

**Greg Bunker, a Sole Proprietor d/b/a Photo Drive Up and United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO.** Cases 32-CA-2914 and 32-CA-3136

24 August 1983

## DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 25 June 1982 Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting 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,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge

<sup>1</sup> Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias, and otherwise excepts to certain credibility findings made by the Administrative Law Judge. After a careful examination of the entire record, we are satisfied that the allegation of bias is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We find no basis for reversing his findings.

Member Hunter agrees that Respondent's no-solicitation rule was unlawfully broad and, therefore, violative of Sec. 8(a)(1) of the Act, but does not endorse the holding of *T.R.W. Bearings*, 257 NLRB 442 (1981), subscribing instead to the standard announced in *Essex International*, 211 NLRB 749 (1974). See his separate opinion in *Intermedics, Inc.*, 262 NLRB 1407 (1982).

Member Hunter also notes that the General Counsel, who bears the burden of proof throughout the case, met that burden with respect to the discharge of employee Ellen Starbird.

<sup>2</sup> In sec. C.4 of his Decision, the Administrative Law Judge made the alternative finding that Respondent's owner, Greg Bunker, "engaged in surveillance of his employees or at the least created the impression [of surveillance] among his employees . . . ." We agree with the Administrative Law Judge that Respondent actually engaged in surveillance of its employees. The record shows that: (1) prior to the union activity, Bunker never stayed an entire night shift at the plant, or if you credit his testimony, which the Administrative Law Judge did not do, he stayed only once or twice previously for a holiday rush; (2) he spoke individually with employees, soliciting their grievances, and indicating that they would be remedied; (3) he assumed a position from which he could observe the employees, and in which he could be observed by them; (4) he watched employee Jensen go out to dump the trash and deliver an authorization card to Starbird, who was not then "on company time"; and (4) he admitted that he came to the plant, at least in part, to ascertain the cause of "morale" problems, "unrest," and purported harassment by union adherents. In light of all these facts, we find sufficient evidence from which to conclude that Respondent engaged in actual surveillance in violation of Sec. 8(a)(1) of the Act that evening, and find it unnecessary to pass upon

and to adopt his recommended Order, as modified herein.

## AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 1(c) and (d), and substitute the following:

"(c) Threatening his employees with unspecified harm, discharge, and plant closure if they engaged in union and/or protected concerted activities, or supported the Union.

"(d) Engaging in surveillance of the union and/or protected concerted activities of his employees."

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Greg Bunker, a sole proprietor d/b/a Photo Drive Up, San Jose, California, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 1(c) and (d):

"(c) Threatening his employees with unspecified harm, discharge, and with plant closure if they engage in union and/or protected concerted activities or supported the Union.

"(d) Engaging in surveillance of the union and/or protected concerted activities of his employees."

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

the Administrative Law Judge's alternative finding that Respondent thereby also created the impression of surveillance.

The Administrative Law Judge also inadvertently failed to include in his Conclusions of Law, the finding in sec. C.3 of his Decision, that Respondent threatened his employees with unspecified bodily harm. In light of this error, and our determination in the preceding paragraph, we will amend the Conclusions of Law, modify the Order, and issue a new notice.

## APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

I WILL NOT interrogate my employees regarding their own and other employees' union or protected concerted activities.

I WILL NOT solicit my employees' grievances and promise that the grievances will be adjusted for the purpose of influencing the employees' selection of a labor organization as their bargaining representative.

I WILL NOT threaten my employees with unspecified bodily harm, discharge, or plant closure if they engage in union or protected concerted activities.

I WILL NOT engage in surveillance of the union or protected concerted activities of my employees.

I WILL NOT promulgate or maintain an invalid no-solicitation rule, or apply it in a discriminatory manner.

I WILL NOT expressly or impliedly promise wage increases or other benefits to my employees for the purpose of discouraging their support of the Union.

I WILL NOT discourage membership in or support of United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating against them in their hire or tenure.

I WILL NOT refuse to recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of my employees in the following unit:

All full-time and regular part-time laboratory employees and drivers employed by me at my Meridian Avenue, San Jose, California facility; excluding all retail clerks, retail sales clerks, guards and supervisors as defined in the Act.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

I WILL offer Ellen Starbird immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and I WILL make Ellen Starbird whole for any loss of pay suffered by her as a result of the discrimination practiced against her, with interest.

I WILL expunge from my files any reference to the discharge of Ellen Starbird on July 23, 1980, and notify her in writing that this has been done, and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

I WILL rescind my invalid no-solicitation rule.

I WILL, upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of my employees in the appropriate bargaining unit set forth above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody that understanding in a written, signed agreement.

GREG BUNKER, A SOLE PROPRIETOR  
D/B/A PHOTO DRIVE UP

#### DECISION

#### STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge: Upon charges filed in Cases 32-CA-2914<sup>1</sup> and 32-CA-3136<sup>2</sup> on July 29, 1980, and October 17, 1980, respectively, by United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, Oakland, California, duly issued an order consolidating these cases, an amended consolidated complaint and notice of hearing on March 10, 1981, against Greg Bunker, a Sole Proprietor d/b/a Photo Drive Up, herein called the Respondent, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein referred to as the Act.<sup>3</sup> On March

<sup>1</sup> The charge therein alleges violations of Sec. 8(a)(1) and (3) of the Act.

<sup>2</sup> This charge alleges additional violations of Sec. 8(a)(1) and (5) of the Act.

<sup>3</sup> A complaint and notice of hearing was duly issued by the Regional Director for Region 32, Oakland, California, in Case 32-CA-2914 on October 9, 1980. The Respondent, by counsel, duly filed an answer to the complaint on October 17, 1980, denying the allegations set forth therein. The Regional Director for Region 32 duly issued an order consolidating cases, consolidated complaint and notice of hearing in Cases 32-CA-2914 and 32-CA-3136 on December 16, 1980.

17, 1981, the Respondent, by counsel, duly filed an answer denying the material allegations in the complaint.<sup>4</sup>

As appears from the evidence herein, in or about July 25, 1980, or within a few days thereafter, the Union filed a petition for certification of representative with the Board in Case 32-RC-1128, seeking an election among various of the Respondent's employees located at its Meridian Avenue, San Jose, California, facility.<sup>5</sup> After a hearing held on August 25, 1980, the Regional Director for Region 32 duly issued his Decision and Direction of Election in Case 32-RC-1128 in which he made various rulings which will be referred to herein in subsequent portions of this Decision.<sup>6</sup> An election by secret ballot was scheduled for October 21, 1980, but with the filing of the charges by the Union and the issuance of the various complaints by the Regional Director for Region 32, as hereinbefore set forth, the election was postponed.<sup>7</sup>

A hearing was duly held before me in San Jose, California, on March 31 and April 1, 2, and 3, 1981. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs.<sup>8</sup> There-

<sup>4</sup> In the answer the Respondent also raised various affirmative defenses: As a "First Affirmative Defense," in substance, that the Union did not represent a majority of the employees in an appropriate unit and therefore the Respondent was under no duty to bargain collectively with it; as a "Second Affirmative Defense," in substance that, having a good-faith doubt as to the Union's majority representation, the Respondent demanded an election to determine representative status; as a "Third Affirmative Defense," that any majority support which the Union may have had from the members of the unit designated resulted from coercion and unfair labor practices occurring on behalf of the Union consisting of the following:

1. Misrepresentation as to the benefit the union representatives would guarantee.

2. Failure to return union support cards signed by members of the designated unit upon request.

3. Misrepresentation as to the character of the support cards to employees of the designated unit. Ellen Starbird and Gina Margherone, agents of the union represented to employees of the designated unit that a signature on a union support card would not mean a union would become the collective-bargaining agent for the members of the designated unit and that a signature on a support card only meant that the person signing the same desired an election.

<sup>5</sup> Ronald Lind, an organizer for the Union, testified that the Union sent the signed authorization cards it had received from the Respondent's employees along with the petition for certification of representative to the Board on July 25, 1980.

<sup>6</sup> See G.C. Exh. 2.

<sup>7</sup> The Board generally will decline to direct an election while unfair labor practice charges that affect the unit involved in the representation proceeding are pending. The rationale is that the charges, if true, would destroy the "laboratory conditions" necessary to permit employees to cast their ballots freely and without restraint or coercion. See *Edwards & Webb Construction Co.*, 207 NLRB 614, 617, fn. 8 (1973); *American Metal Products Co.*, 139 NLRB 601 (1962).

<sup>8</sup> At the hearing counsel for the General Counsel moved to amend the amended consolidated complaint as to the allegations in pars. 6(i) and 6(j), changing the dates set forth therein from "In or about August 1980" to "On or about July 29, 1980." The Respondent raised an objection thereto on the grounds that he prepared his defense on the basis of the August 1980 date. Albeit at the time the change in date appeared to me to be slight, yet I was unsure that it would not have some significance or actually be prejudicial to the preparation and presentation of the Respondent's case and so I therefore granted the General Counsel's motion to amend the amended consolidated complaint with leave to the Respondent to renew his objections thereto upon a showing of such significance or prejudice, or the need for a continuance to further prepare his defense thereon. However, at the end of the hearing it became obvious to all parties that the change of date did not affect, prejudice, or hamper in

after, the General Counsel and the Respondent filed briefs.<sup>9</sup> In his brief the Respondent seeks dismissal of the allegations in the complaint on the grounds, in substance, of failure of proof and that the charges herein are "totally without merit." For the reasons appearing hereinafter I deny the Respondent's request to dismiss the complaint in its entirety.

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

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material herein, has been a sole proprietor doing business as Photo Drive Up with an office and place of business in San Jose, California, where he has been engaged in the business of operating retail photo service stores and a film processing laboratory. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of his operations at all times material herein, the Respondent derived gross revenues in excess of \$500,000. During this same period of time the Respondent in the course and conduct of his business operations purchased and received goods or services valued in excess of \$5,000 directly from suppliers located outside the State of California. The complaint alleges and, while the Respondent denies this, I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.<sup>10</sup>

Additionally, at all times material herein, Greg Bunker was and is the sole proprietor and owner of the business; Michael Shelander, the plant manager; Lynn Shelander, a night-shift supervisor; John Fritts, a swing shift supervisor; and Richard Isla, the quality control supervisor. The complaint alleges, the Respondent admits, and I find that these persons are supervisors within the meaning of Section 2(11) of the Act, and have been and are now

any way the Respondent's presentation of evidence concerning this allegation or his defense thereof and no renewal of his objection or motions thereon was made by the Respondent.

<sup>9</sup> The General Counsel in his brief "moves that the transcript be corrected in accordance with the attached "Appendix." I have reviewed the proposed corrections and I find that they mostly concern inaccurate transpositions of words and misspelled names and designations, and do not affect matters of substance. Therefore I grant the motion to correct the transcript.

<sup>10</sup> While the Respondent denies this allegation in his answer, he does admit therein receipt of gross revenues in excess of \$500,000 during the past 12-month period and also purchasing and receiving goods or services valued in excess of \$5,000 which originated outside the State of California. It should also be noted that in the prior representation proceeding involving these same parties, Case 32-RC-1128, the Regional Director for Region 32 found that the Respondent, during the same above 12-month period, "purchased goods and materials from Kodak valued in excess of \$200,000 which goods and materials were received by Kodak from locations outside the State of California," and "had gross revenues in excess of \$500,000," and therefore concluded that the Respondent "meets the Board's jurisdictional standards for retail establishments," *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958). See G.C. Exh. 2 (Decision and Direction of Election).

agents of the Respondent acting on its behalf within the meaning of Section 2(13) of the Act.<sup>11</sup>

## II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges and, although the Respondent denies this, I find that United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.<sup>12</sup>

## III. THE UNFAIR LABOR PRACTICES

The amended consolidated complaint alleges, in substance, that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by interrogating his employees concerning their own or other employees' union and/or protected concerted activities and union sympathies; by threatening his employees with termination and other "unspecified reprisals" if they did not cease their union and/or protected concerted activities; by threatening his employees with plant closure if the employees engaged in union activities; by engaging in surveillance of the Union and/or protected concerted activities of his employees; by soliciting grievances from his employees and impliedly promising to remedy such grievances in order to discourage their support for the Union; by promulgating a no-solicitation rule in order to discourage his employees from assisting the Union and from engaging in concerted activities for the purposes of collective bargaining or other mutual aid and protection; by offering employees a wage increase and other benefits in order to discourage their support for the Union; by discharging his employee Ellen Starbird and failing and refusing to reinstate her because she joined or assisted the Union or engaged in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection; and by failing and refusing and continuing to fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in an appropriate unit. The Respondent denies these allegations.

### A. Background

The record shows that the Respondent operates approximately 45 retail photo service stores throughout the

<sup>11</sup> The Respondent admits in his answer that Greg Bunker and Michael Shelander are supervisors within the meaning of Sec. 2(11) of the Act and agents of the Respondent within the meaning of Sec. 2(13) of the Act. At the hearing the parties stipulated as to this with regard to Lynn Shelander, John Fritts, and Richard Isla.

<sup>12</sup> After a hearing in Case 32-RC-1128, which involved the same parties as herein, the Regional Director for Region 32 found:

The record reflects that Petitioner is an organization in which employees participate and represents employees with respect to wages, hours and other conditions of employment. Further, Petitioner engages in collective bargaining negotiations with employees on behalf of its members which culminate in the signing of collective bargaining agreements. I therefore conclude that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Michigan Bell Company*, 132 NLRB 632 (1961).

See G.C. Exh. 2. Moreover the Respondent failed to produce any evidence at the hearing contradicting this or supporting his denial as to the Union's status as a labor organization within the meaning of the Act.

State of California and in connection therewith operates a film processing laboratory located on Meridian Avenue in San Jose, California, this facility being the one involved in the instant matter. The Respondent's operations consist of the picking up and delivery of film by company-owned vehicles or otherwise<sup>13</sup> from the retail outlets and the processing of that film at the Meridian Avenue, San Jose, California, facility. The processing laboratory occupies a room "about under 2,000 square feet" in which the photo processing machines are located with approximately 16 or 18 different work stations therein. The plant manager's desk area is off to one side but visible from all the employee work stations. There is a break area with a large "cafeteria-style" counter with chairs, a coffeepot, microwave oven, refrigerator, and drinking fountain. This area serves as a "lunch-room" as well.<sup>14</sup> The Respondent maintains three work shifts for employees at the laboratory around the clock, the day shift, "swing" shift, and the night or "graveyard" shift. Besides Michael Shelander, the plant manager, Kathy Buchan, the day-shift supervisor, John Fritts, the "swing" shift supervisor, Lynn Shelander, the night or "graveyard" shift supervisor, and Richard Isla, the quality control supervisor, the Respondent usually employed approximately "twenty-five full-time and regular part-time labor employees and one full-time driver."<sup>15</sup>

### B. The Evidence

*The "Pornography Incident"*:<sup>16</sup> At approximately 2:45 a.m. during the night shift which began on the evening of July 14 and ended on the morning of July 15, 1980, employee Ellen Starbird,<sup>17</sup> while working at one of the print cutting machines, discovered some photographs which disturbed her. In substance the photographs depicted a nude woman chained by her arms and legs in a "spread eagle" position, her face covered by a black leather mask, with electrodes attached to her vagina and blood appearing in the photographs.<sup>18</sup>

<sup>13</sup> There is testimony in the record that a PSA strike and closedown of the Los Angeles International Airport created a problem as to the receipt of film to be developed at the laboratory, indicating that delivery of such film from southern California is made by airmail or through the airlines.

<sup>14</sup> See the testimony of Michael Shelander, Greg Bunker, Ellen Starbird, and G.C. Exh. 2.

<sup>15</sup> See G.C. Exh. 2. As will be more fully set forth hereinafter, in July 1980 the Respondent also employed Perseam Swami who was the night or "graveyard" shift supervisor for a short period of time, approximately 3 weeks prior to Lynn Shelander becoming this shift's supervisor. The night or "graveyard" shift will hereinafter be referred to as the "night shift."

<sup>16</sup> At the hearing the event which occurred during the night shift comprising the evening of July 14 and the morning of July 15, 1980, came to be known and referred to as the "pornography incident" or "porno incident."

<sup>17</sup> The evidence shows that Starbird was hired by Plant Manager Michael Shelander during the last week in April 1980 as an hourly paid laboratory employee. Starbird was employed on the night shift, from approximately 11 p.m. to 8 a.m., primarily as a cutter of negatives and prints on the cutting machines in the laboratory. She worked 45-50 hours weekly during her employment with the Respondent, her salary being \$4 per hour.

<sup>18</sup> Starbird described the scenes in the photographs as follows:

The pictures were of a woman, most of them, and she was—her arms and her feet were chained and she was being crucified upside

*Continued*

Starbird testified that she showed the photographs to John Fritts, the only supervisor present in the laboratory at the time, who took the pictures and exhibited them to Eric Jensen and the other men in the processing area, and to Donald Alan Slater in the darkroom.<sup>19</sup> Starbird stated that she had in the meantime continued working and, after Fritts had finished showing the photographs to the other employees he returned to her work station and said to her, "Everyone got their kicks. You can ship them out now." Starbird related that she told Fritts, "John, I think this is serious. I think you should call the police on this one," to which Fritts replied, "Well, I'll leave them for Mike," and he placed the photographs on Plant Manager Michael Shelander's desk.<sup>20</sup> Starbird added that, "a few minutes later, I took my break and I went over to the phone and I called the police. And I asked for the Homicide Division and I reported the pictures, and they said they would send someone over."

