those occasions when additional managers were present at the door greeting and bidding good night to exiting employees, they paid any attention to the organizing activity that may have been going on in the mall or behaved in a manner suggesting to employees that the activities being conducted outside the store by exiting employees was being observed by the managers or given scrutiny. The motivation for additional management presence may have arisen from a benign desire to convey greater congenitally, or, as Gieser testified, due entirely to an extension of management working hours which placed management personnel on the premises at store closing time. Whatever the motivation, the mere presence was not sufficient, in the circumstances of this record, to sustain this allegation of the complaint by the preponderance of the credible evidence. Cf., *Cumberland Farms Dairy of New York, Inc.*, 258 NLRB 900 (1981); *Badische Corp.*, 254 NLRB 1195, 1200 (1981); *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981); *Larand Leisurelies*, 213 NLRB 197, 205 (1974).

Nor do I find merit in the contention of the General Counsel that the rights of employees to organize free from the impermissible surveillance or scrutiny of their employer was somehow compromised by the asserted frequency with which Regional Vice President Kalkstein and Vice President of Employee Relations Chevalier appeared at the Century City store during the course of the organizing campaign. That management as well as employees have an interest and stake in the outcome of organizing efforts is too self-evident to require recital. Just as the collective-bargaining process is a matter of importance necessitating the reasonable attention and involvement of the employer, likewise are the preludes to the achievement of a bargaining relationship. Embedded in Section 8(c) of the Act and in the pronouncements of the U.S. Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is a recognition of the right of employers to participate in the process. If a union wishes to organize in public it cannot demand that management must hide. *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972).

Nor do I find unlawful surveillance or impression thereof arising from the practice of management in following the nonemployee union organizers through the sales areas of the store when they entered the store during the course of the organizing campaign. The evidence of record establishes that throughout the campaign Nickelson and Ochoa entered the store on frequent occasions and usually circulated throughout the store, passing through sales areas where customers were present and sales personnel were pursuing their normal work tasks. Respondent undertook no efforts to impinge upon the freedom of Nickelson and Ochoa to enter the store and to meet and talk freely with employees in the public restaurant, employee canteen, and employee lounge. The General Counsel concedes that a retail establishment such as Respondent may issue rules restricting the locus of distribution and solicitation to some extent, and does not appear to challenge the right of Respondent to have precluded discourse and solicitation between the union

organizers and employees as the latter carried out their duties in the sales areas while they were on the clock. Employers are free to observe activities taking place on their premises when the scrutiny of those activities is in furtherance of a legitimate business purpose within the province of management to control, and is not concerned with the union activities of employees as distinguished from impermissible conduct of nonemployee union organizers. See *Documation, Inc.*, 263 NLRB 706 (1982); *Heatilator Fireplace*, 249 NLRB 544, 547-548 (1980); see also *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975), *enfd.* in pertinent part 536 F.2d 461 (1976); *cf.* *General Motors Corp.*, 237 NLRB 1509, 1516 (1978); *Montgomery Ward & Co.*, 256 NLRB 800 (1981), *enfd.* 692 F.2d 1115 (7th Cir. 1982). In the circumstances of this case, including the public nature of the union organizing effort, the high degree of free access to the store accorded the union organizers throughout the course of the organizing effort, and the freedom enjoyed by the employees to meet during their free time in areas of the store set aside for employees' use, it may not be concluded that employees were restrained or coerced in the exercise of their rights to freely organize, by the practice of Respondent of keeping nonemployee organizers under visual scrutiny as they entered and progressed throughout the store.

Nor am I able to conclude that, in a related sense, Respondent created the impression of surveillance by increasing the size of its security staff at its Century City store, and capitalizing on its visual presence for the purpose of inhibiting employees in the exercise of their rights to freely organize. The Board has held that an employer cannot, with impunity, use its security personnel as an instrument in impeding self-organization of its employees. See *Clear Lake Hospital*, 223 NLRB 1, 8 (1976). Clearly an unprecedented buildup of security forces for the purpose of engaging in overt, undisguised, and open visual scrutiny of employees involved in organizing activities will not be permitted under the Act. *Hochschild Kohn*, 260 NLRB 25 (1982). However, the General Counsel does not here challenge the right of an employer during the course of an organizing campaign conducted at its premises to continue the use of security personnel at staffing levels necessary to the furtherance of legitimate business interest. Nor does the General Counsel appear to contest the well-established proposition that under the objective test applicable to the legal principle of surveillance, employees must be aware and perceive that their union activities are under scrutiny by their employer, either directly or through its agents. *E.g.*, *Service Spring Co.*, 263 NLRB 812 (1982). As is disclosed by the record, saturation drives were not unprecedented in Respondent's operation, or in the Century City store. One had transpired shortly before organizing activities became evident at the Century City facility. Moreover, the return to higher levels of security staffing which marked the 7-week period following the beginning of the organizing drive was achieved partially through utilization of security personnel working undercover, and the clear weight of the evidence is to the effect that employees had no means of identifying this group of individuals as having affiliation with the store operation. That these