While Starbird admitted awareness of the Respondent's "rule" that pictures depicting child abuse or molestation, cruelty to animals, or exhibiting violence or the commission of a crime were to be brought to a supervisor's attention, she testified that it was never explained to her that, if it constituted a police matter, Plant Manager Michael Shelander would "handle" it. Starbird stated that, while she believed that company procedure was being followed in connection with the pornographic photographs, she had called the police in the hope and with the desire that police authorities could somehow save the woman's life or assist her in her distress. According to Starbird her call to the police was made at approximately 3 a.m. on July 15, 1980.<sup>21</sup>

Starbird testified that, soon after she telephoned the police, Perseram Swami, her immediate supervisor, and Richard Isla now returned to the laboratory and she told Swami, "I just called the police on these pictures," and showed him the photographs. She stated that Swami responded, "Oh, you can't do that. You can't call the police into the lab." According to Starbird, Swami instructed her to call the police back and tell them she had been mistaken, but that she asked him instead to review the pictures again. She related that Swami looked at the photographs and then both he and Isla spoke to her

down, spread eagle, and they—there was a—appeared to be a black leather mask covering her face. She appeared to be—hampering her ability to breathe.

There were electrodes coming out of her vagina, and there appeared to be a tube of blood coming out as well, and there was—in one picture, there were two men standing at her—She was unclothed. . . . They were clothed. . . . She was chained. I—she was probably not a willing participant.

Starbird continued that there were "twelve to twenty-four" of these photographs and, "I thought the woman was dying, that she was being murdered."

<sup>19</sup> Starbird testified that pornographic photographs had been discovered on other occasions and exhibited to the employees working at the laboratory. According to Starbird also present in the laboratory at the time this occurred were Jackie Shibata, Pamela Kidder, Lee Ann Willhite, Linda Sue Basim, Eric Jensen, Donald Alan Slater, and herself.

<sup>20</sup> Shelander was not due to appear for work until later that morning.

<sup>21</sup> Starbird testified that during her employment with the Respondent no other employee had ever called the police into the laboratory. However, Isla testified that the police had been summoned to the laboratory on previous occasions presumably prior to Starbird's employment.

about what had occurred.<sup>22</sup> Starbird continued that Isla told her that it was very difficult for the police to find out what happens in such cases since at times they cannot locate the woman in the photographs, or, when they do find the participants "she usually doesn't press charges," and therefore Starbird "might as well call the police back."<sup>23</sup> She added that Swami now said to her, "If it was an animal or—something, that would be another matter, but its just pictures of a woman. I want you to call—I want you to tell the police you made a mistake and then go home." Starbird recounted that the other female employees, working at the plant when this incident occurred, were "outraged at the company attitude as expressed by Swami and Richard [Isla]."<sup>24</sup>

Starbird testified that approximately 10 minutes later four policemen arrived at the plantsite in an automobile and she, Swami, and Isla met them outside the laboratory. She related that, just prior thereto, Swami had again told her to advise the police that she had made a mistake, but she refused to do so telling Swami, "Well, you can tell the police whatever you want to. I'm going to give my report." She stated that Swami also told her "not to discuss it with any of the other employees." Starbird recounted that she described the photographs to one of the police officers<sup>25</sup> who then asked Swami for the photographs to which request Swami refused, also telling the policeman that he could not enter the laboratory premises. Starbird continued that after the police officer indicated that he was now investigating a possible homicide and if the matter could not be discussed with Swami at the laboratory he would arrest Swami for "obstructing justice" and they could "discuss it downtown," Swami went into the laboratory and made a telephone call after which the police officer was allowed to enter the plant. Starbird added that Swami also made another phone call before he turned the photographs over to the police<sup>26</sup>

<sup>22</sup> Starbird testified that at this point "the machines were turned off and other people were taking their breaks as well."

<sup>23</sup> After Starbird's recollection was refreshed she recalled that Isla had also stated to her that "We usually don't call the police on these kind of pictures because the women are usually—you usually can't find the women, and—if you do, they don't make a report."

<sup>24</sup> Interestingly the Respondent in his brief uses this testimony to "suggest that Starbird showed the pornographic pictures to fellow employees, and caused this work slowdown," in support of his own witnesses' rendition of what occurred therein and in view of Starbird's denial of this in her testimony thereon. However I do not agree. Various inferences can be drawn therefrom since Starbird also testified that Swami and Jensen both had showed the photographs to the other female employees present. It can only be appropriately inferred from this, before the credibility of the witnesses is determined, that the women employees were aware of what the photographs depicted and as to the attitude of Swami and Isla concerning these pictures.

<sup>25</sup> According to Starbird after she had given a description of the pictures to the policeman he stated, "Well, that sounds like a possible homicide."

<sup>26</sup> Michael Shelander testified that during the early morning of July 15, 1980, while at home, he received a telephone call from Swami at the plant who reported that Starbird had called the police concerning some pornographic material she had discovered and that Starbird had been sent home because of her actions. Shelander stated that he told Swami to handle the problem and leave the photographs for him to review later, when he came to work. He continued that Swami called him back within an hour and advised him that the police had arrived and wanted to see the photographs. Shelander related that after he spoke to the police officer on the phone it was agreed that the police could view the pictures since the officer felt that "there was a possible homicide" involved.

whereupon the officer requested copies of the pictures, recorded Starbird's name and address and that of the customer on the film envelope, and then left after thanking Starbird for her cooperation.<sup>27</sup> According to Starbird, after the police left she did not complete her work shift but instead went home because Swami had told her she would be sent home "if I didn't withdraw my statement from the police and I left as soon—shortly after the police did."<sup>28</sup> Starbird also testified that before she left the laboratory she asked Swami if she was fired and Swami told her to ask Michael Shelander "the next morning."

Starbird testified that she called Michael Shelander at the plant later that morning, July 15, 1980, at approximately 9 a.m. speaking to Lynn Shelander since Michael Shelander had not arrived at the laboratory as yet and it was agreed that Shelander would call her back when he came in.<sup>29</sup> She stated that during her conversation with Lynn Shelander, Shelander said, "I hear you had a little trouble last night . . . Yes, I saw the pictures. I would have called the police myself if I had been there."<sup>30</sup> Starbird related that Michael Shelander "returned my call at about 10:30 or 11:00 a.m." and after she asked him if she was fired he said, "Well, you can come in and apologize to Swami [for what you did last night]; otherwise, I'll consider that you've quit." She continued that she told Shelander, "Well, I'll be happy to come back in, but I have no intention of apologizing to Swami," to which Shelander responded, "Well, we'll see you tonight then." Starbird added that when she appeared at the laboratory for work that evening, July 15, 1980, Michael Shelander approached her and said, "I'm glad you came

<sup>27</sup> Starbird testified that after the police officer had examined the photographs he said, "she certainly doesn't look like a willing participant," and that since the pictures were from Long Beach, the San Jose Police Department would contact the "Long Beach Homicide Division" about this matter.

<sup>28</sup> Starbird testified that, from the time of her discovery of the "pornographic" pictures, to the time the police left the laboratory, she had only showed the photographs to Fritts and Swami. She added that it was Fritts and Swami who exhibited the pictures to some of the other employees.

<sup>29</sup> Lynn Shelander is the wife of Michael Shelander. According to the testimony of Michael Shelander, she was working in customer service at the time and was not a supervisory employee. However, Lynn Shelander testified that she had been the night-shift supervisor prior to Swami's hire in or about June 1980, whereupon she was transferred to customer service. She stated, "At the time that [Swami] was terminated I was in charge of customer service, which had nothing specifically to do with production." Lynn Shelander related that Swami was terminated by the Respondent on July 17, 1980, "the Thursday night after the incident," soon after the "pornographic incident" had occurred.

<sup>30</sup> While Lynn Shelander did not deny making this statement she however also testified that Starbird's conduct in calling the police was a violation of the Respondent's policy regarding the discovery and handling of pornographic photographs. According to Shelander the Respondent's policy, which is unwritten, requires that an employee who believes photographs to be objectionable should give them to the shift supervisor who reviews the pictures. If the photographs depict sexual acts involving children or child abuse or brutalization, cruelty to animals, bestiality, or women in dangerous sexual distress, etc., they are referred to the plant manager who makes the determination as to what should be done, i.e., whether to return the photographs to the owner or report such photographs to the police for investigation. She stated that this is the common practice in the film developing industry. Shelander added that even though she agreed that the police should have been notified about the photographs Starbird had discovered, Starbird's actions in directly contacting the police herself constituted an act of insubordination.

in tonight. You're a valuable employee. You'll be up for a review soon, and you can expect a raise."

Michael Shelander, who was not present when the above incident occurred, testified that he was apprised of it when he came to the laboratory that morning, July 15, 1980, by the supervisors present when the incident happened, John Fritts, Richard Isla, and Perseram Swami. Shelander related that, during his telephone conversation with Starbird on that day, he explained the Respondent's policy concerning the discovery and handling of pornographic material at the laboratory and told her that she was wrong in taking it upon herself to call the police. Shelander stated that he told Starbird that she should apologize to her supervisor, Swami, for her actions during this incident to which Starbird responded that "she didn't think she owed [Swami] an apology, and she would not do that." Shelander continued that when he arrived at the plant that morning, "I found that the production had come to a complete stop. Work was not moving . . . By the time I got there, the police had gone, and I made—first to get productivity moving, production moving again." He added that there was "a large delay" in overnight customer service because of this incident and "the day shift had to finish up the night shifts work." However, Shelander did not deny Starbird's testimony concerning his praise of her actions that morning. Moreover Lynn Shelander testified that the Respondent thereafter gave Starbird "the benefit of the doubt" as to this incident, overlooking it because Starbird had now been made aware of the procedure to be followed by the occurrence of the incident itself, with Shelander agreeing that it was now considered by the Respondent to be a "closed issue."

Lynn Shelander testified that the Respondent's policy concerning pornography was explained to each new employee during their training period to the effect that "when pornography appears to be between two consenting adults, we let it go. . . . If it involves . . . where possibly a woman might be in danger of her life, cruelty to animals, anything regarding minors" it is to be brought to a supervisor's attention. While Shelander acknowledged having a hand in training Ellen Starbird as a new employee, she did not directly testify that she had personally explained this policy to Starbird and it would appear to be her testimony by inference that she did so since she stated that she explained this policy to every employee she trained.

Michael Shelander similarly testified as to the Respondent's policy concerning pornographic photographs stating that he had explained the policy to all supervisory employees who presumably then instructed the employees under their supervision as to the proper procedure thereon. Supervisors Richard Isla, John Fritts, and Lynn Shelander all testified to having knowledge of this policy as did employees Eric Jensen and Donald Allen Slater. Fritts also testified that, while he did not know if there was a rule prohibiting an employee from contacting the police directly, "It was more an implied rule." Furthermore, according to Fritts' testimony, he did not specifically explain the Respondent's policy concerning pornographic materials to the employees he trained.

Additionally, while Gina Margherone could not remember if, at the time she was hired by Michael Shelander, he had told her about the Respondent's rules and regulations, she did recall that he had not mentioned anything to her about the rule concerning the handling of pornographic material. Moreover, Starbird and Jackie Shibata also testified that although they were generally aware of such a rule or policy, the mechanics or operation thereof had not been specifically explained to them when they were hired by the Respondent.

Richard Isla testified that when Starbird discovered the pornographic pictures during the early morning of July 15, 1980, she immediately brought them to the attention of Swami, her supervisor, whereupon Swami came over to him and asked what should be done with the photographs.<sup>31</sup> He states that Starbird appeared angry about the pictures and wanted something to be done about them and Isla told Swami to "leave them for Mr. Shelander." Isla related that Starbird now became upset because they had not called the police "right then and there" and started to exhibit the pictures to the other women in the "finishing department,"<sup>32</sup> causing "a commotion" for about "an hour, an hour and-a-half, something like that,"<sup>33</sup> and refusing to return to her work station. According to Isla about "15 minutes to a half-hour" after Swami had brought the pictures to his attention, Swami advised him that Starbird had called the police, "she didn't want to wait till the morning."<sup>34</sup> He contin-

<sup>31</sup> Isla testified that, since Swami had been a supervisor for only about a month, Isla was training him in his duties including the Respondent's policies and procedures. Isla admitted that while he was aware of the Respondent's policy to leave unusual pornographic material for the plant manager to handle he did not convey this to Starbird.

<sup>32</sup> Starbird denied ever having taken the pornographic photographs from Shelander's desk and exhibiting them to other employees. She also denied discussing these photographs with fellow employees for the reason that Swami had instructed her not to do so. According to Starbird it was Fritts who had initially showed the pictures to the male employees at the laboratory after she brought them to his attention, and thereafter Swami and Eric Jensen showed them to the other employees, including the female employees at work that evening.

<sup>33</sup> Subsequently Isla changed his testimony to "less than an hour." Greg Bunker, the Respondent's owner, although not present at the laboratory when this incident happened, also testified that the "pornographic incident" caused "a real disruption of the plant and it prevented a good portion of our processing to not be able to be shipped out in the morning."

However, Starbird testified that she did not believe the plant was disrupted as a result of her having called the police. While she admitted the possibility that if she had not called the police work at the plant would have proceeded as usual, she refused to classify what occurred as a disruption or disturbance, and she felt that she had not caused it anyway. She stated that the incident occurred during the employees' lunch break and was not the cause of "any stoppage that I know of." It is interesting to note that although admittedly the more experienced and senior supervisor present that evening, and with production allegedly having come to a complete halt, Isla did not himself direct Starbird to stop "disrupting" the laboratory workers and for the employees to return to their work. Moreover according to his testimony Starbird was supposedly showing the pictures to her fellow female employees, and in view of Swami's having told Isla that he was unable to "get production out, because of the commotion within the lab," and albeit Isla's own testimony that at the time and because of Swami's inexperience on the job, Isla "answered all questions concerning the night shift, until I could have [Swami] take over," it seems most strange that this was not done unless this occurrence had not happened as Isla related.

<sup>34</sup> Isla also testified that Swami had previously told him that Starbird "did not want to leave the photographs on Mike's desk, that she was going to call the police." However, according to Isla's testimony he re-

ued that after the police arrived at the laboratory and some telephone calls were made to Michael Shelander, the police were given the photographs to view.<sup>35</sup> Isla added that the police showed particular interest in the photograph depicting a woman with electrical wires attached to her body and "said something to the effect: We might have something here . . . that they have seen photographs like this, and that if she was a willing participant, then they couldn't do anything about it. They just wanted to check to see if she was okay." Isla related that "within an hour after the police came" he left the laboratory and went home.

Concerning this incident "swing" Shift Supervisor John Fritts, a witness for the Respondent, testified that near the time he was getting ready to leave the laboratory at the end of his work shift he passed by Ellen Starbird's work station and she handed him some pornographic photographs that she had discovered and asked him to look at the pictures. Fritts stated, "At the time I didn't realize that she was upset. I mean, the lab was still pretty new and things were still pretty loose at the time and I thought she was just showing me some good pornos." Fritts continued that he then showed the photographs to Donald Allen Slater and returned them to Starbird.<sup>36</sup> He related that Starbird told him, "John it looks like the girl is in pain," and he then realized that "she was serious" and said that he would leave the photographs on Michael Shelander's desk to look at "when he comes in in the morning." According to Fritts, Starbird said, "okay."

Fritts testified that he then placed the pictures on Shelander's desk and Swami, who was sitting there at the time, glanced at the photographs and told him, "there's nothing wrong with these pictures" to which Fritts replied, "Yes, I know, but Ellen's upset, I'm going to save them for Mike." He added that Starbird's work station was located approximately 7 feet from the desk and that she was within hearing range. Fritts then left the laboratory and went home.<sup>37</sup>

Another witness for the Respondent, employee Eric Jensen, testified that he was familiar with the rule regarding pornographic material and that at the time the "pornographic incident" took place he observed Starbird talking to Swami and Isla and that she seemed very upset. He stated that Starbird then proceeded to show

frained from personally prohibiting Starbird from calling the police authorities, instead directing Swami to do so despite Swami's confessed inability at the time to even get the other employees to return to their work stations, because he was too busy to do so while all this was happening. In reviewing Isla's testimony I found it at times confusing and changeable, designed more to foster the Respondent's contentions herein than to relate what actually had occurred.

<sup>35</sup> Isla testified that it was he who had instructed Swami to telephone Shelander before the police came to apprise him of what was happening.

<sup>36</sup> While Slater testified as a witness for the Respondent he gave no testimony concerning this incident. Additionally Eric Jensen testified that Fritts had shown him the photographs that evening as well.

<sup>37</sup> Fritts testified that pornographic pictures are "common-place" and that "as far as my experience goes, they were just good pornography." He related the pictures depicted "a naked lady laying on either a table or a bed with what looked like wires attached to parts of her body . . . She appeared to have electrical wires attached to her [privates]."

the pictures to employees in the "break area."<sup>38</sup> Jensen added that some of the employees were on their "lunch break" and some were working at the time and when the police arrived the workflow stopped, "things just sort of came to a dead standstill." Jensen related that he was shown the pornographic photographs several times that evening by Fritts, Isla, and Starbird.<sup>39</sup>

*The Union's Organizational Campaign:* Ellen Starbird testified that sometime in early July 1980 she called the "AFL-CIO" to inquire about the possibility of union representation at the Respondent's Meridian Avenue plant and as to which Union had jurisdiction over photo processing plant employees.<sup>40</sup> She was told by Sal Lopez, a union representative, that he would check into it and have the appropriate union contact her. Starbird stated that she called Lopez a second time and he advised her that he was still checking into the matter. Starbird continued that soon thereafter, also in early July 1980, Steve Stamm, a union organizer, called her at home and arrangements were made to set up a meeting between them. Starbird related that on July 15, 1980, she called Stamm and told him that she had been sent home early from work and discharged because of the "pornography incident." She added that after she spoke to Shelander and realized that she had been "rehired," she again telephoned Stamm and apprised him of this, at which time they discussed the possibility of setting up a meeting on July 18, 1980, between union representatives and the Respondent's employees and Stamm arranged to meet Starbird at her home that day to work out the details of such a meeting.