plainclothes personnel, under cover of anonymity, may have been charged by management with monitoring union activity and maintaining unobstructed ingress and egress through store entrances, could not reasonably be found to have had a restraining or coercive effect on employees, for their communications were solely with management and other security personnel and were discreet and confidential in nature, arising from the fact that the principal function of these plainclothes agents was to deter internal and external theft, a responsibility necessitating complete anonymity *vis-a-vis* store employees. While the facts of record establish a higher utilization level of security personnel generally, the only visible manifestation of this use, so far as employees were concerned, was in the red coat category. Focus must therefore be on employee perception of the increased presence and use of this group of security agents. I am unable to conclude that in the Century City store, comprised of four floors, including three floors of selling space, the addition of one or two red coats within the store on any given business day would have the effect of conveying to employees that management was subjecting organizing efforts to scrutiny.<sup>32</sup> Further, in the strict sense of the term, the "additional red coats" assigned to the Century City facility during the 7-week period following the beginning of organizing activity were utilized to provide budgeted red-coat coverage created by a vacancy in a part-time position, and vacancies created by the transfer of Larimore and the resignation of Greenwood. In this latter regard there was, in point of fact, no increase of red-coat coverage; merely a change of identity. Moreover, even if this staffing implementation had been one likely to come to the attention of employees, I am constrained to conclude that Respondent made a sufficient showing of business justification to overcome the suspicion that lurks below the surface of the record regarding the timing of this implementation.

In this regard, I find that security management had sufficient insight into theft, shrinkage, and inventory trends to have accorded *prima facie* justification for the decision to assign additional security forces to the Century City facility during the period following the election. In so concluding, I credit the testimony of Weeks that he received a continuing inflow of trend information with respect to inventory losses and shoplift threats. It is reasonable to conclude that in the dynamics of loss prevention, the flow of intelligence information would be timely and current, and that the dramatic increases in losses for Century City reflected in the report of losses occurring during August 1981 would have come to the timely attention of Weeks, at least in general outline and trend form. That the report did not issue in final form until September 24, 1981, does not, in my view, overcome the explanation proffered by Weeks in his generally credible testimony. Further, I find no basis in the record for rejecting the testimony of Weeks to the effect that the saturation campaign which he initiated on

<sup>32</sup> The use of three additional red coats on August 29 and September 3 appears to have been the exception and not the rule, and too isolated to support a finding of a substantial, unprecedented buildup of security personnel, identifiable as such by employees seeking to organize.

August 11 was initially intended to continue for 2 weeks, but was prematurely terminated due to conflicts and divergence of viewpoint within supervision. In sum, the record contains sufficient credible evidence to suggest a business justification for the presence of additional security forces during the initial days of the organizing campaign. Moreover, the "additional" red coat presence was insubstantial and marginal, not of the magnitude likely to be inhibiting, and was necessitated, in significant degree, by normal, budgeted staffing needs, affected by turnover considerations. Upon an application of the objective standard against which issues of surveillance must be measured, I conclude and find that the General Counsel failed to sustain this allegation of the complaint by the requisite preponderance of the credible evidence.

Moreover, I find nothing in the instruction issued to Larimore by Gieser on August 24, or in the instructions given the security staff by Honore soon after organizing efforts commenced, or in the statements of Novak by Larimore, Rhinehart, and/or Greenwood in the early phases of the organizing effort, constituting surveillance or interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.

In contradistinction, I find Gieser engaged in unlawful surveillance of the Union and protected activities of employees on August 25 when he stood inside the store and observed employees on their break conversing with Nickelson on the wall near the south entrance to the store. Gieser's conduct in maintaining sustained visual scrutiny of the actions of the employees as they met and conversed with Nicholson over a period of approximately 30 minutes clearly served to have an inhibiting effect on Cano, who had an essentially unbroken line-of-sight view of Geiser who stood inside the store watching and observing. This conduct violated Section 8(a)(1) of the Act.

However, I find no violation of the Act resulting from the comments of Larimore to John Schlaff on or about August 25 relating to the purported attention being given Schlaff by management and supervision because of his role in preparing the bulletins being distributed by the Union; and relating also to the stationing of an agent in the Tot Toggery for the asserted purpose of scrutinizing the organizing activities of the employees. Conceding for analytical purposes the validity of the General Counsel's contention that Larimore, in his position as a security agent, possessed agency status, attribution of these statements to Respondent is not appropriate in the circumstances of this case. Initially, no credible evidence of record supports the notion that Respondent had instructed any member of the security staff to undertake surveillance of *employee* organizing activities. Moreover, there is no specific predicate in the record for the finding that Larimore had, in fact, been informed of Schlaff's organizing activities, or that any member of management had discussed, with Larimore, Schlaff's role or involvement in authorizing the union newsletters. Further, there is substantial basis in the record for concluding that Larimore's reference to alleged surveillance of employees being conducted from the Tot Toggery was a flight of Larimore's imagination colored in significant regard by his own interpretation of rumors of an essentially innocu-

ous conversation between Honore and Hartman using a two-way radio. I am unable to conclude that this excursion into the area of speculation by a security agent having only nebulous agency connection with Respondent may be attributed to Respondent. See *Air Express International Corp.*, 245 NLRB 478, 492 (1979); cf. *Stride Rite Corp.*, 228 NLRB 224, 230 (1977).