Starbird testified that she met with Stamm at her home later that day, July 15, 1980, and Stamm explained about the Union's dues payments and "the insurance plan and the medical benefits." She continued:

. . . he explained to me about talking to people, other people at the company. And he explained to me the process for collecting cards. He told me I was free to talk to people about the Union during breaks and when I wasn't working and he told me that I could hand out cards and ask people . . . to read the cards before they signed them and not to tell anybody that they were signing a card for—to get an election.

Starbird added that Stamm gave her approximately 15-20 union authorization cards to distribute to fellow employees for their signatures and a union meeting was arranged to be held at Flags Restaurant at 9 a.m. on July 18, 1980.<sup>41</sup>

<sup>38</sup> According to Jensen these employees were Jackie Shibata, Pamela Kline, Lynn Cole, Pamela Kidder, and two other employees he could not name. Jensen believed that these employees "might have been on their break," while both Shibata and Kline testified at the hearing they were not asked about this.

<sup>39</sup> Jensen described the photographs as depicting "a heavy case of bondage," with a woman "tied up" with what looked like "A vibrator" with an "extension cord" connected to it attached to her "privates."

<sup>40</sup> Starbird testified that at a previous time she had been an organizer for the United Farm Workers in California.

<sup>41</sup> Starbird admitted to strong prounion feelings wanting the Union to represent the Respondent's employees for purposes of collective bargaining.

Starbird related that during her work shift that evening and into the early morning (July 15-16, 1980) she distributed authorization cards to employees Gina Margherone and Donald Alan Slater<sup>42</sup> and she also invited to the union meeting "pretty much everybody at the plant who wasn't a supervisor."<sup>43</sup> She stated that she asked Margherone to speak to any other employees who Margherone felt would be interested in the Union and to invite them to the meeting as well. Starbird continued that she later saw Margherone in conversation with Lynn Cole, who Starbird believed had come to the laboratory to pick up her paycheck since Cole no longer was employed by the Respondent, after which Cole immediately "Walked directly over to Mike Shelander and spoke to him."<sup>44</sup> She added that after Cole and Shelander finished their conversation she observed Cole leave the plant and Shelander, who had "turned bright red," went over and spoke to Margherone.<sup>45</sup>

Gina Margherone<sup>46</sup> testified that on July 16 or 17, 1980, while working at her "machine," Starbird asked

<sup>42</sup> Starbird testified that, when she gave the authorization card to Slater, she told him, "We were collecting cards to get a union at the plant." As appears from the record evidence herein, on July 17, 1980, Starbird invited Slater to attend the union meeting to be held the next day and according to Starbird, when he declined her invitation, she asked him if he still had the authorization card she had previously given him and he said, "that he had lost it." She stated that after Slater advised her that he was still interested in signing an authorization card she gave him another card which he then signed. Slater's signed authorization card is dated July 17, 1980. (See G.C. Exh. 13.)

Slater testified that he had initially received an authorization card from someone whom he could not recall, which he did not sign but, instead, "threw it away or I left it home." He continued that on July 17, 1980, he was given another authorization card by Ellen Starbird in "the break area" at which time, "We were more or less talking about the benefits and a raise and that it didn't—all it would do is bring an election. It didn't mean it was a vote or yes or no. It would just bring an election." Slater related that he read the card, understood what it said, and then signed it. Slater seemed unsure about the above dates and had to be shown his signed authorization card in evidence to refresh his recollection as to when he had signed it. On cross-examination Slater also testified that Starbird had said, in response to his question as to what the authorization card meant and what would happen to it, "it wasn't a vote for yes or no. It was more or less for—to get an election. . . . They needed . . . so many union cards signed . . . before they could get an election. I think it was over 50 percent of the employees had to sign it." He added that while he had told other employees that he had signed a union authorization card he did not tell Fritts, his immediate supervisor, about this nor did he tell Michael or Lynn Shelander. Starbird denied telling Slater that the sole and only purpose of the card was to obtain an election or to "support an election."

<sup>43</sup> Starbird testified that she had spoken to Jackie Shibata, Donald Alan Slater, Eric Jensen, Lee Ann Willhite, Pamela Kidder, Diane Long, Linda Sue Basim, Mary Sweeney, Pamela Kline, and Gina Margherone.

<sup>44</sup> Michael Shelander testified that Lynn Cole had appeared at the laboratory that evening to pick up "her final check," having previously terminated her employment with the Respondent.

<sup>45</sup> Starbird testified that although she observed the happening of these various conversations, and in the sequence as related, she could not overhear anything that was said between the participants thereto.

<sup>46</sup> Margherone was employed by the Respondent at the time the events set forth herein occurred although she was later terminated for cause, she had broken "a piece of company equipment." She testified that she was not a willing witness for any of the parties, having been subpoenaed to appear herein, and acknowledged having feelings of anger and hostility toward the Respondent because of her discharge, toward the Board because of the refusal of the Regional Director for Region 32 to issue a complaint against the Respondent when she filed a charge concerning her termination, and toward the Union since she had worked to bring the Union into the Respondent's plant but the Union had failed to support her concerning her discharge.

her what she "thought about getting a union in Photo Drive-Up," and when Margherone responded that it "sounded pretty good," Starbird told her about a meeting scheduled on July 18, 1980, for "Friday morning about 9 or 10 o'clock," between union representatives and any interested employees of the Respondent. Later that evening, according to Margherone, she remarked to "Lynn"<sup>47</sup> that "some people in the plant were thinking about getting a union in the plant" to which "Lynn" replied, "oh really?" Margherone related that she then observed "Lynn" go over to Michael Shelander and speak to him. She continued that thereafter Shelander came over to her and

. . . he said that he'd heard that there was going to—that people were trying to get a union into the place and I told him yeah—and he asked me if I was going to the meeting that was held the next day and I told him, yes, I was.<sup>48</sup>

Also concerning this, Michael Shelander related:

I first became aware of the involvements of some of our employees in the union activity around the 16th or 17th of July, when an employee named Lynn Cole came in to pick up her final check. At that time she said to me "I don't know if you're aware of it, but there's a union meeting scheduled—"<sup>49</sup>

Shelander stated that after Cole had told him that Gina Margherone had been the source of this information he shortly thereafter<sup>50</sup> went over to Margherone and "I asked her what she knew about a union meeting." Shelander continued, "[She] said only that there is one. She said is this going to get me fired and I said of course not."

Shelander testified that he informed the Respondent's owner, Greg Bunker, about this "probably the same day as the first conversation with Gina . . . the 17th or 18th. I think it was a Thursday." Later in his testimony he fixed the date as July 17, 1980. Shelander stated that, when he apprised Bunker of the union meeting, Bunker seemed unconcerned although Shelander himself was "concerned" and "nervous" about this, with Bunker advising him to "calm down." He related that Bunker told him that he would contact his attorney to seek advice about what was happening. Shelander continued that his concern stemmed from his "previous unpleasant experiences with Unions and it worried me [about] the possibility of the Photo Drive Up facility being unionized." Shelander added that he and Bunker spoke about the possi-

<sup>47</sup> Margherone testified that "Lynn" was not employed by the Respondent at that time. It is obvious from the record that "Lynn" is Lynn Cole, a former employee of the Respondent. See Starbird's testimony and fn. 44 herein.

<sup>48</sup> Margherone testified that when Shelander asked her if she were going to the union meeting she did not feel intimidated by this question.

<sup>49</sup> Shelander read this into the record from an affidavit he had given previously to a Board agent during the investigatory stage of this proceeding after he had initially testified that he had first learned about the Union's organizing campaign "around" July 18, 1980.

<sup>50</sup> On cross-examination Shelander now testified that his conversation with Margherone occurred "one or two hours" after Lynn Cole had advised him that Margherone was the one who had told her about the scheduled union meeting.

bility of a union organizational campaign at the laboratory "many times" thereafter and as to "what the Company could do legally."<sup>51</sup>

*The Meeting of July 18, 1980:* A meeting between representatives of the Union and various of the Respondent's employees occurred at Flaggs Restaurant on July 18, 1980.<sup>52</sup> Starbird testified that present at the meeting were Ronald Lind, a union organizer, and employees Gina Margherone, Jackie Shibata, Lee Ann Willhite, Linda Sue Basim, Darla Jean Espinoza, and herself. Starbird related that Lind explained to the employees present that once the Union received the signed authorization cards of a majority of the Respondent's employees the Union would "approach the owner" and request recognition. She stated that Lind said that, if the Respondent doubted the Union's majority status, the Union would offer to show the signed cards to a neutral third party for verification which would protect the identity of those employees who had signed the cards from disclosure to the Respondent and, if recognition were still denied, the Union would then seek an election through the Board's processes and, thereafter, "bargain with the Employer for a contract."<sup>53</sup>

Starbird continued that Shibata asked Lind about union dues and he told her that employees "wouldn't start paying dues until after we already had a contract." She related that Willhite questioned Lind about the Union's membership initiation fee and Lind advised them that "you don't pay initiation fees until 30 days after there's a contract, and the people that started working there . . . before a month after the contract is signed don't have to pay initiation fees to become members of the Union." Starbird testified that she, Shibata, Margher-

<sup>51</sup> Shelander testified that on or about July 24 or 25, 1980, the Respondent's "General Counsel" instructed him "not to interrogate, not to intimidate, not to threaten, not to spy [upon employees] . . . I was told that I could not ask questions pertaining to Union activity." He also testified subsequently that this occurred "probably in August, 1980" and that he and Bunker discussed the Union's organization campaign "half a dozen times" between the time Shelander advised Bunker about the Union's campaign and the time the Respondent's "General Counsel" instructed them as to what their response should be thereto.

<sup>52</sup> Margherone testified that the meeting lasted from approximately 9 a.m. to 12 noon. Ronald Lind, the Union's representative, testified that the meeting started at 8:30 and lasted about 2 hours.

<sup>53</sup> Lind testified that he told the employees at the meeting,

that by signing the authorization cards they were giving the Union the authority to represent them. And that once we obtained the majority of the employees' signatures on cards, we would approach Mr. Bunker and demand recognition based on majority status. I told the employees that at this time if Mr. Bunker were willing to submit to what we called a card check, and have a neutral third party look at the cards, and we did have a majority, that we could commence collective bargaining.

I also told them that in all probability he would not give us recognition through a card check, and at the same time that we made a demand we would also file a petition with the National Labor Relations Board to conduct an election. . . .

I told employees that the normal circumstances, if they were to go to work in a Union shop, that they would have to pay an initiation fee, but we have a policy at Local 428 that in newly organized units we waive the initiation fee for all employees who are working at the location up until 30 days after a contract is signed.

Lind also testified that he told the employees about dues amounts and that "no one would pay dues until they were enjoying the benefits that would come out of a new contract."

one, Basim, and Willhite all signed authorization cards at the meeting and gave them to Lind.<sup>54</sup> She stated that she also gave to Lind Donald Slater's signed card which she had received from Slater previously.<sup>55</sup> Starbird added that at the meeting Margherone advised her that Michael Shelander knew about the meeting because Lynn Cole had told him about it.

Starbird also testified that subsequently she received signed authorization cards from employees Mary Sweeney, Jennifer Paet, Elaine Brewer, Brenda Flowers, Pamela Kidder, and Karen Gomez which she then turned over to Lind.<sup>56</sup> As to the authorization card of Darla Jean Espinoza, Starbird stated that Espinoza had asked Shibata to give her signed card to Starbird which Shibata did and Starbird also gave this card to Lind.<sup>57</sup> Lind acknowledged that he received the signed authorization cards from Starbird. He testified that Starbird had also given him the signed authorization card of Pamela Kline which is dated July 20, 1980. He added that on July 25, 1980, the Union sent to the Board all the above cards along with its petition for an election.

Also concerning what was said at this meeting, Shibata<sup>58</sup> testified that Lind told the employees present that "we would not have to pay initiation fees, but anybody coming into Photo Drive-up thereafter, if the union got in, would have to, you know, pay their initial initiation fees." She related that Lind also told them that there would be an election to see if the Union "was going to be voted in or not" and if the Union won it would "bargain with Greg [Bunker] for, you know, the things that we wanted." Shibata added that she had read the authorization card, understood it at the time, and had signed it because she wanted the Union to represent her. She stated that she also believed that it was "only" a request that there be an election.

Margherone testified that after the Union's meeting at Flagg's Restaurant on July 18, 1980, while at work the evening of that same day, Michael Shelander came over to her and asked her if she had attended "a meeting" and she said that she had. Margherone continued, "And then he asked me how many people were there. . . . And I said, there were quite a few that went and then he just

<sup>54</sup> The signed authorization cards of Starbird, Shibata, Margherone, and Willhite in evidence are all dated July 18, 1980. The card of Basim is dated July 16, 1980, and Lind testified that while Basim signed her card at the meeting on July 18, 1980, she incorrectly dated it July 16, 1980, but the date was not corrected or changed. Concerning Darla Jean Espinoza, Starbird testified that she did not sign a card at the meeting because she wanted to talk it over with her husband first. Espinoza subsequently signed an authorization card which is dated July 23, 1980.

<sup>55</sup> Slater's authorization card is dated July 17, 1980.

<sup>56</sup> The authorization cards of Mary Sweeney, Jennifer Paet, and Elaine Brewer are all dated July 20, 1980. Brenda Flowers' card is dated July 22, 1980, and the cards of Pamela Kidder and Karen Gomez are dated July 23, 1980.

<sup>57</sup> Shibata acknowledged that Espinoza had given her the signed authorization card to return to Starbird which she did. Darla Jean Espinoza's authorization card is dated July 23, 1980. While the Respondent initially stipulated that Espinoza was an employee properly in the appropriate bargaining unit, counsel for the Respondent subsequently maintained that Espinoza was a supervisor at the time she signed her authorization card and thus now should be excluded from the unit.

<sup>58</sup> Shibata was employed by the Respondent from March 9, 1980, until February 12, 1980, when she voluntarily left the Respondent's employ.

kind of smiled and went on his little merry way."<sup>59</sup> She stated that she asked Shelander if "it would have anything to do with my job, me going to the union meeting and he said no, it would not." After her recollection had been refreshed by resorting to her affidavit given earlier to a Board agent, Margherone recounted that Shelander had asked her about what happened at the meeting and she told him, "I really didn't want to talk about it."<sup>60</sup> Margherone added that she had thereafter worn a "Union T-shirt" to work on three or four occasions.

*What Occurred During the Night Shift of July 21-22, 1980:* Starbird testified that when she reported to work at 11 p.m. on July 21, 1980, her supervisor, Lynn Shelander, advised her that the Company's owner, Greg Bunker, wanted to speak to her. She stated that, with Lynn Shelander present and Bunker seated at Michael Shelander's desk in the plant, Bunker told Starbird that he was proud of the Company's record of cooperation with the police, i.e., reporting unusual pornographic pictures to police authorities, etc., but that Starbird should have waited for Michael Shelander to review the photographs before she called the police, since photographs have been known to be "staged" and in this instance there might not have been what looked like a "murder" at all but just some "special effects." Starbird related that Lynn Shelander interjected, "Well, the pictures were pretty gruesome, Greg." She recounted that Bunker then told her that he was giving a party on August 23, 1980, and he wanted to invite her and all the employees to it. Starbird continued that Bunker also said that he was thinking about enlarging the lunchroom area, and asked her if there was anything he could do to make the employees happier, and for any suggestions Starbird might have about "conditions at Photo Drive Up." She added that she then returned to her work station and observed that Bunker spoke to each of the other female employees at work that evening individually, but with Lynn Shelander present as he had with her, and after he finished speaking to the employees he remained at the plant through her entire shift, at times "just watching the employees."

Margherone also testified that Bunker spoke to her at the plant in the presence of Lynn Shelander after Shelander had told her that Bunker wanted to speak to her.<sup>61</sup> She stated that Bunker told her that any pornographic pictures which were discovered by employees and which "upset" them should be brought to the attention of Bunker himself or a supervisor. Margherone related that she asked Bunker if employees could purchase cameras from the Respondent "on a payment type basis" and then Bunker asked her "if there was anything else

<sup>59</sup> Margherone testified on cross-examination that Shelander had asked her, "Was it a large group, small group or medium group."

<sup>60</sup> Shelander testified that he asked Margherone if she had gone to the union meeting and she said, "Yes." He stated that he then asked if she "could tell me about it," and Margherone responded that "she really didn't want to talk about it."

<sup>61</sup> While Margherone indicated that this occurred on July 24, 1980, it should be noted that counsel for the General Counsel, in framing his questions, first suggested and mentioned that date and I believe this suggestion was responsible for the inaccurate date she thereafter set forth in her answers.

that he could do to improve the employment status, like conditions—working conditions and things like that.” She recounted that Bunker told her he was giving a party at the Oakwood Gardens and was inviting all the employees including her, and Margherone added that this was the very first time something like this had ever happened since her hire in June 1980. Margherone indicated that while Bunker did on occasion appear at the plant “when film processing wasn’t going right or something,” this was the first time that he had stayed the entire shift, something he had never done before.<sup>62</sup>

Greg Bunker testified that he had come to the plant on July 21, 1980, because “there seemed to be some confusion as to our policy on pornographic material and also there seemed to be an all-time kind of low in morale at the lab and I wanted to discuss that along with the productivity of the lab seemed to be decreasing.”<sup>63</sup>

Bunker continued that prior to that evening he had been told by one of his supervisors that there was a morale problem at the plant.<sup>64</sup> Bunker stated that while he had heard “a reference” to union activity occurring at the plant and “had no real first hand knowledge of it,” he suspected that “there was some sort of situation with employees intimidating or harassing fellow employees.” He added that he spoke to each employee individually in order to give them an opportunity to talk freely to him about any “harassment or hazing” that they had suffered, and, in fact, employee Diane Long indicated to him that she had an “ongoing problem” with Ellen Starbird, and if Starbird “doesn’t quit harassing me then she was going to have to quit.”<sup>65</sup> Bunker related that he spoke to between 8–10 employees “individually in the presence of their supervisor,” while seated at Michael Shelander’s desk in a “little open office area.”<sup>66</sup>

<sup>62</sup> Richard Isla also testified that Bunker had never before stayed at the plant through an entire night shift.