In a closely related sense, I find no violation of Section 8(a)(1) of the Act arising from any statements which Honore may have made to Crystal Rinehart concerning the activities of Virginia Hartman, or from any communications over two-way radio from Hartman to Honore, which the record reflects Rinehart may have overheard. The credited testimony of Virginia Hartman and Bonnie Honore, considered in context with Crystal Rinehart's description of the events, accords no basis for concluding that the General Counsel's evidence with respect to this issue preponderates.

Nor do I find a violation of Section 8(a)(1) of the Act resulting from Rinehart's decision to spend a break period on the mall near the employee entrance to the store in the company of Nicholson and other employees, as found above. This initiative on the part of Rinehart is not attributable to Honore or any member of Respondent's management and supervision, and Respondent may not be held responsible for the fact that Respondent was thus placed in a position of observing employee involvement in organizing activities and rendering it possible for her to overhear discussions between employees and Nicholson.

Finally, I find no violation of the Act deriving from the remarks of Chevalier to Schlaff to the effect that upper management would always have a "special eye" on the Century City facility. The use of this terminology, as reflected in Schlaff's undisputed and credited testimony, was in conjunction with a frank discussion and dialogue which, on balance, must be viewed as a mere statement on the part of Chevalier that the union organizing campaign had served to heighten the awareness of upper management to several problems affecting employees at the Century City facility. It is in this context that he remarked that these problems would be given special attention and ongoing interest. I am unable to conclude from the context of the discussion between Chevalier and Schlaff that under an objective test, Chevalier's remarks had an inhibiting effect upon Schlaff's Section 7 rights, or conveyed to him that his organizing activities, or those of his fellow employees, would be subjected to present or future surveillance at the hand of management.

#### B. *The Solicitation Rule*

In agreement with the General Counsel, I conclude and find that Respondent's rule governing solicitation and distribution, as contained in the employee handbook, and as posted at various locations within the store, is presumptively invalid. This determination is necessitated by the decision of the Board in *T.R.W. Bearings*, 257 NLRB 442, 443 (1981), wherein the Board stated:

We, however, see no inherent meaningful distinction between the terms "working hours" and "working time" when used in no-solicitation rules. Both terms are, without more, ambiguous, and the risk of such ambiguity must be borne by the promulgator of the rule. Either term is reasonably susceptible of an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods). As such, either term tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights.

Inasmuch as employees may rightfully engage in organizational activities during breaktime and mealtime, rules which restrain, or which, because of their ambiguity, tend to restrain employees from engaging in such activity constitute unlawful restrictions against and interference with the exercise by employees of the self-organizational rights guaranteed by Section 7 of the Act. As pointed out in the dissenting opinion in *Essex International*, an employer who does not intend that its employees misinterpret rules against solicitation during "working time" or "working hours" in the unlawfully broad sense described above need only incorporate in the rule itself a clear statement that the restriction on organizational activity contained in the rule does not apply during break periods and mealtimes, or other specified periods during the workday when employees are properly not engaged in performing their work tasks.

In view of the foregoing, we hold that rules prohibiting employees from engaging in solicitation during "work time" or "working time," without further clarification, are, like rules prohibiting such activity during "working hours," presumptively invalid. [Footnote citations deleted.]

In its decision, the Board specifically overruled *Essex International, Inc.*, 211 NLRB 749 (1974), to the extent that it held that rules prohibiting solicitation or distribution during "work time" or "working time" are presumptively valid.<sup>33</sup>

In the case at bar, the record shows that Respondent has undertaken no written revision of the solicitation rule, so as to define the intended scope and limitation of the term "working time," as contained in the two paragraphs comprising the rule. Under *T.R.W.* it is requisite to find that the presumption of invalidity attaches to both paragraphs of the rule. It is accordingly necessary to reject Respondent's contention that the initial paragraph is outside the scope of the instant inquiry. By applying the prohibition contained in paragraph 1 of the rules to "anyone" and by extending the prohibition to "working time" of employees, that paragraph is rendered intrinsically ambiguous within the meaning of *T.R.W.* As the Board stated in *T.R.W.*, the risk of ambiguity must be

borne by the promulgator of the rule. I conclude that the rule in its entirety is presumptively invalid.

The presumption of invalidity of a promulgated and posted rule may be rebutted. *Standard Motor Products*, 265 NLRB 482 (1982).<sup>34</sup> In *Standard Motor Products*, the Board affirmed the decision of the Administrative Law Judge who concluded that the respondent therein had rebutted the presumption of invalidity of the no-solicitation rule arising by virtue of the reference therein to "working hours" by properly, orally clarifying to employees the extent of application of the rule. The Administrative Law Judge concluded that no violation of the Act arose from the maintenance of the written and promulgated rule, as orally clarified by respondent's oral clarification.<sup>35</sup> *Standard Motor Products*, must be interpreted as authority permitting a respondent charged with maintaining a presumptively invalid rule prohibiting solicitation to show that the rule had been sufficiently clarified, either through oral communication, or in such a manner as to convey an intent to permit solicitation during breaktime or other periods when employees are not actively at work. Cf. *Intermedics, Inc.*, 262 NLRB 1407 (1981); *Southern Molding, Inc.*, 255 NLRB 839, 850 (1981); *NLRB v. Rich's Precision Foundry*, 667 F.2d 613 (7th Cir. 1981). But see *Intermedics, Inc.*, *supra*, p. 6, (dissenting opinion, then-Chairman Van de Water and Member Hunter); *NLRB v. Rooney's at the Mart.*, 677 F.2d 44 (9th Cir. 1982). The record in this proceeding establishes that throughout the course of the entire organizing campaign employees were permitted to engage in a wide range of organizing activities in the employee lounge and canteen during their break and lunch periods with full knowledge of Respondent and without interference. The activities included discussion of the Union, distribution of union literature, and discourse with nonemployee union organizers. Union literature was distributed and accepted by and between employees during their breaks and mealtime and no prohibition was interposed. I assume for the purposes of this proceeding that the rule enunciated in *T.R.W.* is applicable to the distribution of literature, in the circumstances encompassed by the Board's decision in that case. However, in the circumstances of this case, including the freedom granted employees to engage in organizing efforts in the store during their break and mealtimes, the absence of any evidence revealing an attempt on the part of Respondent to improperly limit this freedom, either with respect to oral solicitation or distribution of literature, and in the absence also of any evidence of disparate application of the policy, I find that the presumption of invalidity arising from the application of the *T.R.W.* principle to the case at bar has been overcome. Basic to this determination is the finding, which I make, that the uniform practice of

<sup>34</sup> The decision was rendered by a three-member panel comprised of Chairman Fanning and Members Jenkins and Zimmerman.

<sup>35</sup> The respondent in *Standard Motor Products*, had promulgated the rule in writing but there had been no enforcement of the rule so as to prohibit employees from soliciting during their breaktime, lunchtime, or other free time during regular "working hours" without permission. Moreover, respondent's representative followed a practice of informing new employees that their "breaks were their own time and they could do what they wanted during breaks and lunch periods."

<sup>33</sup> Chairman Fanning and Members Jenkins and Zimmerman participated in the *T.R.W.* decision. Then-Member Fanning and Member Jenkins had dissented in *Essex International*.

applying the rule governing solicitation and distribution of literature in a manner fully consonant with the concept that employees "may rightfully engage in organizational activities during breaktime and mealtimes," as articulated in *T.R.W.*, constitutes a fully efficacious clarification of the rule, as promulgated and maintained. The objective interpretation accorded the scope and limitation of Respondent's rule by employees directly affected by it are more likely to be influenced by empirical experience under the literal application of the rule, than by oral assurances. Cf. *Standard Motor Products, Inc.* *supra*.

### C. The Union T-Shirt Issue

The question remains whether Respondent independently violated Section 8(a)(1) of the Act by prohibiting off-duty employees from remaining in the store in the general presence of employees and customers while wearing union T-shirts. It is Respondent's view that the shirts bearing the language, "Help Make The Broadway Your Way!" in close visual and textual context with the prominent insignia of the Union, and the numerical designation of the local (770), constitutes solicitous material, indistinguishable in relevant, ultimate respects from the same language appearing in the same context on a placard or hand-carried sign. It is Respondent's view, that, under applicable court and Board precedent, solicitation by off-duty employees in the sales or business areas of the store may properly be made subject to an employer's no-solicitation rule.<sup>36</sup>

It is Respondent's contention that the selling floor and customer service areas of its retail establishment constitute private property from which nonduty employees may legitimately be excluded, absent a showing of discriminatory intent. E.g., *Tri-County Medical Center*, 222 NLRB 1089 (1976); *GTE Lenkurt*, 204 NLRB 921 (1973); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In *Tri-County*, the Board concluded that a no-access rule which prohibits solicitation or distribution by off-duty employees is valid if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity. As a corollary, under the rule of *Babcock & Wilcox* a facially valid no-access rule prohibiting solicitation or distribution by off-duty employees may be lawfully applied to prevent even union solicitation by nonemployees if it is applied in a nondiscriminatory manner, unless the union is able to show that it has no reasonable alternative means of communicating with the employees. Cf. *Montgomery Ward & Co.*, 256 NLRB 800 (1981), *enfd.* 692 F.2d 1115 (7th Cir. 1982).

In basic agreement with Respondent, I find that the initial paragraph of its duly promulgated rule governing solicitation, as applied to off-duty employees, constitutes, a permissible limitation upon rights of off-duty employees to solicit in the sales area of the store in that it attempts to strike a reasonable balance between Respond-

ent's right to conduct its customer-dependent retail business in an orderly fashion, and the right of off-duty employees to enter the store, either as shoppers and customers, or for the limited purpose, integral to the employee relationship, of obtaining paychecks due and owing for services rendered. It becomes unnecessary, in my view, to determine whether the rule complies with the validity test articulated in *Tri-County Medical Center*, *supra*. Cf. *Continental Bus Systems*, 229 NLRB 1262 (1977); *Continental Bus Systems*, 229 NLRB 1262 (1977); *The Mandarin*, 221 NLRB 264 (1975). This is so, because, in agreement with the General Counsel, and contrary to the contention of Respondent, the T-shirts worn in the store did not constitute solicitous material which, in the circumstances here present, Respondent could proscribe.