<sup>63</sup> Bunker testified that the “pornographic incident” had previously disrupted production and he felt the Respondent’s policy concerning pornographic materials needed clarification to prevent another such occurrence.

Bunker also testified, “[M]y reason for being there was then to see what type of problems were associated with this decrease in productivity and during the course of the conversation . . . we decided on electric pencil sharpener and things of that nature.” Bunker denied having gone to the plant for the purpose of soliciting employee grievances but he stated, “I did ask them if there was [sic] other problems in the lab because of the fact that the morale was down and the productivity was down and I’m trying to find out, you know, what’s going on.”

<sup>64</sup> Lynn Shelander testified that, prior to Bunker’s appearance at the point that evening, she told him in a telephone conversation that there was unrest at the plant and it would be worthwhile for him to discuss this with employees at the laboratory when he came there. She related that during this conversation Bunker had made no reference to the Union or to employees’ union activities.

<sup>65</sup> On cross-examination Bunker testified that he now was not sure whether Long had actually mentioned Starbird or Margherone by name as the employees “harassing or hazing” her, although he added, “I was aware of the fact that [Long] was referring to these individuals.” Bunker also testified on cross-examination that he was unsure as to whether Long told him about this on the evening he spoke to all the employees at the plant, or the night before this happened.

<sup>66</sup> Bunker acknowledged that, when he spoke to the employees on an individual basis that evening, the other employees working that shift could see what was happening at the time.

On cross-examination Bunker now testified that he did not ask employees what was bothering them specifically but gave them “an opportunity to express any [kind] of concern that they have.” Bunker then offered that Shibata had requested an electric pencil sharpener in response to his asking her if there was some sort of problem affecting productivity at the plant. Bunker’s testimony concerning how often he had remained at the plant through an entire night shift was equivocal but he finally admitted that this had only happened once or twice before.<sup>67</sup>

Lynn Shelander’s testimony confirmed that Bunker had spoken individually and in her presence to employees on the evening of July 21, 1980, and had remained there throughout the night shift into the morning of July 22, 1980. She related that Bunker discussed the Respondent’s policy concerning pornographic material because “It needed restating . . . purpose was to clarify and restate the company’s posture about pornography.” She continued that Bunker “asked employees for their suggestions at that time about improving working conditions at the plant.” Shelander stated that “there was a tremendous amount of unrest, there was just an unreal atmosphere in the plant, and we were trying to get at the bottom of what was going on. What . . . generated this entire animosity that hadn’t been there a week ago.”<sup>68</sup> She added that Bunker asked employees, “What can we do to change things, to get them back on the plane again . . . ? Is there something that we can do in the lab?” Shelander recounted that employees made various suggestions and complaints including the acquisition of an electric pencil sharpener, “cleaning up” the bathroom which was also being used as a storeroom, allowing employees to purchase cameras at reduced prices, and the inadequacy of the lunchroom facilities, and that Bunker agreed to consider and possibly remedy these complaints.<sup>69</sup> According to Shelander, none of the employees to whom Bunker spoke raised any complaints to him about being harassed or bothered at his or her work station.

Michael Shelander testified that, after the occurrence of the “pornographic incident,” Bunker came to the plant and spoke to each employee individually to clarify the procedures concerning “objectionable photo-

<sup>67</sup> In general, I found Bunker’s testimony on cross-examination to be equivocal, guarded, defensive, and unclear at times. His inability to now recall various parts of conversations to me seemed less than forthright since on his direct examination he appeared not to be suffering from any lack of recall or problems of remembering what had occurred.

<sup>68</sup> Shelander denied that she knew that the Union was attempting to organize the Respondent’s employees at this time nor that she had any inkling as to what was generating the “unrest” and “animosity” among the employees. She testified that she found out about union activity at the plant on the morning of July 22, 1980, from her husband Michael Shelander, when he asked her if she was aware that the Union was attempting to organize the Respondent’s employees at the laboratory. She added that, during a telephone conversation with Bunker that same day, Bunker also informed her that the Union was attempting to organize the Respondent’s employees. However, Eric Jensen testified that he had complained to her about Starbird’s union activities concerning him “probably around the 18th” but acknowledged that the date could have been July 20, 1980, also.

<sup>69</sup> Shelander testified that Bunker agreed to obtain an electric pencil sharpener, clean up the bathroom, and “investigate” improvement of the lunchroom.

graphs."<sup>70</sup> Shelander denied any knowledge as to whether Bunker had discussed "other things" with employees during these conversations. Notwithstanding being shown his affidavit dated September 22, 1980, given to a Board agent, which states therein,

Soon after the police incident, the Company owner, Greg Bunker, came in and spent some time with each of the employees in an effort to make sure everyone was aware of our policy about objectionable photographs. He also took that time to visit with the employees about what could be done in their minds to make the company a better place to work.

Shelander still could not remember either whether this statement was true or if he had made such a statement at all to the Board's agent.

While Jackie Shibata testified at the hearing, she was not asked about her conversation with Bunker in detail. Eric Jensen, who also was present that evening and testified herein, was also not questioned about this, possibly because Bunker only spoke to the female employees present at work.

*Another Incident Which Occurred During That Same Work Shift:* Starbird testified that she gave authorization cards to two employees during that night shift, July 21-22, 1980, Pamela Kidder and Eric Jensen.<sup>71</sup> Starbird stated that, at the end of their work shift while they were punching out at the timeclock, she gave an authorization card to Pamela Kidder. She added that while this was happening Bunker was seated at Shelander's desk and could see what was occurring. She related that Kidder signed and returned the authorization card to her.<sup>72</sup>

Starbird continued that having previously given an authorization card to Jensen during lunchtime of that shift, between 3-3:30 a.m., she again spoke to Jensen while they were near the timeclock, this occurring while Kidder and now Bunker were also standing there. Starbird asked Jensen if he had filled out the authorization card and he said, "Yes, just let me dump the garbage." Starbird related, "I held the door open for [Jensen] as he was walking out, and then I noticed that Greg Bunker was right behind me." Starbird stated that she followed Jensen outside to where he dumped the garbage in a "dumpster" and found that Bunker had also followed them outside. She recounted, "I said to [Bunker], 'Do you want something?' He said, 'Yes, I want to talk to my employee.' And I said, 'You want to talk to me?' And he

<sup>70</sup> Shelander testified that the Meridian Avenue plant had been in business for "approximately a year and a half" before July 1980 and the Respondent was still in the process of establishing the "best operating procedures."

<sup>71</sup> Jensen could not recall the date that Starbird gave him the authorization card to sign. Jensen did not sign a card for the Union.

<sup>72</sup> Although not clarified in her testimony it appears that Kidder did not sign and return the authorization card to Starbird at this time. The card is dated July 23, 1980, so there is a strong inference therefrom that Kidder signed and returned it to Starbird the next evening. Starbird might also have been mistaken as to when this occurred since the evidence shows that Bunker was also present in the laboratory during the following night shift, July 22-23, 1980, and this incident may have happened then.

said, 'No, I want you to get off my property.'" Starbird then left for home.

Eric Jensen testified that Starbird had previously spoken to him about the Union and about signing an authorization card on several occasions<sup>73</sup> commencing about "a week or a week and a half" before her termination.<sup>74</sup> He stated that he had feigned interest in the Union to Starbird in order to get her to "leave me alone so that I could get my work done."<sup>75</sup> Jensen recounted that Starbird had given him an authorization card to sign but he could not recall when this had occurred.<sup>76</sup> Jensen added that during the night shift of July 21-22, 1980, while he was working at his "Agfa Printer" machine Starbird, who was on "her lunch break or something," came over to him and asked him for the authorization card she had previously given him.<sup>77</sup>

Bunker testified that during the night shift of July 21-22, 1980, he observed employee Eric Jensen "carrying out a trash can out of the building and he didn't return in a timely manner."<sup>78</sup> Bunker stated that he went outside the plant to investigate what was taking Jensen so long and saw Jensen being "detained" by Starbird.<sup>79</sup> He relat-

<sup>73</sup> Jensen related that Starbird on July 17, 1980, had invited him to the union meeting to be held the next day, July 18, 1980 at Flags Restaurant. According to Jensen she spoke to him regarding the Union about "five or six [times] at the most."

<sup>74</sup> Jensen testified that he had told several of the supervisors at the plant about this including John Fritts, Richard Isla, Michael Shelander, and Lynn Shelander. He felt that as a loyal employee it was his duty to do so because the other employees involved in union activities were "going behind the employer's back." He stated that he asked Fritts if Fritts knew that "certain people in the lab were trying to go union" and that Fritts had responded that "he had heard it around." Jensen added that he also said this to Isla. Jensen related that he additionally complained to Lynn Shelander on or about July 18, 1980, that he was being "harassed on the job, during my working hours." He related that subsequently he also complained to Michael Shelander about this. Jensen could not recall how soon after Starbird had spoken to him about the Union he first reported it to a supervisor.

Isla testified that Jensen had complained to him about being "harassed" by Starbird at his work station and he wanted permission to speak to Michael Shelander about it, but he could not remember if this occurred before or after the posting of the "no solicitation rule." He stated that Jensen had said that Starbird was trying to get him to attend a union meeting and had spoken to him about joining the Union on three separate occasions.

<sup>75</sup> On cross-examination Jensen at first denied having any interest in the Union when Starbird approached him about it. However, in an affidavit given previously to a Board agent, he had stated that when Starbird first spoke to him about the Union, "I was somewhat interested at that point, in that everyone including management was involved." He then admitted his interest but on the grounds that he believed management supported such union activities.

<sup>76</sup> Jensen testified that when Starbird gave him the authorization card, "She said that we would get medical, dental, better life insurance policy, plus better working conditions . . . . She told me that if I wanted the union, to sign the card and I could be—she needed enough people to get the vote to carry over for the union." He added that Starbird told him she needed the card back by July 22, 1980, or "they wouldn't have enough people to vote or to win an election." Starbird denied telling Jensen that she needed the card back on a certain date.

<sup>77</sup> Interestingly, while Jensen was called as a witness for the Respondent and asked if he remembered the incident which occurred that evening when he was emptying "trash" outside the plant, he never was asked to tell what actually happened.

<sup>78</sup> Bunker said that Jensen had been gone "three to five" minutes.

<sup>79</sup> Bunker stated that, while it appeared to him that Starbird was "detaining" Jensen from emptying the trash can he was carrying and returning to work, Starbird was only talking to Jensen and not physically touching him.

ed that "I indicated to [Jensen] that he need not be detained during business hours by this individual in the parking lot and suggested that he enter the building." According to Bunker, Starbird was not on "company time" when this occurred but Jensen was on "regular work time." Bunker added that he made no comment to Starbird at all during this incident.

What Occurred During the Night Shift of July 22-23, 1980

*The Conversation Between Starbird and Michael Shelander:* Starbird testified that she reported for work early on July 22, 1980, at approximately 10:30 p.m. She related that Michael Shelander met her near the timeclock and said, "I understand you're soliciting union cards." According to Starbird, when she told Shelander, "Mike, you're not allowed to ask that," Shelander replied, "Well, I have witnesses that you've been soliciting union cards." Starbird continued,

He said that he was reinstating, as of tonight, or as of the 22nd, a no solicitation rule that they had allowed to lapse, they had taken down all the signs about six months ago, and that he didn't want me at—talking about the union during working hours, or asking anyone to sign a card on company property.

Michael Shelander testified that on July 22, 1980, he spoke to Starbird telling her that he had received reports about her soliciting and harassing employees at their work stations. He stated that she denied this. Shelander continued that prior to his conversation with Starbird on July 22, 1980, he had learned from employees Diane Long<sup>80</sup> and Eric Jensen<sup>81</sup> that Starbird was engaging in union activities, talking to employees about the Union, distributing authorization cards, and soliciting the signatures of employees on these cards.<sup>82</sup> Shelander stated that he then questioned some of the supervisory employees, John Fritts, Richard Isla, and Lynn Shelander about Starbird's activities and they responded similarly that they all had heard "that something was going on" although they were "not totally aware of the union activity in the lab" and "they had very little knowledge of

<sup>80</sup> Shelander testified that on July 21 or 22, 1980, Long had shown him the authorization card given to her by Starbird and asked him if there were going to be problems because of the union activity such as rock throwing at cars and he told her there would be no violence. He stated that Long also complained to him about Starbird during the next work shift, July 22 or 23, 1980, and asked him if he could stop Starbird from "approaching" her at her work station.

<sup>81</sup> Shelander testified that on July 21 or 22, 1980, Jensen told him that Starbird had harassed him, asking Jensen to sign an authorization card while he was working at his job station and that she had done this on numerous prior occasions even though he had advised her that he was not interested in the Union.

<sup>82</sup> Shelander initially testified that he had heard about Starbird's union activity "about the time or shortly" after the occurrence of the "pornographic incident." In his affidavit previously given to a Board agent he indicated that he learned of this "soon after [he] had praised her," again referring to the above incident. Shelander later testified that he actually learned of Starbird's activities in or about July 21, 1980. He related that on July 21, 1980, Isla advised Shelander that he had seen Starbird distributing authorization cards.

her activity."<sup>83</sup> Shelander could not recall or remember any direct reference or specific replies by the supervisors regarding Starbird.<sup>84</sup>

Shelander continued that he then "reposted our no solicitation rules,"<sup>85</sup> on July 22, 1980, and in addition spoke to Starbird as follows:

I told her that I had received reports from her fellow employees that they were being harassed by her and that she was soliciting their signatures. I also told her that in case you're not informed, we have a no solicitation rule in the company. We have had it for a long time. I want you to discontinue solicitation of the employees at their work stations.<sup>86</sup>

Concerning the Respondent's "no solicitation rule" Ellen Starbird, Jackie Shibata, and Gina Margherone, all testified that when they were hired they were not told that the Respondent had any such rule.<sup>87</sup> In fact they each stated that until the rule was actually posted by Shelander in July 1980 they were unaware that such a rule even existed.<sup>88</sup> Starbird also testified that she was unaware of any rule prohibiting employees who were not on working time from coming to the plant to talk to other employees. She added that other employees had done this, Lynn Cole being one of them.

Shibata testified that, until the "no solicitation rule" was posted "right after all the union activity started," she was unaware that such a rule existed. Shibata related that she had actually purchased products solicited by

<sup>83</sup> Isla testified that he had rumors that Starbird was attempting to bring a union into the plant sometime between July 18 and July 31, 1980, but again the dates were set by counsel for the General Counsel in his questions and not by Isla's answers. However, Isla did testify that Starbird had invited him to attend a union meeting at Flagg's Restaurant on a Friday morning but he could not remember the date this occurred other than that it happened during the same week within which the meeting was to occur. He added that he told Fritts and Michael Shelander about this either that same day or the next. The evidence shows that this meeting was held on July 18, 1980.

<sup>84</sup> However, in his affidavit Shelander had stated, "I also was informed by the night supervisors that Ellen was handing out and collecting cards during working hours." Shelander also testified that during the week of July 20-24, 1980, his wife Lynn had reported to him that "things were slowed down . . . the whole crew was quiet, sullen and non-productive."

<sup>85</sup> The posted notice states:

7/22/80

It is the policy of this company not to allow the solicitation of employees during the working hours for non business purposes.

M. Shelander

<sup>86</sup> However, in his Board affidavit Shelander had stated:

Therefore, around the 21st or 22nd of July, I posted our no solicitation rule and told Ellen we have rules against solicitation that are posted and I want you to stop all solicitations.

<sup>87</sup> Shelander testified that when he interviewed prospective employees he told them about the Respondent's benefits, salary, starting date, etc., but not always about the "company's rules and regulations." He stated that the supervisors were instructed and obliged to review such rules and regulations with new employees but he did not know if they actually did so. Lynn Shelander testified that during her training and orientation Starbird as to the Respondent's rules and regulations, she did not explain the "no solicitation" rule to her.

<sup>88</sup> Supervisor John Fritts testified that while he was aware of a "no-solicitation" rule in the Phototron manual, he thought that the rule applied to soliciting products for sale, not about union solicitation.

fellow employees during the time she worked for the Respondent and prior to the advent of the Union's organizational campaign, i.e., Amway and Avon products from employees Debbie Perkins and Lee Ann Willhite, respectively. She related that on one occasion she had even asked Richard Isla to pick up for her the Amway products she had purchased from Perkins, which he did.