A resolution of the instant issue is governed by the principles given explicit adoption in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), wherein the U.S. Supreme Court quoted approvingly from the Board's decision in that case (51 NLRB 1186, 1187-88) that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and Respondent's curtailment of that right is clearly violative of the Act." Applicable also is *De Vilbiss Co.*, 102 NLRB 1317, 1321-22 (1953), wherein the Board held that an employer may not interpret a no-solicitation policy so as to bar the wearing of union insignia or T-shirts on company premises. In so concluding the Board adopted the rationale of the Trial Examiner, that:

Employees generally have a right under the Act to wear union insignia on company property, and the words, "join" or "vote" or "support" do not destroy the essentially protected character of the insignia and convert such insignia into the kind of solicitation which is otherwise amenable to proper rules under proper circumstances. Most, if not all, insignia, union or otherwise, have certain propaganda effects, and the words "vote" or "join" on union insignia during a union campaign convey no additional ideas not implied in a button or T-shirt which contains only the union name.

Special circumstances may justify a prohibition against the use of union insignia by employees in working areas, but the mere fact that employees wearing union buttons or union insignia of other types may come in contact with customers has been held not to constitute "special circumstances" sufficient to deprive employees of the rights recognized to exist under the Act, as defined in the *Republic Aviation Corp. v. NLRB*, *supra*. E.g., *Florian Hotel of Tampa*, 137 NLRB 1484 (1962), *enfd.* as modified 318 F.2d 545 (5th Cir. 1963); *Howard Johnson Co.*, 209 NLRB 1122, 1130-31 (1973); *Davison-Paxon Co.*, 191 NLRB 58 (1971); *Virginia Electric & Power Co.*, 260 NLRB 1196 (1982). A prohibition against the wearing of union insignia may find justification in efficiency and production considerations, or in the need of an employer to maintain the integrity of a dress code or to sustain a rationally important professional image or appearance. E.g., *Evergreen Nursing Home*, 198 NLRB 775, 778

<sup>36</sup> Respondent contends, and I find, that, to the extent that the initial paragraph of Respondent's rule governing solicitation proscribes solicitation by nonemployee organizers in the selling areas of the store, the *T.R.W.* standards are not applicable.

(1972); *United Parcel Service*, 195 NLRB 441 (1972); *Singer Co.*, 199 NLRB 1195, 1204 (1972).

The instant case presents a melding of the hybrid policy considerations attending the permissible limiting of solicitations in the business areas of retail establishments, and the not always compatible rights accorded employees to support union objectives through wearing of insignia, including T-shirts. A fair balancing of conflicting rights lies at the center. It would indulge a fiction to proclaim that off-duty employees present in the store for the purpose of obtaining their paychecks, or for the additional purpose of shopping, stand, as it were, precisely in the shoes of on-duty employees, while, simultaneously, and in all other respects, relegating them to a status precisely equivalent to that of a nonemployee. In my view, the realities of labor relations require a rejection of that fiction. Respondent is correct that, in the main, the decided cases defining the right of employees under Section 7 of the Act to wear union insignia in the business areas of an employer's premises during working hours have involved on-duty employees, and not, as here, employees on store premises on days when they are off-duty and not scheduled to work. However, the rights accorded employees under Section 7 of the Act, and the fundamental economically based interest of the employee in his or her job and employment relationship, appear, for the precise purpose under discussion, to be treated by the Board as ongoing in nature, and broader than the duty-hours concept. Fully applicable here is the observation of the Administrative Law Judge in *Harvey's Resort Hotel & Harvey's Inn*, 236 NLRB 1670, 1676 (1978):

It is well settled that, absent special circumstances, an employer may not prohibit employees lawful on the premises from soliciting union support during nonwork time or distributing union literature in nonwork areas during nonwork time. This represents a balancing of the statutory rights of employees to self-organization against the employer's interest in production, safety, or discipline and, absent a showing that interference with the employees' statutory rights is essential, the statutory rights prevail. *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105 (1965). *This protection extends to activity before and after shifts. East Bay Newspapers, Inc. d/b/a Contra Costa Times*, 225 NLRB 1148 (1976); *M Restaurants, Incorporated, d/b/a The Mandarin*, 221 NLRB 264 (1975). [Emphasis supplied.]

I specifically find that the rights of the employees herein to wear union T-shirts in Respondent's store on their days off is governed by the principle enunciated in *Republic Aviation Corp. v. NLRB*, and its progeny, and the balancing of interest considerations fully articulated in those cases is here applicable.