Both Lynn Shelander and Isla testified that they were aware of the Respondent's "no solicitation rule" in the Phototron book.<sup>89</sup> Shelander stated that the rule had never been posted before until Michael Shelander did so on July 22, 1980. Isla related that, prior to July 1980, some employees "had solicited during company time and on company premises," i.e., Lee Ann Willhite soliciting the sale of Avon products, and Debbie Perkins the sale of Amway products. Isla stated that, when he observed Willhite soliciting employees, he told her "she was not allowed to do that on company time, and that she can do it on her breaks." He recounted that he also told Perkins the same thing concerning her soliciting for the sale of Amway products. Isla added that no disciplinary action was taken against either Willhite or Perkins for soliciting on company time at the plant nor did he recommend any.<sup>90</sup>

*The Conversation Between Starbird and Bunker:* Starbird related that at approximately 11 p.m. that same evening she had a conversation with Bunker at Michael Shelander's desk while Shelander was present, at which time Bunker asked her if she was working "anywhere else besides Photo Drive Up," and when she asked Bunker "Why?" he merely repeated his question again and after this happened an additional time, Starbird told him what she did on her own time was her own business. She stated that Bunker now said that he wanted to review her personnel file with her because she had been employed 3 months and it had not been reviewed before, to which Starbird responded that there were other employees there for 3 months and Bunker had not spoken to

<sup>89</sup> The undisputed evidence shows that the Respondent adopted as its own policy the rules and regulations of another company, Phototron. These "General Rules of Conduct and Discipline" are encompassed in a looseleaf book which at first had "Phototron's" name on the cover, then was changed to "Photo-Drive Up," and was kept in a bookcase near Michael Shelander's desk for use by all employees. Of significance for purposes of this case is a page from this book (Resp. Exh. 1) which states in pertinent part:

General Rules of Conduct and Discipline

Group 2

A first violation of any of the following prohibited conduct is cause for disciplinary layoff from 2 to 5 days and written warning; a second violation is cause for discharge;

3. Gross insubordination and using profane, abusive, vulgar, or threatening language to anyone.

Group 3

A first violation of any of the following prohibited conduct is cause for written warning notice; a second violation is a cause for disciplinary layoff from 2 to 5 days; a third violation is cause for discharge.

6. Unauthorized *soliciting or collecting contributions* on Phototron premises. [Emphasis supplied.]

<sup>90</sup> Michael Shelander testified that he was unaware that Willhite and Perkins had solicited the sale of products at the laboratory since no supervisors or other employee had brought this to his attention.

them about reviewing their files. Starbird testified that she then told Bunker, "I don't really think that's the reason for this interview." She continued that Bunker then said:

Well, I'm very upset and I want this union business to stop because I don't want anyone to get hurt.

Starbird added that, after she asked Bunker if he were threatening her, Bunker responded, "No, I'm just telling you I don't want anyone else to get hurt." Starbird then returned to her workplace. She recounted that she repeated to the other employees at work during that shift what Bunker had said to her.

Bunker testified that subsequent to July 21, 1980, he had a conversation with Starbird at the plant during which he asked her "if she worked for another company" for the reason that she had been harassing employees, had caused "severe loss of productivity during the night of the pornographic material," and the Respondent was experiencing "a severe morale problem" with employees threatening to leave "because of this," and he thought that Starbird might be working for one of his competitors. He stated that "several people" were present at the time and that, although he asked her this "two or three times," she answered that it was none of his business. Bunker added that nothing else was said between them.<sup>91</sup>

*Starbird's Union Activities During That Night Shift (July 22-23, 1980):* Starbird testified that during her lunch break later that evening, about 3 p.m., she had conversations with various employees at the plant. She stated that, while this was going on, Lynn Shelander was "across the room" and Starbird believed that she could hear the conversations. Starbird related that she told Eric Jensen she was aware that he had talked to Bunker and "probably gotten a full view of what management's position is on [the Union]," and that he had a right to join the Union if he wanted to, and she invited him to another union meeting which was scheduled for July 23, 1980.<sup>92</sup> She added that Jensen said, "No, I've already made up my mind. I don't want to join the union."

Starbird continued that she also spoke to Diane Long, to whom she had previously given an authorization card when Long expressed interest in joining the Union. Starbird stated that she asked Long if she had filled out the card and also invited her to the meeting scheduled for July 23, 1980. She recounted that Long responded, "I got fired from my last job. I don't want any trouble. Please don't talk to me about union." Starbird testified that Shibata now approached them and Long began to shout, "I'm sick of this union business. I just want to do

<sup>91</sup> However on "Recross-Examination" Bunker testified that only Michael Shelander was present when the conversation between him and Starbird took place. Significantly Shelander, who was called both as a witness for the General Counsel and for the Respondent, gave no testimony concerning this conversation although he was the only other person present and the Respondent's plant manager.

<sup>92</sup> Starbird testified that she had spoken to Steve Stamm on July 20, 1980, and a second meeting between the Respondent's employees and union representatives was arranged for July 23, 1980.

my job and get paid."<sup>93</sup> Starbird recounted that she additionally spoke to Linda Basim, Jackie Shibata, and Lee Ann Willhite, presumably about the union meeting scheduled for July 23, 1980.

Starbird testified that before the end of her work shift she took some photographs over to where Karen Gomez was working because the "photos needed to be redone." She continued, "I put them on her table, and, as I walked away, she said, 'Don't you want your union card back?' And I turned around and, at that point, Lynn was rounding the corner. I took the card and folded it and put it in my pocket and walked away." Starbird stated that she now experienced some trouble with her machine and Lynn Shelander came over and checked it and at that time admonished Starbird for "signing people up in the morning" telling Starbird, "you're not supposed to do that, Ellen." Starbird related, "And I said, 'Well, I'll check out five minutes earlier.' And she said, 'That's not the point.'"

Concerning this, Lynn Shelander testified that toward approximately the end of the night shift on the morning of July 23, 1980, she saw Karen Gomez "sitting at her station, ready to start her printing activities of the day. Ellen had taken back some makeovers, and as I rounded the corner, I saw her encouraging Karen to sign the card and give it back to her." Shelander stated, "I saw her and I overheard part of the conversation . . . 'Sign the card and give it back to me. We need—!' I don't know her exact words, but: 'Sign the card!'" Shelander added, "I saw her point—the card was laying on the physical part of the printing machine. And Ellen saying, 'Sign the card. This is where you fill in the information!'" She related that she examined the card and it was unsigned at the time and she then "instructed Karen Gomez that she did not have to sign that card. It was her decision to make."<sup>94</sup> Shelander continued that she then told Starbird, "Ellen, I am sorry, you cannot do that. You are not allowed to solicit," after which Starbird just "shrugged her shoulders and walked off."

Shelander testified that therefore, when her husband told her on "the evening of the 22nd" that he had admonished Starbird about her solicitation of employees on company time, she considered Starbird's action in soliciting Gomez' signature on the authorization card on company time as an act of insubordination, since Starbird had continued to solicit "Union cards" contrary to Michael Shelander's instructions to discontinue such activities. She continued that "During the night of the 22nd, two different employees approached me and complained of

<sup>93</sup> Shibata testified that she and Starbird had just come off their break and Starbird spoke to Diane Long at her work station about the Union. She stated that Long began "mumbling" that she was "sick and tired of all this union stuff," and that all she wanted to do was her work and to get paid. Shibata added that Long was the only employee she ever saw Starbird solicit and that no employee complained to her about Starbird's union activities. However in an affidavit given to a Board agent prior to her appearance at this hearing Shibata had stated,

Although we were instructed not to solicit during work time, as I recall, Ellen would solicit fellow employees during work time. Gina [Margherone] was more careful about soliciting only during breaks. With respect to Ellen's activities, I can recall that Diane Long got pretty upset one night just after Ellen had gone over to Diane's work station—.

<sup>94</sup> Karen Gomez was not called as a witness herein.

being harassed by Ellen, Diane Long and Eric Jensen." Shelander stated that Long was "close to hysteria" when she spoke to her asking, "They are not going to hurt me, are they? I don't like this Union. I want her to leave me alone. I told Ellen I am not interested. Why won't she leave me alone." She added that Long had reported to her that Starbird was engaging her in conversation while Long was at her work station. Shelander also related that Jensen had told her that Starbird was continuing to "try to enlist his cooperation" in support of the Union although he had advised Starbird that he was not interested in union representation, and that Starbird's continued "approaches" toward him occurred while Jensen was at his work station. Therefore, according to Shelander, she then recommended to Michael Shelander that Starbird be terminated.

Shelander testified that she also considered Starbird's conduct in calling the police during the "pornographic incident," despite being told by her supervisors that "the problem would be dealt with," as another act of insubordination and therefore additional justification for her recommendation to discharge Starbird. Shelander stated that Starbird was also a "probationary employee" at the time.<sup>95</sup> Shelander acknowledged that she knew that Starbird and Margherone were the most active of the Respondent's employees on behalf of the Union and that Starbird's "solicitation of union cards" was common knowledge at the Respondent's plant.

*The Discharge of Ellen Starbird:* Starbird testified that Michael Shelander called her at home at or about 10:30 p.m. on July 23, 1980. She related,

Mike said, "I understand you have a transportation problem, so I thought you'd might want to ask your Mom to bring you in early tonight!" and I said, "Why?" And he said, "So she can take you back home again." And I said, "Am I fired?" And he said, "Well, I'd like to explain it to you in person." I said, "Well, Mike, why should I come all the way in and go all the way home again? Just—can't you tell me over the phone?" He said, "Well, you're fired for the police photo incident." And I said, "You'll never make that stick!" And he said, "Well, that and continued uncooperativeness with management." And I said, "Well, I'll remember when it comes time to negotiate a contract that you think the job is worth \$8.00 an hour." And he said, "How's that?" And I said, "Well, you'll have to pay me backpay, plus \$4.00 an hour to replace me with someone else." He said, "I don't understand what you mean." I said, "Yes you do, Mike."

Starbird stated that she did not return to work thereafter.<sup>96</sup>

<sup>95</sup> In explaining the procedure dealing with the termination of an insubordinate probationary employee, Shelander stated that the employee is usually "counseled with the recommendations of the plant manager" and after the incident is discussed with the employee, "a judgment is made" whether to continue the employee or terminate her.

<sup>96</sup> Starbird testified that after Michael Shelander had told her about the Respondent's "no solicitation rule" she had not distributed any authorization cards to employees while on "working time."

By letter dated July 23, 1980, from Michael Shelander, the Respondent confirmed Starbird's discharge. This letter states:

Because of your calling the police into the Photo Drive Up lab 7/14/80 causing a work stoppage and delays and your continued uncooperative attitude toward management I find it necessary to terminate your employment.<sup>97</sup>

Michael Shelander testified that he learned from his wife, Lynn Shelander, now Starbird's night-shift supervisor, that Starbird had "totally ignored" his instructions regarding "soliciting," and she recommended Starbird's discharge. Presumably this occurred on the morning of July 23, 1980. Shelander stated that he then called Starbird that evening, before she was scheduled to report for work, and his version of their conversation went as follows:

I asked Ms. Starbird if she could come to work a little earlier to speak to me and she said why and I said well, I understand that you have a transportation problem. She says are you going to fire me and I said well, yes. She says you'll never get away with it and I said what do you mean. She says it's going to cost you eight dollars an hour plus. I said I don't understand. And then she just laughed and hung up, as I recall.<sup>98</sup>

<sup>97</sup> It should be noted that on Starbird's "employment Change of Status Report," a form used by the Respondent to record employee dispositions such as hire, discharge, promotion, etc. (G.C. Exh. 23), the box listed under "Dismissals," which Shelander marked as the reason for Starbird's termination, is "incompatibility." There are also boxes on the form for "insubordination," "failure to follow instructions," "failure to comply with policy," and a box marked "Other." None of these other boxes was marked as the reason for Starbird's discharge. Shelander's explanation for this was "Because I terminated her for uncooperative attitude, and I didn't have a box for that." However, Shelander in an apparent attempt to explain away his failure to make other reasons on the form as appropriate for Starbird's discharge in support of the reasons now given by the Respondent herein agreed with counsel for the Respondent that he felt "incompatibility" would probably have been the most appropriate box to check under the circumstances. I do not agree. It should be noted that any of the above other reasons or all of those listed above would have been more appropriate.

Additionally, Shelander's testimony concerning the preparation of this form continued to be contradictory and unclear in that he testified that the form was prepared by him "a few days" after Starbird's termination and since his time is taken up in "trying to run a Photo Drive Up" he only "briefly" considered and reflected on its preparation and completion. He then testified that he completed the form the next morning after Starbird was fired. However, Shelander also testified that he always dates such report forms as to the effective date of the employee action taken and as to the date he completes the form. Both of these dates appear as "7/23/80" on Starbird's form, with his signature also thereon.

<sup>98</sup> Shelander's testimony concerning when he had decided to terminate Starbird was again equivocal and guarded. Shelander testified that he had not as yet made his mind up about her discharge when he telephoned her, being disappointed that she had disobeyed his instructions, and feeling that there was a chance to resolve any problems between them if they could talk about this. He then testified that he decided to discharge her when she told him it would be inconvenient for her to come in. According to his own testimony, when Starbird asked him directly if he intended to fire her, information she needed before she came into the plant in view of her acknowledged "transportation problem," Shelander immediately terminated her.

After his recollection was refreshed, Shelander remembered that he had given Starbird as the reasons for her termination, "her continued uncooperative and insubordinate attitude," and because of the "pornography incident."<sup>99</sup> While Shelander admitted that he was aware of Starbird's prouion feelings and the fact that she was an active union adherent he denied discharging her because of this.<sup>100</sup>

*What Occurred on July 24, 1980:* Gina Margherone testified that on July 24, 1980, at approximately 6 a.m. John Fritts, the swing shift supervisor, asked her to accompany him outside the plant, that he wanted to speak to her. She stated that Fritts told her that "if I would keep talking union, on company time, that they were going to fire me." Margherone continued, "And I told him, who was talking union? And he mentioned that Richard [Isla] had told him that I'd been talking to him about it."<sup>101</sup> Margherone denied that she had solicited employees to join the Union during working hours after she saw the posted notice regarding the Respondent's "no solicitation rule."<sup>102</sup> She added that prior to its posting she had not been informed that such a rule even existed.

Margherone testified that Ellen Starbird was the "prime organizer of union activity" at the Respondent's plant. She stated that Starbird had solicited employees at their work stations prior to the night shift encompassing July 21-22, 1980, during which Bunker remained at the plant the "entire evening." Margherone continued that she had not noticed whether or not Starbird solicited employees at their work stations after the "no solicitation rule was posted in the break areas," since she and Starbird worked different shifts, although their shift hours sometimes overlapped, because she worked a different shift on occasion other than her regular "swing" shift assignment. However, Margherone appears also to have testified that Starbird engaged in union activities after that as well.<sup>103</sup>

<sup>99</sup> Shelander testified that he told Starbird that one reason for her discharge was that she "had ignored his instructions about soliciting her fellow employees." He stated that she had an uncooperative and "poor attitude" toward supervisors. Shelander stated that he also told her that "she had violated company policy by calling the police on the occasion of the pornography incident."

<sup>100</sup> Shelander testified that he had previously terminated an employee, Jeff Parrish, for insubordination and an uncooperative attitude. Parrish had raised his voice to Shelander demanding his paycheck before the scheduled payday, performed his work poorly, and argued and demanded on various occasions a larger salary increase than he had been given.

<sup>101</sup> Margherone testified that she had in fact suggested to Isla that he join the Union while Isla was at his work station but she was unsure as to when this happened. At first she stated that it happened on the "same night" that she had the conversation with Fritts, then she recanted this and stated that she was not sure as to when it actually occurred. Isla testified that both Jensen and Slater had complained to him about Margherone's soliciting them on behalf of the Union.

<sup>102</sup> Margherone testified that she spoke to Jensen once while he was at his work station but before the posting of the no-solicitation rule, and thereafter solicited him to join the Union but "not on company time." She also testified that she spoke to Diane Long about joining the Union but this occurred before the posting of the Respondent's no-solicitation rule.

<sup>103</sup> However, it should be noted that immediately after answering "Yes" to this question she responded "No" to a similar question. This part of her testimony is unclear. It appears to me from a close reading of the record that Margherone's testimony concerning this was elicited by a

*Continued*

John Fritts<sup>104</sup> testified that in July 1980 he became aware that Margherone and Starbird were soliciting employees to join the Union. He stated that employee Diane Long had complained to him "during that week when I spoke to Gina"<sup>105</sup> about being harassed by Margherone and Starbird at her work station.<sup>106</sup> Fritts related that Long told him, "She couldn't take the harassment of Gina and Ellen coming to her work station. She was also afraid that her car tires were going to be slashed if she didn't go along with what they were talking to her about . . . about signing a Union card. . . . She told me she wanted no part of the whole thing but at the same time she was afraid." He related that Long had said she would quit the Respondent's employ if the harassment did not stop.<sup>107</sup> Fritts continued that he told Long not to quit and that he would speak to Margherone about this. Fritts added that Eric Jensen had also complained to him that Margherone "was bothering him at his work station."<sup>108</sup>

Fritts related that because of these complaints he "talked to Gina outside the back door" and told her "to quit soliciting the people at their work stations . . . that she could do it on a break . . . but not when people were working." Fritts denied that he had told Margherone that she would be fired if she continued this. He testified, "I made no statement at all to that effect. I simply asked her to stop what she was doing. I told her what she was doing was wrong and I asked her to stop." According to Fritts, Margherone responded, "Oh, you're just harassing me because of the Union," and then she walked back inside the plant.

*What Occurred on July 29, 1980:* Jackie Shibata testified that on July 29, 1980, after the completion of her work shift and while Lynn Shelander was driving her home, Shelander told her that "she felt that Greg [Bunker] would close the lab up and move it elsewhere . . . . You know, if a union came in . . . . Well, that she would be out of a job and that I would be out of a job . . . . Well, if he closed the lab up and moved it elsewhere." She related that Shelander also said, "what did the girls want, you know, what did they hope to gain with a union," to which Shibata responded, "they want better pay, and better medical." Shibata stated that Shelander did not respond to this "because it was just, you know, like two friends talking to each other, you

confusing series of questions asked by counsel for the Respondent on cross-examination with objections raised by counsel for the General Counsel only exacerbating the confusion. Her testimony was not clarified on redirect or recross-examination.

<sup>104</sup> Fritts is the "swing" shift supervisor and in July 1980 supervised the following employees: Pamela Kline, Donald Alan Slater, Craig Park, Jennifer Paet, Brenda Flowers, and Gina Margherone.

<sup>105</sup> Fritts also testified that this occurred the day before he spoke to Margherone.

<sup>106</sup> Fritts stated that Long was "very upset" and "shaking" at the time she spoke to him about this.

<sup>107</sup> Fritts testified that Long had complained to him "two or three times before that," presumably about Margherone and Starbird, but that he had ignored it at those times.

<sup>108</sup> While Jensen testified extensively concerning Starbird's efforts to solicit his signature on an authorization card and his support for the Union, and as to his complaints to Fritts about this, he made no mention of Margherone as having harassed or solicited him or his having complained to Fritts about this concerning Margherone.

know."<sup>109</sup> She added that she and Shelander had had "many conversations," about "a lot of things" including the Union. Also present in the car at the time was Shelander's niece, Theresa Holub.<sup>110</sup>

Lynn Shelander testified that "within approximately a week" after Starbird was terminated, while she was driving Jackie Shibata home, she asked Shibata, "Jackie, tell me what is going on. I don't understand what has happened to this crew. These are not the people I know. It has got me frustrated and confused, and upset. You are not even talking to me, and you are my friend. What is our problem? Why are we in this situation?" Shelander related that after Shibata told her that she was "uptight too" Shelander said to her, "I don't understand what is wrong with the girls. I don't understand what the girls want, what has happened to them. It has almost changed them into totally different people that I have never even known before. Help me. What can I do? How can I get the crew back on a working format again?"<sup>111</sup> Shelander denied telling Shibata that the Respondent would close his plant if the Union came in. According to Shelander,

. . . what I stated was that I have been involved indirectly and personally with Union-related activities on three separate occasions in the photo-finishing business. In two such cases, plants have been closed. Most recently . . . it was Technicolor in San Francisco. They simply closed the plant down and moved it. The second instance was an attempt to unionize the drivers at Phototron, San Jose, when I was employed there, and I firmly believe that had the Union been successful that the sole owner, Mr. Ralph Steady, would have closed that plant. I am afraid, frankly, of being unemployed.

*What Happened Thereafter:* Shibata testified that, sometime in August 1980<sup>112</sup> while she was working at the

<sup>109</sup> Shibata testified that she and Lynn Shelander are friends and that, after she gave an affidavit to a Board agent during the investigative stage of this proceeding, she told Shelander about it because she felt that she had been unjust to Shelander by relating therein conversations they had between them as friends. She also testified that at the time of the conversation she did not consider Shelander to be speaking as a representative of the Respondent.

<sup>110</sup> Holub was not called as a witness during the hearing.

<sup>111</sup> Shelander initially testified that when she again became the night-shift supervisor, in and around July 20, 1980, soon after Swami had been terminated, she immediately noticed a tense atmosphere which she believed to be partly due to the "pornography incident," and later on that week, after she learned about the Union's organizing campaign, she knew that this was a factor also. She then acknowledged that the "whole very tense, upset atmosphere, the animosity towards me, the unwillingness for people to communicate with me on anybody" was brought about primarily because of the "manner in which [the Union] was trying to organize" the Respondent's employees. Shelander also stated that since she was the plant manager's wife she believed that the other employees felt she might be a "company spy."

<sup>112</sup> While Shibata could not remember whether this happened in August, September, or October 1980, counsel for the General Counsel having fixed the date as August 1980 in his initial question concerning the incident, she did recall that it occurred during a PSA strike and that the Board's election was pending at the time. It should be noted that the Decision and Direction of Election by the Regional Director for Region 32 is dated September 22, 1980. However, the parties stipulated that a Board election had been scheduled for October 21, 1980.

laboratory, Lynn Shelander mentioned to her that she was going to a meeting and would "be back later." Shibata stated that, at or about 1 a.m., she was just going "on break" with some of the other employees, Pamela Kidder, Nancy Torres, Kathy Milligan, and Rebecca Morales, when Shelander returned to the plant and joined them in the break area. Shibata related that she and Kidder were curious as to what had happened at the meeting and engaged Shelander in conversation about this.<sup>113</sup> She continued:

I know—sometime during the conversation [Shelander] said that Greg [Bunker] was thinking about giving us a better medical, with maybe possibly a dental plan on it and I had said that—well, I was more interested in a better medical, rather than a raise in—an increase in salary, whereas . . . Pam was interested in a raise in salary plus the medical also . . . I know at one particular time, I had said—I had asked if Greg would be the type of person that would, you know, say he would give it to us and then not give it to us after we'd voted a union down. And she said that she—that Greg was really a very generous person, which he is—he's proven that and that she really didn't think that he would—you know—if he said that he would give something, he would do it. I know that she said that she rather than being a middle person, we should all get together with Greg and tell him ourselves what we wanted and—I think Pam agreed to that. She thought that that would be a good idea. . . .<sup>114</sup>

Shibata recounted that "we must have been talking about money or something at the time" and they asked Shelander if Ellen Starbird's case was still pending and Shelander replied "that even if Greg was thinking about giving us a 10 cent cost of living increase, he couldn't until Ellen's case was over."<sup>115</sup> She testified:

I do not recall if Lynn asked us specifically at that time what we were interested in or whether she was making her comments in response to a subject that one of the employees brought up, but I seem to remember Lynn saying that at the meeting she had just attended "Greg wanted to know what the girls wanted . . ." I also asked Lynn why Greg was interested in giving us more pay and a better medical plan at that particular time. I further asked if it was related to the union trying to get it. Lynn said that Greg wanting to do these things was not related to the union activities, but rather he was talking about

<sup>113</sup> Shibata testified that the other employees in the break area were talking among themselves at this time in another group.

<sup>114</sup> In her affidavit dated October 22, 1980, given to a Board agent, Shibata had stated:

[Shelander] went on to say that instead of using her as a middle person, the employees ought to speak directly to Greg in some kind of joint discussion. . . . Not individually, by ourselves, but like maybe in a group or something.

<sup>115</sup> In her Board affidavit Shibata had stated:

[Shelander] said that even if he was, meaning Greg, thinking about giving us a 10 cent cost of living increase and provided us with a better plan that would perhaps include a dental plan, he couldn't do so until the union issue was resolved.

more pay and better medical benefits at that time, only because the company was relatively new and was just getting around to those issues. . . .

At one point she said, "He would like to give us more pay and better medical benefits would that make us happy." My response was "I am right in the middle and I don't know which way I'll go." What I meant by that comment was that I didn't know at that point whether I would vote for or against the union.<sup>116</sup>

Shibata added that at the time this conversation occurred a Board election had already been scheduled by the Regional Director for Region 32.<sup>117</sup> Interestingly, Shibata also testified that, after her conversation with Shelander, she called the Union to verify Shelander's statement that even if Bunker desired to give the employees a 10-cent-an-hour cost-of-living wage increase he could not, until the question of union representation was resolved. She stated that the Union's representative told her that this was true.

Lynn Shelander testified that the conversation among her, Shibata, Kidder, and Kathy Milligan, who was also present, occurred in late September or early October 1980. She stated that Milligan had asked her about the possibility of a cost-of-living increase and was it not required "by law," and Shelander responded that there is no legal requirement and that, even if Bunker wanted to, "there could be no changes in accepted company policies, procedures, including a cost-of-living raise could not be given until the Union matter was resolved." Shelander recounted that she also told the employees that "the matter of our established procedure of doing evaluation and giving normal raises would not be changed." Shelander related that there was a PSA strike in progress at the time, and the Orange County airport had been closed for runway resurfacing creating a problem concerning the shipping of film for development from Los Angeles to the laboratory in San Jose, and either Kidder or Shibata wanted to know how this would affect their hours of work and pay, and asked her what had happened at the meeting with Bunker.<sup>118</sup> She added that Shibata asked her about the possibility of obtaining a better medical program to include dental coverage, and Shelander told them that the Respondent's medical plan had "already been upgraded once," and that "even if we wanted to at this time, we could not make any changes until the Union business is resolved." Shelander continued that the employees then returned to their work stations.

Neither Pamela Kidder nor Kathy Milligan was called as a witness by any of the parties herein to testify about this conversation, although both were still employed by the Respondent at the time of the hearing.

<sup>116</sup> Shibata read this into the record from her affidavit.

<sup>117</sup> As hereinbefore set forth the election was scheduled for October 21, 1980.

<sup>118</sup> Shelander testified that Bunker informed her at this meeting that he had decided to run "specials" and try to bring extra work into the plant to increase employee work hours. Shelander stated that the meeting "started about 11:00 p.m., and I returned to the lab at approximately 1:00 [a.m.]"

*The Appropriate Unit:* The amended consolidated complaint alleges that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laboratory employees and drivers employed by the Employer at its Meridian Avenue, San Jose, California facility; excluding all retail clerks, retail sales clerks, guards and supervisors as defined in the Act.

The Respondent denies this allegation in his answer. According to the Decision and Direction of Election issued by the Regional Director for Region 32 in Case 32-RC-1128, which representation case involved the same parties as herein, the Respondent stipulated to the very same unit, as above, as being appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. The Regional Director for Region 32 also found therein that the record in that proceeding supported the stipulated unit's appropriateness.

It has long been the Board's uniform policy to refuse to redetermine unit issues in an unfair labor practice proceeding in the absence of changes of facts surrounding a prior unit determination, or the discovery of evidence unavailable to the Respondent in the representation proceeding.<sup>119</sup> Moreover, as the Board stated in *Baker & Taylor Co.*, 109 NLRB at 246:

This principle is applicable equally to cases in which the necessary facts are determined by the Board upon the record of a hearing, and to cases in which the parties have consented to expedite resolution of a question of representation by agreeing to the determinative facts for purposes of conducting the election.

Further, the burden of proof in establishing that there have indeed been changes that would warrant altering the appropriate unit, as determined in the context of a representation case, is upon the party asserting such change.<sup>120</sup> In this case the Respondent offered no evidence at all on the issue of unit appropriateness nor explained in any way why the above unit is not appropriate for the purposes of collective bargaining.

In view of the above I find and conclude that the unit herein appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

All full-time and regular part-time laboratory employees and drivers employed by the Respondent at his Meridian Avenue, San Jose, California facility; excluding all retail clerks, retail sales clerks, guards and supervisors as defined in the Act.

*The Union's Demand for Recognition and Bargaining:* Ronald Lind testified that on July 25, 1980, after he had received signed authorization cards from a majority of the Respondent's employees in the appropriate unit, he

and Steve Stamm appeared at the Respondent's plant at approximately 3 p.m. of that day and spoke to Greg Bunker, the Respondent's owner.<sup>121</sup> Lind stated that he presented Bunker with a letter from the Union "which demanded recognition based on what we felt was majority status."<sup>122</sup> Lind related that he asked Bunker to recognize the Union "based on a card check" and Bunker responded "that he didn't think that he had to recognize us."<sup>123</sup> Lind continued,

He went on to complain that he did not like the way that the organizing program had progressed. He said that people had been promised \$8.00 an hour. He said that—he said that the Union had hired—had paid someone to infiltrate his plant and to organize. He accused us of that.<sup>124</sup>

He said that we were not what he expected to show up demanding recognition. . . . He said he expected two short, fat Italians in dark suits wearing pink earrings and smoking cigars.

We spoke about—I said it would be a lot easier for him in the long run to grant us recognition rather than going through an election process.

He said that he couldn't afford to have a Union, that all of his money was tied up in equipment, that he had no checking account, that everything he owned was in front of us.

Lind added that by letter dated July 29, 1980, from the Respondent's counsel to the Union, the Respondent confirmed his decision not to recognize or bargain with the Union for the reasons set forth therein.<sup>125</sup>

Bunker testified that on July 25, 1980, he met with representatives from the Union who, without "advance notice," appeared at the plant and presented him with a letter alleging that the Union represented a majority of his employees. Bunker maintained that he had "very little recollection of that conversation" although he acknowledged that he did refuse at the time to recognize the Union or to negotiate with it. He stated that when

<sup>121</sup> Lind testified that Bunker was at his desk in the laboratory when this occurred and that while Michael Shelander "occasionally walked by" he was not present throughout the conversation.

<sup>122</sup> The letter, dated July 25, 1980, in substance indicates that the Union represents a majority of the Respondent's employees in various job categories, and demands that the Respondent negotiate a collective-bargaining agreement with it. See G.C. Exh. 21.

<sup>123</sup> Lind related that Bunker asked them who a possible impartial person would be to verify the authenticity of the signed authorization cards and Lind offered that a rabbi or priest could serve this purpose.

<sup>124</sup> Both Lind and Starbird denied that Starbird was being paid by the Union for her organizing efforts at the Respondent's plant on behalf of the Union. Additionally, while Lind initially testified that Starbird was given employment by the Union as an "informational" picketer after her discharge by the Respondent he subsequently, on rebuttal, testified that he was mistaken, that it was Margherone, not Starbird, whom the Union employed after her discharge.

<sup>125</sup> In the letter the Respondent, in substance, expressed his doubt that the Union represented an "uncoerced and informed majority of the employees in an appropriate unit," declared unacceptable the Union's offer to establish its majority by a card check, suggested that the Union "file a petition for an election with the Labor Board" so that the issue of representation can be resolved in "the best way," and suggested that "an open discussion" be held between union and employer representatives in the presence of the employee. See G.C. Exh. 22.

<sup>119</sup> *J. H. Filbert, Inc.*, 165 NLRB 648 (1967); *Corral Sportswear Co.*, 156 NLRB 436 (1965); *Baker & Taylor Co.*, 109 NLRB 245 (1954).

<sup>120</sup> *Arizona Public Service Co.*, 188 NLRB 1 (1971).

this meeting took place he did not know whether or not the Union represented a majority of his employees, in actual fact believing that the Union lacked such majority status. Bunker added that he was unfamiliar with what the Union meant in its letter when indicating that "guards and supervisors" are to be excluded from the appropriate unit.<sup>126</sup> However, on cross-examination, despite his "very little recollection" of what was said, Bunker remembered with certainty that the Union's representatives did not offer to prove their majority representation by "card check."<sup>127</sup>

*Unit Placement of Employees:* The parties herein stipulated that the following employees are properly includible in the unit found appropriate above and were employed by the Respondent during the payroll period ending July 31, 1980: Mistee Strawn, Bernice Cervantes, Linda Coker, Brenda Flowers, Karen Gomez (a/k/a Karen Hooker), Eric Jensen, Pamela Kidder, Pamela Kline, Vincent Ridgeway, Donald Alan Slater, Mary Sweeney, Linda Sue Basim, Jackie Shibata, Lee Ann Willhite, Darla Jean Espinoza, Larry Dula, Elaine Brewer, Diane Long, and Jennifer Paet.

The General Counsel alleges that also includible in the unit are Ellen Starbird, who was discharged on July 23, 1980, allegedly unlawfully, and Gina Margherone, who was terminated on July 31, 1980. While the Respondent at the hearing took the position that both Starbird and Margherone should be excluded from the unit, in his brief the Respondent agreed that Margherone should be included therein,<sup>128</sup> albeit Starbird should still be excluded therefrom.<sup>129</sup> Additionally, the Respondent asserts that the following employees, Craig Park, David Kettman, Rene Carrillo, and Lea Powers should also be included in the appropriate unit. The General Counsel would exclude these employees from the unit.<sup>130</sup>

<sup>126</sup> Lind testified that he explained to Bunker the criteria upon which a finding of supervisory status is made, i.e., right to hire, fire, discipline employees, or effectively recommend the same, etc., and discussed with Bunker the issue of the exclusion of guards from the unit.

<sup>127</sup> I must admit that Bunker's almost total lack of recall of what was said during this conversation seems arbitrary and contrived in view of his clear and complete remembrance of conversations and events which occurred shortly before this one, and is in line and consistent with the whole tenor of his testimony in this case wherein he answered questions posed by counsel for the Respondent, whether on direct or cross-examination, clearly and unequivocally, but became guarded, unclear, and evasive when questioned by counsel for the General Counsel. Bunker's answers concerning his meeting with the Union's representatives on July 25, 1980, is particularly reflective of this. See Bunker's testimony herein.

<sup>128</sup> I cannot believe that this was done through mistake or inadvertence, since the Respondent's brief makes extensive reference to the record reflecting familiarity with the evidence set forth therein. Moreover, the evidence clearly shows that Margherone signed an authorization card on July 18, 1980, was employed by the Respondent on July 25, 1980, when the Union made its demand for recognition and bargaining to Bunker, and she was not discharged until July 31, 1980.

<sup>129</sup> The Respondent maintains that Ellen Starbird was lawfully discharged for cause on July 23, 1980, prior to the Union's demand for recognition and bargaining, and therefore should not be included in the unit.

<sup>130</sup> At the hearing the Respondent also alleged that Theresa Holub and "possibly" Wayne Borch were employees who also should be included in the appropriate unit. However, the Regional Director for Region 32, in his Decision and Direction of Election in Case 32-RC-1128, found Holub to be a temporary employee excluding her from the unit, and it would appear that the Respondent now agrees with that determination since in his brief he does not again assert her inclusion in the unit. Theresa Holub is, as well, the niece of Plant Manager Michael Shelander, and was living with the Shelanders at the time of her employment. With

Furthermore, Michael Shelander testified that the photofinishing business, in which the Respondent is engaged, is "cyclical with peaks and valleys," with the peak seasons being "the Christmas holidays and summer." He stated that the Respondent employs students on a regular basis either full time or part time although most of the student employees work on a part-time basis or on evening shifts which do not conflict with their school hours.<sup>131</sup> Shelander stated that the Respondent experiences a high employee turnover rate at its Meridian Avenue plant.

a. *Craig Park and David Kettman:* The record shows that Craig Park was a first-year student majoring in biology at West Valley College, and David Kettman a second-year student majoring in art and photography at San Jose State University. Both Park and Kettman were employed during the summer of 1980 including the payroll period ending July 31, 1980, and until September 2, 1980, and September 29, 1980, respectively, when they left the Respondent's employ to return to school. The evidence herein shows that Park's last employment prior to taking this job with the Respondent was with Fotomat in Santa Clara for the summer period July through September 1979. Additionally Park indicated in his employment application form for the Respondent that he was "available for evening work anytime." However, there is no evidence in the record that the Respondent either offered work to Park after September 2, 1980, or that Park actually worked for the Respondent at any time thereafter.