In this regard, I find that the record contains no evidence of detrimental effect upon the efficiency or proficiency of sales or office employees occasioned by the wearing of union T-shirts by the off-duty employees who were admonished by supervision for doing so. Nor is there any evidence that Respondent suffered a diminu-

tion of professional esteem or customer acceptance by reason of the T-shirt wearing incidents. Neither conjecture nor the postulating of potential for injury substitutes for proof of actual injury. No evidence was adduced of adverse customer reaction to the presence of T-shirt clad individuals in the store. The shirts contained a message for those who paused to read it, but it was not one which disparaged Respondent or tended to interrupt normal store routine or pursuits. No potential for clogging of aisles, escalators, or elevators was present, as would clearly have attended the display of hand-carried signs or placards bearing the same message as that contained on the shirts. It is of no decisional significance that the shirts had a partial genesis as a fund-raising device. The commercial purposes were not explicit in the slogans and entirely latent. In short, I find that Respondent made an insufficient showing of "special circumstances" justifying the imposition of an oral proscription against the wearing of union T-shirts by employees Alexander, Bass, Cano, Remmes, Slaughter, and Villanueva. I therefore conclude that the proscription interposed by Huntsman, Johnson, and Rotman violated Section 8(a)(1) of the Act. Cf. *Ford Motor Co.*, 222 NLRB 855, 857 (1976).

#### D. Additional Unlawful Conduct

##### 1. The alleged interrogation

Contrary to the General Counsel I find no violation of Section 8(a)(1) of the Act arising from the conversation which transpired on August 24 between Frederickson and his Supervisor Capiluppo. I conclude that the conversation occurred in circumstances lacking any suggestion of harassment and was merely an element of a wide ranging conversation between friends wherein the employee, Frederickson, freely expresses his views concerning management and work related topics and openly manifested his support of the Union. Interrogation of employees about their union or protected or concerted activities is not a *per se* violation of the Act and may or may not amount to coercion, depending on the manner in which it is done and the surrounding circumstances. *Pepsi-Cola Bottling Co.*, 211 NLRB 870, 872 (1974); *United Fireworks Mfg. Co. v. NLRB*, 252 F.2d 428, 430 (6th Cir. 1958); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *NLRB v. Hotel Tropicana*, 398 F.2d 430, 434 (9th Cir. 1968). Moreover, the Board precedent establishes that an objective test is applied in determining whether questions posed by supervisors to employees are coercive, in violation of Section 8(a)(1) of the Act. See, e.g., *Harrison Steel Castings Co.*, 262 NLRB 450 (1982); *PPG Industries*, 251 NLRB 1146 (1980); *Continental Chemical Co.*, 232 NLRB 705 (1977); *Florida Steel Corp.*, 244 NLRB 45 (1976). In *Florida Steel Corp.*, *supra*, the Board held:

It has long been recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on a respondent's motive, courtesy, or on whether the coercion succeeded or failed. It also does not turn on whether the supervisor and employee involved are on friendly or un-

friendly terms. Rather, the test is whether supervisor's conduct reasonably tended to interfere with the free exercise of employee's rights under the Act.

Under this test, and applying the constituent elements thereof, I am unable to conclude that, in context of the total conversation here under scrutiny, Capilupo's inquiry as to how Frederick "felt about the activities" tended to convey to Frederickson his employer's displeasure with Frederickson's union activity or reasonably tended to interfere with the right of Frederickson, or any other employee, to freely exercise his rights under the Act. In my view *Harrison Steel Castings Co.*, *supra*, and *PPG Industries*, *supra*, are distinguishable and not controlling here. Cf. *Cherokee Culvert Co.*, 262 NLRB 917 (1982).

### 2. Rotman's alleged solicitation of grievances

On the other hand, I find that Rotman engaged in conduct in violation of Section 8(a)(1) by soliciting grievances from Frederickson in the early phases of the Union's organizing campaign.

Respondent contends that the conversation between Frederickson and Rotman wherein Rotman compiled a list of grievances articulated voluntarily by Frederickson was nothing more than a routine interlude in a continuum of Rotman's own past practice involving Frederickson and other employees, and of Respondent's open-door policy, as enunciated in its promulgated employee manual, both of which antedated the advent of the Union. Respondent emphasizes also that no promises were made by Rotman, a critical factor, in Respondent's view, rendering the pertinent complaint allegation fatally deficient. The General Counsel convincingly counters that Rotman's appearance of benign impotency to translate Frederickson's complaint into tangible, beneficial change is belied by the initiative taken by Rotman in inviting Frederickson to his office, on the occasion in question, and in the solicitous nature of the meeting wherein Rotman invited discourse and gave vitality to the responses by compiling a handwritten list of complaints which he agreed to submit to management. Present here was an implied promise that Frederickson's grievances, which reflected employee concern in matters intimate to the employment relationship, would be considered by management with the viable potential that they would be remedied. Under the objective test applicable to Rotman's actions, the manifestations of his overt conduct in meeting, discussing, and painstakingly compiling a list of grievances was clearly more likely to impact Frederickson's consciousness than would Rotman's disclaimer of promised action. These ingredients of initiative on the part of Rotman, coupled with the existence of the union organizing campaign which was clearly open and known to all concerned, tended to modify Rotman's own past practice and the open-door policy which Respondent had pursued, in a manner transferring the initiative of approachment and communication from employees to supervision. Although factual distinctions exist, I thus conclude that this case is controlled by the principles enunciated by the Board in *Raley's Inc.*, 236 NLRB 971, 972 (1978); *EMR Photoelectric*, 251 NLRB

1597, 1610 (1980); *Arrow Molded Plastics*, 243 NLRB 1211 (1979). Accordingly, I find that Respondent, through Rotman, solicited employee grievances and impliedly promised to rectify them, in a manner which conveyed the concept that union representation and support was unnecessary in order to achieve improvements in working conditions and terms of employment.<sup>37</sup> Cf., e.g., *California Pellet Mill Co.*, 219 NLRB 435 (1975); *Tiffin Division of Hayes-Albion Corp.*, 237 NLRB 20 (1978); *Cherokee Culvert Co.*, 262 NLRB 917 (1982).