The evidence also shows that Kettman left his last employment prior to that with the Respondent "because he was a full time student and there was a job conflict." While Shelander wrote on Kettman's "Employee Change of Status Report" that Kettman was "returning to school full time and cannot work but part time weekends" again there is no evidence in the record that the Respondent either offered work to Kettman after he left the Respondent's employ on September 29, 1980, or that Kettman actually worked for the Respondent thereafter. The Respondent alleges that Park and Kettman were "full time" employees includible in the appropriate unit. The General Counsel asserts that they were "summer temporary employees lacking sufficient regularity of employment to warrant their inclusion in the unit."

In *Georgia-Pacific Corp.*, 195 NLRB 258, 259 (1972), the Board stated,

... where a student is hired for the summer vacation and will terminate at the beginning of the school year, the student is a temporary employee and not included in the unit. *O'Hara Metal Products*

regard to Borch, the evidence shows that he left the Respondent's employ on July 9, 1980, to join the U.S. Coast Guard. Moreover, the Respondent in his brief apparently also changes his position concerning Borch, since he failed to assert therein that Borch should be included in the unit, nor did he in fact list Borch's name among the employees proposed therein as properly in the unit.

<sup>131</sup> While Shelander testified in this proceeding that he hires only permanent full-time or part-time employees, in the representation case, Case 32-RC-1123, he testified that he had hired Theresa Holub as a temporary employee.

Co., 155 NLRB 236; *Sandy's Stores, Inc.*, 163 NLRB 728. All other such student employees shall be included in the unit, and are eligible to vote, including any such student employees who, upon returning to school, continue their employment on a regular part time basis. *Sandy's Stores, supra*; *The Horn & Hardart Company*, 147 NLRB 654; *Farmers Insurance Group, et al.*, 143 NLRB 240; and *Giordano Lumber Co., Inc.*, 133 NLRB 205.

Applying the facts present herein to the Board's general rule in *Georgia-Pacific Corp.* I find and conclude that both Park and Kettman were summer temporary employees who "do not enjoy a regularity of employment sufficient to create the requisite community of interest with the regular employees."<sup>132</sup> Therefore they should not be included in the appropriate unit.

In his brief the Respondent cites *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978), in support of his position that Park and Kettman should be included in the unit. However, in that case the Board, in continuing to apply its above general rules to students, held,

As these employees work on holidays and Saturdays during the school year, as well as the entire summer, we find that they are regular part-time employees and shall include them in the . . . unit.

Upon reflection and based upon the facts present in the instant proceeding, the *Dick Kelchner* case more strongly supports the General Counsel's position herein than the Respondent's.<sup>133</sup> Moreover, the other cases cited by the Respondent in his brief concern "seasonal employees," not students who would work full time or part time all year round, if possible, and whose factual circumstances are different and distinguishable, these cases being therefore not really applicable or informative on this particular issue.

b. *Rene Carrillo*: The evidence discloses that Rene Carrillo, a high school student, was employed by the Respondent during the summer of 1980, including the payroll period ending on July 31, 1980, and until sometime in September 1980, when she left the Respondent's employ to return to school. Michael Shelander testified that Carrillo "has returned two summers, on [one] Christmas vacation and has full intentions of returning this summer permanently."<sup>134</sup> The Respondent asserts that Carrillo should be included in the unit while the General Counsel contends she should be excluded as a temporary employee.

<sup>132</sup> *Berenson Liquor Mart*, 223 NLRB 1115 (1976); *De Luca Bros., Inc.*, 201 NLRB 322 (1973); *Georgia-Pacific Corp., supra*, and cases cited therein. Also see *Melba Theatre*, 260 NLRB 18 (1982).

<sup>133</sup> The Respondent also contends that, since the parties stipulated that Pamela Kline and Donald Alan Slater properly belong in the unit, and Kline and Slater were also students, "their inclusion compels the inclusion of Park, Carrillo and Kettman." I do not agree. The evidence herein shows that not only were Kline and Slater employed by the Respondent during the summer of 1980, but they were also still employed by the Respondent at the time of the hearing, and clearly under those circumstances includable in the unit.

<sup>134</sup> Shelander testified that Carrillo had told him of her intent to return to work the following summer. Carrillo did not testify at the hearing.

In *Melba Theatre*, 260 NLRB 18, 22 (1982), the Board affirmed the Administrative Law Judge's findings therein that:

The general Board rule is that "college [or high school] students who perform full-time unit work during the summer months as well as part-time unit work on a regular basis during the remainder of the year are to be included in the unit. . . . The determinative criteria as to whether students are to be included in a unit appears to be the regularity of their part-time employment [which may be as little as one day per week.]" *Century Moving & Storage, Inc.*, 251 NLRB 671, 681 (1980), and cases cited therein.

While Carrillo worked successive summers and one Christmas vacation I do not believe that this establishes any "regularity of part time employment," to warrant her inclusion in the unit.<sup>135</sup> I therefore find that Rene Carrillo should be excluded from the unit found appropriate herein.

c. *Lea Powers*: The record shows that Lea Powers was hired by the Respondent on July 30, 1979, and remained continuously employed until sometime in April 1980, when she "took medical leave of absence because of pneumonia." Michael Shelander testified that Powers submitted a doctor's "note" indicating that she would be away from her job for a period of 2 weeks. He stated that a second medical statement from her doctor "recommended an extended three to six week period . . . because she wasn't responding well."<sup>136</sup> Powers returned to work in September 1980. According to Shelander's "opinion," during the period April through September 1980, while Powers was on "medical leave of absence," she remained on the Respondent's payroll nonetheless although not working.<sup>137</sup> Shelander continued that, after the expiration of the period in the doctor's second "note," Powers did not return to her job nor contact the Respondent until her resumption of work in September 1980. He added that Powers performed "finishing" work and that, while she was on medical leave, the Respondent had hired "at least two" finishers to work in the laboratory.

An employee on sick or other leave is ordinarily presumed to continue in that status and to have a reasonable expectation of returning to work, unless he or she is shown to have resigned or been terminated before the crucial date.<sup>138</sup> A party seeking to overcome that presumption must affirmatively show that the employee has resigned or been discharged.<sup>139</sup> Powers was on sick leave for at least a total of 10 weeks starting sometime in April 1980.<sup>140</sup> This would bring us to a period sometime

<sup>135</sup> Also see *Dick Kelchner Excavating Co., supra*; *Georgia-Pacific Corp., supra*.

<sup>136</sup> The doctor's "note" actually states "six to eight weeks."

<sup>137</sup> However, Powers' name does not appear on the Respondent's payroll records for the payroll period ending July 31, 1980.

<sup>138</sup> *J. P. Stevens & Co.*, 247 NLRB 420 (1980); *Hercules, Inc.*, 225 NLRB 241 (1976); *Miami River Co.*, 147 NLRB 470 (1964).

<sup>139</sup> *Medline Industries v. NLRB*, 593 F.2d 788 (7th Cir. 1979), and cases cited therein.

<sup>140</sup> Using the periods set forth in the doctor's first and second "notes" totaling at the outside 10 weeks.

in June or July 1980. Powers was not on the Respondent's payroll for the payroll period ending July 31, 1980, nor did she contact the Respondent or advise him through anyone as to when she was returning to work. Powers actually remained away from her job until September 1980, when Powers resumed her position with the Respondent. However, there was no manifestation on the part of the Respondent, clearly communicated to Powers, that he had terminated or was terminating the employment relationship, which manifestation and communication would appear to have been essential for a termination.<sup>141</sup> Moreover, Powers gave the Respondent no reason to believe that she would not return to work. In fact, she eventually did so in September 1980, approximately 3 months after the time requested for recovery of her illness in her physician's "notes." Therefore, under the circumstances of this case I find and conclude that Lea Powers had a reasonable expectation of future employment during the payroll period ending July 31, 1980, including the date, July 25, 1980, when the Union made its demand upon the Respondent for recognition and bargaining although she was not actually on the payroll at the time, and therefore Powers should be *included* in the appropriate unit.<sup>142</sup>

### C. Acts of Interference, Restraint, and Coercion

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

#### 1. Interrogation of employees concerning their union activity and support

The amended consolidated complaint herein alleges that the Respondent interrogated his employees regarding their own and other employees' union and/or protected activities and sympathies in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

#### Analysis and Conclusions

The evidence shows that on or about July 16 or 17, 1980, immediately upon learning of the involvement of the Respondent's employees with the Union, Plant Manager Michael Shelander engaged employee Gina Margherone in conversations concerning this at work. Margherone testified that Shelander told her that he had heard that the employees "were trying to get a union into the place," and then Shelander asked her if she was going to attend the union meeting to be held the next day and she

answered "yes." Margherone continued that after she attended the union meeting on July 18, 1980, that same evening at work, Shelander questioned her about the size of the group of employees who attended the meeting, and asked her about what had occurred therein. Margherone stated that she told Shelander that "quite a few people did show up," and that "I really didn't want to talk about it." Margherone added that she then asked Shelander if her attendance at the union meeting would "have anything to do with my job" and Shelander responded that it would not.

Concerning the above Shelander testified that, at their first conversation prior to the union meeting, he merely asked Margherone "what she knew about a union meeting." Shelander stated that after Margherone acknowledged that such a meeting was going to be held she asked him, "Is this going to get me fired and I said of course not." Shelander related that during the second conversation, after Margherone had attended the union meeting on July 18, 1980, "I asked her if she went to the meeting. She said yes, and I asked her if she could tell me about it and she said no, she really didn't want to talk about it."

Furthermore, Ellen Starbird testified that when she reported for work on the night shift encompassing July 22-23, 1980, Michael Shelander told her, "I understand you're soliciting union cards." Starbird related that when she told Shelander, "Mike, you've not allowed to ask that," he responded, "Well, I have witnesses that you've been soliciting union cards." Shelander testified that, after receiving various reports that Starbird was "harassing" employees and "soliciting their signatures," he told her that he knew about her union activity and directed her "to discontinue solicitation of the employees at their work stations."

Additionally Jackie Shibata testified that Supervisor Lynn Shelander, while driving her home from work on July 29, 1980, asked her, "What did the girls want, you know, what did they hope to gain with a union." Shelander testified that what she told Shibata during this car ride was, "Jackie, tell me what is going on. I don't understand what has happened to this crew. . . . I don't understand what is wrong with the girls. I don't understand what the girls want, what has happened to them. . . . Help me. What can I do? How can I get the crew back on a working format again?"

With regard to what occurred during the above conversations I fully credit the accounts thereof given by

<sup>141</sup> *Keeshin Charter Service*, 250 NLRB 780 (1980); *NLRB v. Staiman Bros.*, 466 F.2d 564 (3d Cir. 1972).

<sup>142</sup> *Price's Pic-Pac Supermarkets*, 256 NLRB 742 (1981); *J. P. Stevens & Co.*, *supra*.

The General Counsel asserts that "Rather, Respondent replaced Powers with at least two additional employees performing the work she had performed and Powers did not return to employment until Septem-

ber 1980. In these circumstances, where Powers' absence from work was of indefinite duration and she was replaced, her status in the payroll period ending July 31 cannot be considered anything more than that of a former employee who had been forced to leave employment due to illness." I do not find that the evidence herein supports this contention. I also do not find that the General Counsel overcame the presumption of Powers' continued sick leave status on July 25, 1980.

Gina Margherone,<sup>143</sup> Ellen Starbird,<sup>144</sup> and Jackie Shi-

<sup>143</sup> I am aware that Margherone candidly acknowledged hostility and anger toward the Respondent because of her discharge. However, she also admitted to having these same feelings toward the Board and the Union for the reasons, respectively, that the Regional Director for Region 32 refused to issue a complaint based on her charge that the Respondent unlawfully terminated her, and that the Union failed to "support" her concerning this dispute despite her having been an active participant in the Union's organizational campaign. That she entertained such feelings against all the parties concerned herein is bolstered by the fact that her appearance as a witness, albeit for the General Counsel, was compelled and obtained through subpoena, Margherone admitting that she was reluctant to appear in this proceeding as a witness for any of the parties.

<sup>144</sup> Starbird's testimony concerning the events that transpired up through her discharge on July 23, 1980, was perhaps the clearest and most comprehensive of any of the witnesses who testified herein. In most part it was clear, unequivocal, and forthright, and consistent with the other evidence in the record. The Respondent in his brief attempts to discredit her testimony on the grounds that it was in part less believable than his own witnesses, that her testimony was inconsistent, and that the evidence herein suggests that Starbird was an "immature young lady" who had demonstrated hostility toward authority (her employer). I do not agree and find that the record refutes the Respondent's attempts at her discreditation. That Starbird's testimony is more believable than the Respondent's own witnesses will be amply shown hereinafter in the discussion of the various incidents which occurred. That the alleged inconsistencies in Starbird's testimony, referred to in the Respondent's brief, are not actually such becomes amply clear upon a close analysis of the record herein. Her testimony concerning Mary Sweeney's authorization card, although a trifle confusing, basically relates that she gave Sweeney an authorization card to sign and received the signed card back from Sweeney and, more importantly, is somewhat consistent with what she stated in her affidavit previously given in this matter to a Board agent. Again, her testimony herein, about her being discharged twice, is certainly consistent with her testimony given at the representation hearing. She believed, although not too surely, that Swami had discharged her when he sent her home on the evening of the "pornographic incident" and that Shelander's allowing her to return to work the next day constituted a re-hiring. Be that as it may, even conceding these as inconsistencies, they pale and become less important and convincing as a determinant against her credibility when compared to the varied, numerous, and important inconsistencies evidenced in the testimony of the witnesses testifying on the Respondent's behalf. Not only was their testimony inconsistent and contradictory as to their own statements but this was also true even among themselves, and more significantly concerned itself in most part with the very acts on the Respondent's part which comprise the violations involved herein and the basic issues presented in this case. I am therefore compelled to credit Ellen Starbird's testimony over that given by the Respondent's witnesses.

As to the Respondent's contention that Starbird was "an immature young lady," etc., based on the tenor of her testimony and her demeanor during the course of the hearing, this is certainly not substantiated by the record evidence herein. Additionally with regard to the Respondent's assertion of conflicting testimony in Starbird's explanation as to why she told Shelander that it would cost the Respondent \$8 per hour if she were fired, I do not find any inconsistency therein. Her knowledge that backpay is given as part of the remedy imposed when discharges are found to be illegal under the Act is not unusual, especially where an employee has been exposed previously to union organizational campaigns. As an aside, it has been my experience that discriminatees are fully aware of this at least at the time, if not prior thereto, of their filing of a charge, or the complaint issues and the trial takes place in an unfair labor practice case. The Respondent asserts that Starbird "professed ignorance" of the Board's proceedings yet she was actually knowledgeable thereof as evidenced by the above. However, her knowledge of backpay as a Board remedy does not necessarily mean that she was also fully aware of the Board's rules, regulations, and procedures. Starbird admitted that she had participated in organizational activities concerning agricultural and farm workers and had been involved in State Board proceedings. She also participated in the representation proceeding before the National Labor Relations Board in Case 32-RC-1128, but I again do not find that this implies a full knowledge of the workings of the Board's processes. Furthermore, I did not get the impression that Starbird professed complete ignorance thereof.

bata<sup>145</sup> for the reasons that their testimony was generally forthright, mostly clear, unequivocal, and plausible, and consistent with the other evidence present in the record.<sup>146</sup> In contrast thereto, the testimony of Michael and Lynn Shelander was, at times, contradictory, equivocal, unbelievable, and significantly not only contrary to other uncontroverted evidence in the record, but in direct opposition to the testimony of the Respondent's other witnesses, and in the case of Michael Shelander, to previous sworn statements he made in an affidavit he gave to a Board agent.<sup>147</sup>

<sup>145</sup> It should be noted that Shibata admitted to a close friendship with Lynn Shelander when she worked at the laboratory. She expressed the feeling that she had been unjust to Shelander by relating the conversations they had to a Board agent and she therefore told Shelander about her Board affidavit. I was impressed by her sincerity and her obvious emotional struggle to tell the truth first, but with the desire not to hurt Shelander in any way in so doing. Moreover, Shibata had voluntarily left the Respondent's employ under friendly circumstances, appearing herein pursuant to subpoena, and had no apparent reason to testify other than to her own recollection. See *Tri-Country Tube, Inc.*, 194 NLRB 103, 107 (1971).

<sup>146</sup> It should be noted that, since the resolution of many of the issues presented in this case rests primarily on a determination of the credibility of the respective witnesses herein, and because even witnesses who are generally believed often give testimony that in part may be unclear or slightly inconsistent because of the passage of time requiring the remembrance of things past, I have also based my findings upon my observation of the demeanor of the witnesses, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). Also see *Cas Walker's Cash Stores*, 249 NLRB 316 (1980).