### 3. The low-cost lunch program

I find that Respondent did not violate the Act by implementing a decision to offer a low-cost lunch program in the employee canteen. The evidence establishes that the program had its conceptual origin in a meeting which transpired prior to the first public manifestations of the Union's organizing effort, and the operative decisions with respect to the precise nature of the program and its contemplated effectuation at the earliest practicable time, were made before the managerial and supervisory participants in the meeting had any knowledge of union activity among the employees. I credit the testimony of Store Manager Nave that at the conclusion of the meeting at which the plan was conceptualized and its precise nature determined, no decisions of substance remained to be taken, but only details essential to accomplish implementation, involving as-soon-as-possible staff resolution remained. While it may be that after the meeting at which Nave issued implementing instructions, approval by divisional vice president of food services, Tony Gracyk, stood as a decisional prerequisite to actual implementation. However, it appears fully inferable, from the record as a whole, that his rejection of the decision of Store Manager Nave would have been in the nature of a countermand terminating the entire program. It is evident therefore that this countermand would be retroactive *vis-a-vis* that operative decision earlier reached by Nave with respect both to the nature and the implementation of the program. It thus can have no bearing upon the analytical issue of whether Nave's operative decision to proceed with the low-cost lunch program was "undertaken with the expressed purpose of impinging upon [employee] freedom of choice for or against unionization . . ." See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The state of the record is such as to infer that the decisions reached at the mid-August meeting between Nave, Flint, and Rotman were sufficiently firm in all significant respects to render unnecessary further involvement of Nave, in keeping with Gracyk's directive. The permissible inference is that staff work only was sufficient to accomplish the written formulation of the program in compliance with decisions earlier reached by Nave and that, contrary to Gracyk's suggestion to Flint, it became unnecessary for Nave to submit a written request that the program be implemented. In sum, I conclude and find that the decision to offer and to implement the low-cost lunch program had been

<sup>37</sup> In the circumstances of the instant meeting the extent of Rotman's awareness of Frederickson's support of the Union is not relevant.

reached prior to August 24, in a manner and to an extent constituting definitive approval thereof. Cf. *Tommy's Spanish Foods*, 187 NLRB 235, 236 (1970), enforcement denied in pertinent part 463 F.2d 116 (9th Cir. 1972).

Although no formal announcement of the decision was made to the employees prior to the commencement of the organizing campaign, the evidence is convincing that the low-cost lunch was but an element of an ongoing program undertaken by Nave prior to the emergence of the Union, and having as its purpose the improvement of employee facilities. The date and manner of informing employees of the decision to offer the program was timely in relation to its actual implementation. Cf. *J. P. Stevens & Co.*, 247 NLRB 420, 431 (1980); *Ed Chandler Ford*, 254 NLRB 851, 859-860 (1981); *Litton Dental Products*, 221 NLRB 700 (1975). Moreover, both the timing of the announcement of the lunch plan, and the chronology of its implementation have been shown to relate solely to legitimate business reasonings, and appear not to have been orchestrated to interfere with the employees' free choice of a bargaining representative. Cf. *May Department Stores*, 191 NLRB 928 (1971). I conclude and find, therefore, that the General Counsel failed to sustain this allegation of the complaint by the preponderance of the credible evidence.

#### E. The Warning Notice to Villanueva

I find that Respondent did not violate Section 8(a)(3) and (1) of the Act by issuing a cause warning to Villanueva. Rather, I conclude that Respondent acted reasonably in disciplining an employee for gross insubordination and affront to a senior management official. I rejected the General Counsel's contention that Villanueva's comments were shielded from discipline because they occurred in the course of Villanueva's protected concerted activities; or that they were a form of animal exuberance not sufficiently egregious to deprive him of the protection of the Act.

The short answer to the General Counsel's contention is that the decision to discipline Villanueva has nothing to do with his involvement in protected activity, but was predicated solely on his verbal abuse of Chevalier. Villanueva was a known union advocate but his verbal foray occurred after the ballots in the election had been counted, and not in the course of advocating or supporting legitimate labor relations objectives protected by the Act. This is not a case of verbal abuse transpiring in intimate context of organizing activities, preelection campaigning, grievance processing, or concerted protest against identified employer practices arguably inimical to employee interests, protected by the Act. E.g., *Union Carbide Corp.*, 171 NLRB 1651 (1968); *Coors Container Co.*, 238 NLRB 1312, 1320 (1978); *Houston Shell & Concrete Co.*, 193 1123 (1971); *Red Top, Inc.*, 185 NLRB 989 (1970); *Boaz Spining Co.*, 165 NLRB 1019 (1967), enforcement denied 395 F.2d 512 (5th Cir. 1968); *Webster Clothes*, 222 NLRB 1262 (1976). Thus, the concept that an employee engaging in concerted activity must be permitted some leeway for impulsive behavior does not come into play, nor does the need arise to balance the right of employees to engage in concerted activity against the employer's right to maintain order and re-

spect. See, e.g., *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965); *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946); *Socony Mobile Oil Co.*, 153 NLRB 1244 (1965). The record contains no evidence that in addressing Chevalier, Villanueva identified any specific conduct on the part of Respondent, or Chevalier, constituting impermissible preelection conduct, nor is he shown to have articulated any specification of conduct allegedly constituting unfair labor practices on the part of Respondent or Chevalier. Rather, Villanueva acted alone in verbally assailing Chevalier, not in furtherance of any identified or identifiable concerted objective or group interest, but solely to satisfy his own pent up hostilities and frustrations. The nexus between Villanueva's insulting verbal assault on Chevalier and the potential for concerted action is both remote and highly speculative. Not only was Villanueva acting by himself, he was also acting for himself. See *NLRB v. C & I Air Conditioning*, 486 F.2d 977 (9th Cir. 1973), denying enforcement of 193 NLRB 911 (1971); *Hunt Tool Co.*, 192 NLRB 145 (1971); *Northeastern Dye Works*, 203 NLRB 1222 (1973); *Continental Mfg. Corp.*, 155 NLRB 255, 257-258 (1965). To recapitulate, I find, contrary to the General Counsel, that Villanueva was not engaged in protected concerted activity when he addressed Chevalier, and I reject the notion that his remarks must be considered as part of the *res gestae* of the election process. Cf., *Interboro Contractors*, 157 NLRB 1295, 1301 (1965); *Leece-Neville Co.*, 159 NLRB 293 (1966), enf'd. 396 F.2d 773 (5th Cir. 1968); *Red Top, supra*.

Nor do I find sufficient support in the record for concluding that Villanueva's advocacy of the union cause was the consideration which tipped the scale and motivated the issuance of the warning to Villanueva. Villanueva's identity as a union advocate is well established in the record, but his remarks to Chevalier were confrontational and insulting, and grossly so, and they were rendered while Villanueva was on duty, on the clock, as it were, albeit, during his breaktime. The evidence adduced by Respondent showing application of good cause, business-related judgment in deciding to discipline Villanueva, substantially outweighs the evidence tending to infer the presence of an antiunion motive in the decision to warn Villanueva. Applicable here is the observation of the court in *NLRB v. Ace Comb Co.*, 342 F.2d 841, 847 (8th Cir. 1965):

It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act.

The disciplinary action which Respondent took to redress the invective visit on Chevalier by Villanueva was clearly within its authority and not so excessive as to infer the presence of unlawful motivation of the Act. See *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974), enf'g. 205 NLRB 51 (1973). The response of management to Villanueva's complaint concerning treat-

ment accorded him by Sharlene Pearson, a trainee, for a minor supervisory position is so readily distinguishable generically as to form no basis for finding disparate treatment. I find no basis for concluding that Villanueva was disciplined because of the exercise of his Section 7 rights. See *Host Service*, 263 NLRB 672 (1982).

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent, The Broadway, a Division of Carter Hawley Hale Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 770, chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By observing employees as they met and conversed with union organizers in the public area of the mall located proximate to the south entrance of the Century City facility in a manner conveying to employees that their union or other protected concerted activities were being subjected to surveillance by management, Respondent, through Richard Gieser, interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and did thereby violate Section 8(a)(1) of the Act.

4. By ordering employees in the store during their day off to leave the store or remove T-shirts which they were wearing and which contained the slogan "Make The Broadway *Your Way!*" in context with a printed logo and numerical designation identifying the Union, to leave the store premises, while permitting other employees who were in the store on their day off and who were not wearing T-shirts of the type described to remain in the store, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, and did violate Section 8(a)(1) of the Act.

5. By soliciting employee grievances and impliedly promising to redress those grievances, Respondent, through Craig Rotman, engaged in conduct in violation of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not in any other manner engage in conduct in violation of the Act.

#### THE REMEDY

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

Having found that the solicitation rule, as maintained and promulgated in writing, is presumptively invalid

under the decision of the Board in *T.R.W. Bearings*, 257 NLRB 442 (1981), but having further found that Respondent rebutted the presumption of invalidity of the rule as it pertained to solicitation and distribution of literature on store premises, by employees during break periods and mealtimes, by properly and efficaciously clarifying for employees the extent of application of the rule, I conclude no remedial order with respect to the rule is necessary. See *Standard Motor Products, supra*.

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

#### ORDER<sup>38</sup>

The Respondent, The Broadway, a Division of Carter Hawley Hale Stores, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in their rights to engage in union or other protected concerted activity by engaging in unlawful surveillance of employees; prohibiting employees in the store on their day off from wearing union T-shirts, while permitting other employees in the store on their day off who were not wearing union T-shirts to remain in the store; and/or soliciting employee grievances and impliedly promising to redress those grievances.

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

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

(a) Post at its Century City, California, retail establishment and place of business copies of the attached notice marked "Appendix."<sup>39</sup> Copies of said notice on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

IT IS ALSO RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

<sup>38</sup> In the event no exceptions are filed as provided in 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.

<sup>39</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."