<sup>147</sup> For example, Shelander at first denied any knowledge as to whether Bunker had spoken to employees about "other things" during the night shift of July 21-22, 1980, when, in conversation with individual employees, Bunker explained the Respondent's "pornographic materials" policy. However, in his Board affidavit he acknowledged that "[Bunker] also took that time to visit with the employees about what could be done in their minds to make the company a better place to work."

Again, Shelander testified that, after he was apprised that Ellen Starbird had been soliciting employees' signatures on union authorization cards, he told her that the Respondent had a "no solicitation" rule and "I want you to discontinue solicitation of the employees at their work stations." However, in his affidavit he stated that he told Starbird, "I want you to stop all solicitation." The significance of this will be discussed more fully hereinafter.

Moreover, Shelander testified that when he asked Supervisors John Fritts, Richard Isla, and Lynn Shelander about Ellen Starbird's union activities they responded that they had "heard rumors that something was going on," that they "were not totally aware of the union activity in the lab," and that they "had very little knowledge of her activity." Shelander also testified, "I don't remember any specific reply by the supervisors at the time. It was all a very confused period," and he could not recall if they had made any direct reference to "anything" that Starbird was doing. However, in his Board affidavit Shelander had stated, "I was also informed by the night supervisors that Ellen was handing out and collecting signed authorization cards during working hours."

Additionally, Shelander testified that at the time the "pornographic incident" occurred, his wife Lynn Shelander was working as a rank-and-file employee in customer service and was not a supervisor. However, Lynn Shelander testified that at the time she was the customer service department supervisor. Moreover, Lynn Shelander also testified that she had been a production shift supervisor prior to that and Michael Shelander, being the plant manager and her husband, must have been aware of this. Other instances of the above and those also concerning Lynn Shelander will be related hereinafter, as applicable.

From the above and from his testimony as a whole I received the distinct impression that Michael Shelander was generally relating, in most part, what had occurred as truthfully as he remembered it, but when it came to giving any testimony that might be construed as adverse to the

*Continued*

Furthermore, concerning the events discussed herein-after, I tend to credit the account of what occurred as stated by the General Counsel's witnesses, of course excluding the testimony of Michael and Lynn Shelander when they testified as witnesses for the General Counsel,<sup>148</sup> for the same reasons, as previously stated, that their testimony was in large measure given in a forthright manner, was more detailed, unequivocal, and clear, corroborative and consistent generally with that of each other, and apparently consistent with the other evidence in the record and therefore believable, while the testimony of the principal witnesses for the Respondent, including that of Michael and Lynn Shelander, was for the most part contradictory, evasive, guarded, forgetful, and quite defensive (particularly in Greg Bunker's case), at times unclear and equivocal, and in some instances of such an incredible nature as to be unworthy of belief. Significantly, and as indicated hereinbefore, at various times and concerning important issues involved herein, the Respondent's witnesses consistently contradicted not only their own testimony given both at the hearing and in affidavits previously acquired by the Board during the investigative stage of this proceeding, but also that of each other.<sup>149</sup>

The General Counsel asserts that by the foregoing conversations the Respondent unlawfully interrogated his employees regarding their own and other employees' union and/or protected activities and sympathies. I agree. The basic premise in situations involving the questioning of employees by their employers about union activities is that such questions are inherently coercive by their very nature and therefore violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained."<sup>150</sup> However, the Board has held that in certain circumstances employers may have a legitimate purpose for making a particular inquiry of employees which may involve, to some limited extent, union conduct.<sup>151</sup> In this case there were no

Respondent's position herein or supportive of a finding of unlawful conduct on the Respondent's part, Shelander geared his answers to either outright denial or he attempted to portray such action in a favorable light, sometimes without regard to the truth of the matter. I also believe that this was true of Lynn Shelander as well.

Additionally, in support of the above is the testimony of both Michael and Lynn Shelander admitting having "previous unpleasant experiences" and loss of jobs, respectively, because of union activity at plants where they were previously employed, strongly suggesting union animus on their part.

<sup>148</sup> Both Michael and Lynn Shelander were initially called as witnesses by the General Counsel.

<sup>149</sup> While this is clearly reflected in the testimony of Michael Shelander and Greg Bunker, it is also true of the Respondent's other principal witnesses, Lynn Shelander, Richard Isla, Donald Alan Slater, and Eric Jensen, and, in varying lesser degrees, John Fritts and Pamela Kline. In fact concerning Bunker and as clearly evidenced in the record, Bunker's demeanor, evasiveness, and at times what appeared to me to be his contemptuous attitude toward this proceeding in general and the incredible nature of some of his testimony lead me inexorably to discredit and disbelieve his testimony as a whole.

<sup>150</sup> *Jefferson National Bank*, 240 NLRB 1057 (1979); *Sans Souci Restaurant*, 235 NLRB 604 (1978); *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953).

<sup>151</sup> *P. B. & S. Chemical Co.*, 244 NLRB 1 (1976); *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 334 F.2d 617 (8th Cir. 1965).

circumstances present which might have justified some limited inquiry into the union activities of his employees. The Respondent offered no legitimate reason nor can I find any valid purpose for such interrogation or questioning of his employees other than that it was done, when considered in the light of the Respondent's other actions herein, for the purpose of coercing its employees into refraining from engaging in any union or protected concerted activities.<sup>152</sup> Further, the Respondent, while interrogating his employees, gave Starbird and Shibata no assurances against reprisals.<sup>153</sup> Besides what was set forth hereinbefore, it should also be noted that the coercive impact of interrogation is not diminished by either an employer's open union support or by the absence of direct attendant threats of adverse consequences to the employee.<sup>154</sup>

The Respondent asserts in substance that since any interrogations engaged in were "casual," "isolated," "non-coercive, and had no effect whatsoever upon union organizational activities," they were not unlawful. The Respondent adds that, in the case of Margherone, she was given actual assurance that "no action would be taken against her because of her union activities." I do not agree with the Respondent's assertions.

The credited evidence shows that, as observed by both Margherone and Starbird, immediately upon being informed of the union activity at the laboratory by Cole, Shelander came over to Margherone and interrogated her about this.<sup>155</sup> Moreover, after Margherone attended the union meeting on July 18, 1980, that same day Shelander again interrogated Margherone, this time about the size of employee attendance and as to what occurred therein. Significantly, Margherone asked him if she would be fired for having attended the union meeting. This strongly implies the presence of some feeling on Margherone's part of possible threat and coercion at the time, despite the fact that Shelander then told her she would not be discharged for her actions, and her admitted feelings that she was not "intimidated" by this.<sup>156</sup> Shelander's interrogation of Margherone under these circumstances can certainly not be characterized as "isolated and casual" and uncoercive in nature.<sup>157</sup> Moreover,

<sup>152</sup> *7-Eleven Food Store*, 257 NLRB 108 (1981); *World Wide Press*, 242 NLRB 302 (1979); *Seal Trucking*, 237 NLRB 1090 (1978); *Franklin Property Co.*, 223 NLRB 873 (1977).

<sup>153</sup> *Trinity Memorial Hospital*, 238 NLRB 809 (1978); *Thermo Electric Co.*, 222 NLRB 358 (1976), enf. 547 F.2d 1162 (3d Cir. 1976); *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024 (6th Cir. 1974), cert. denied 491 U.S. 828 (1974).

<sup>154</sup> *Gossen Co.*, 254 NLRB 339 (1981).

<sup>155</sup> Starbird testified that Shelander had "turned bright red" upon hearing about this. It should also be noted that Shelander's testimony concerning the time sequence of this incident was inconsistent and equivocal. He at first testified that he spoke to Margherone shortly after Cole had told him that Margherone had informed her about union activity in the laboratory. He subsequently testified that he did not speak to Margherone until "an hour or two" after his conversation with Cole.

<sup>156</sup> It also should be noted that Shelander did not voluntarily assure Margherone against reprisals when he interrogated her. What assurance he gave about her not being discharged for attending the union meeting was elicited by her apparently fearful inquiry about this.

<sup>157</sup> The Respondent alleges in his brief that "the facts of this incident [involving Margherone] are almost identical to *NLRB v. Ralph Printing* Continued

Shelander also interrogated Ellen Starbird about her union activities, and his wife, Lynn Shelander, interrogated Jackie Shibata about her union feelings and desires.<sup>158</sup>

The test applied in determining whether a violation of Section 8(a)(1) of the Act occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."<sup>159</sup> Applying that test, I find that the Respondent by interrogating his employees, as set forth above, has interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby violated Section 8(a)(1) thereof.<sup>160</sup>

and *Lithography Co.*, (1967) 379 Fed. 2d 687." Not so. In the cited case, the U.S. Court of Appeals for the Eight Circuit stated,

... on a single occasion one of the Respondent's supervisors ... inquired of Angus' union activities, and asked him to report to the Company on the Union activities of his co-workers. An employer's interrogation of its employees, however, is not unlawful *per se*, unless conducted with such anti union animus as to be coercive in nature. [The supervisor's] interrogation of Angus, not in itself threatening or coercive, would not violate Section 8(a)(1) unless it were conducted against a background of employer hostility and discrimination towards unionization, such as would induce in its employees a fear of reprisal for lawfully pursuing their union activities. ... The circumstances surrounding [the supervisor's] interrogation negative any inference of coercion. *The questioning of Angus was not part of any employer plan of systematic intimidation of its employees, but at best was isolated and casual in nature. The questioning, moreover, was totally devoid of any coercive statements, which are usually characteristic of an unlawful interrogation.* [Emphasis supplied.]

From the record evidence herein it is clear that the instant case is distinguishable and different, in significant part, from the cited case. Furthermore, the other cases cited by the Respondent are nonsupportive of its position based on the evidence herein.

<sup>158</sup> The Respondent asserts in his brief that the close personal friendship between Shibata and Lynn Shelander negates any possibility that Shelander could coercively interrogate or otherwise restrain Shibata in the exercise of her Sec. 7 rights. However, the test of interference, restraint, and coercion under Sec. 8(a)(1) does not turn on a respondent's motive, courtesy, or gentleness—or whether the supervisor and employee involved are on friendly or unfriendly terms. Rather, the test is whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employees under the Act. *Florida Steel Corp.*, 224 NLRB 45 (1976).

Shibata had attended the union meeting on July 18, 1980. She had signed a union authorization card. The evidence shows clearly that Shibata wanted to be represented by the Union initially. After the Respondent engaged in unlawful acts as hereinafter set forth, including the above interrogation, Shibata testified that she then told Shelander in a subsequent conversation concerning the Union and employee desires, "I am right now in the middle and I don't know which way I'll go. What I meant by that comment was that I didn't know at that point whether I would vote for or against the union." The likely coercive effects of the unlawful interrogation and Shelander's subsequent threats and promises to Shibata, plus the Respondent's other unlawful conduct herein, are patently clear.

<sup>159</sup> *7-Eleven Food Store*, *supra*; *Electrical Fittings Corp.*, 216 NLRB 1076 (1975). Although interrogation concerning union activity is not a *per se* violation of the Act, it can "be a very subtle weapon for interfering with employee rights." *Ridgewood Management Co. v. NLRB*, 410 F.2d 738, 740 (5th Cir. 1969), cert. denied 396 U.S. 832, for "[a]ny interrogation by the employer relating to union matters presents an ever present danger of coercing employees in violation of their Section 7 rights." *Texas Industrial, Inc. v. NLRB*, 366 F.2d 128, 133 (5th Cir. 1964).

<sup>160</sup> *Jefferson National Bank*, *supra*; *World Wide Press*, *supra*; *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975). As the General Counsel states in his brief,

In this case, the interrogations by Respondent's Plant Manager and one of Respondent's supervisors went to the heart of [the] nascent organizing campaign and bore none of the factors which might result

## 2. Solicitation of grievances

The amended consolidated complaint herein alleges that the Respondent solicited grievances from its employees and impliedly promised that such grievances would be adjusted in violation of Section 8(a)(1) of the Act, which allegations the Respondent denies.

### Analysis and Conclusions

Soon after the Respondent Greg Bruncker, the owner, learned of the Union's organizational campaign<sup>161</sup> among his laboratory employees, he visited his plant on July 21, 1980, and conferred with each employee in the presence of Supervisor Lynn Shelander. During these conversations, Bruncker asked the employees, in substance, for any suggestions as to improving working conditions at the plant to make employees "happier," or "improve the employment status,"<sup>162</sup> and agreed to remedy some, and "look into" others of the suggestions made by the employees.<sup>163</sup> Additionally, Lynn Shelander questioned Jackie Shibata on July 29, 1980, as to what the employees "hoped to gain with a union." Again, sometime in September or October 1980, following Lynn Shelander's meeting with Greg Bruncker, she told employees that Bruncker wanted to know "what the girls wanted," and Shelander recommended that the employees speak to Bruncker directly concerning their requests, while at the time also suggesting that Bruncker could provide a wage increase after the union issue was resolved. That the above constituted the unlawful solicitation of grievances is clear.<sup>164</sup>

Bruncker offered as reasons for these conversations that he wanted to clarify the Respondent's "pornographic materials policy," and to find out why he was experiencing morale and productivity problems. While at first admitting that he did ask employees about their problems, if any, at the laboratory, on cross-examination he denied this alleging that he did not ask them specifically what was bothering them but only gave the employees "an opportunity to express any [kind] of concern that they have." I do not credit Bruncker's testimony thereon.<sup>165</sup>

in the Board considering it noncoercive, for no assurances against reprisals were given and there was no legitimate reason advanced for the questioning. *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979); *NLRB v. Chatfield-Anderson Co.*, 606 F.2d 266 (9th Cir. 1979); *NLRB v. Super Toys, Inc.*, 458 F.2d 180, 182-183 (9th Cir. 1972). Also see *Capitol Records, Inc.*, 232 NLRB 228 (1977); *Calcine Corporation*, 228 NLRB 1048 (1977), *enfd.* 83 LC ¶ 10367 (9th Cir. 1978); *Dreamland Bedding*, 221 NLRB 1082 (1975).

<sup>161</sup> Michael Shelander testified that he had told Bruncker about union involvement at the laboratory on July 17 or 18, 1980.

<sup>162</sup> See the testimony of Starbird, Margherone, and Lynn Shelander.

<sup>163</sup> Bruncker admitted agreeing to supply an electric pencil sharpener which employee Shibata had requested, to check into improving and enlarging the lunchroom facilities, and into allowing employee discount purchases of cameras. Lynn Shelander testified that Bruncker also agreed to clean up the room used for toilet facilities which was also being used as a storage room.

<sup>164</sup> *St. Vincent's Hospital*, 244 NLRB 84 (1979); *Pepsi-Cola Bottling Co.*, 242 NLRB 265 (1979); *Rexair, Inc.*, 243 NLRB 876 (1979); *Don Moe Motors*, 237 NLRB 1525 (1978); *Coca-Cola Bottling Co.*, 232 NLRB 794 (1977).

<sup>165</sup> As pointed out previously, Bruncker's testimony was equivocal, guarded, defensive, and generally forgetful upon direct or cross-examination.

*Continued*

His attempt to initially show that the main reason for these conversations with his employees was the "pornography incident" which occurred on July 15, 1980, clearly illustrates the pretextual nature thereof and Bunker's unworthiness of belief as a witness. If the alleged disruption of production and the chaos which ensued from this incident was as severe as alleged, why did not Bunker immediately hold these conversations with the employees to clarify the Respondent's "pornographic material policy." Instead, this was done almost a week later on July 21-22, 1980, only after Bunker had learned about his employees' union activities.

Moreover, while Bunker subsequently admitted that another reason for his having spoken to each employee during that shift was his learning that there was a morale problem among the Respondent's employees at the plant affecting production and he wanted to find out why, his testimony about this again shows that this was not the main reason or purpose therefor. He testified, "I did ask them if there were other problems in the lab because of the fact that the morale was down and the productivity was down and I'm trying to find out, you know, what's going on." However, on cross-examination he testified that he did not ask employees what was bothering them specifically, but gave them "an opportunity to express any [kind] of concern that they have."

Finally, Bunker testified that another reason for these conversations was that although he had heard "a reference" to union activity occurring at the plant and "had no real first hand knowledge of it," he suspected that employees were being harassed and intimidated by fellow employees as part of their union activities. Significantly Bunker, although at first testifying that Diane Long had told him during their conversation that she was being harassed by Ellen Starbird and would quit if it did not stop, on cross-examination he testified that he was not sure Long had mentioned Starbird or Margherone by name but that "I was aware of the fact that [Long] was referring to these individuals." He was now also unsure as to whether Long had told him this on that evening or the night before. It is therefore clear and reasonable to assume that Bunker was fully aware of the union activity at the plant having learned this from Michael and/or Lynn Shelander who had knowledge of it directly from their own observations or reports from other supervisors or employees. His equivocation and his hedging about this are extremely suspect and with the above raise a strong inference that this union activity and the Respondent's intent to negate or stop it were the main reasons for Bunker's conversations with employees in which he solicited their grievances and promised to remedy the same.<sup>166</sup>

tion by counsel for the General Counsel, while his responses to questions posed by the Respondent's counsel were answered directly, clearly, and unequivocally.

<sup>166</sup> The above is indicative of the kind of testimony given by the principal witnesses who testified in the Respondent's behalf. The testimony of the witnesses for the General Counsel and even that of Bunker, Michael, and Lynn Shelander clearly shows that the Respondent knew on July 21, 1980, and even before that date, that the Union was attempting to organize the Respondent's employees at the laboratory and that Starbird and Margherone were actively supporting and assisting in the campaign. Yet Bunker and the Shelanders denied this in their testimony, disclaiming

The solicitation of employee grievances during an organizational campaign accompanied by a promise, expressed or implied, that the grievance will be remedied is a violation of the Act. The essence of such a violation is not the solicitation of grievances itself; rather, it is the promise to correct them, either expressed or inferred from the solicitation.<sup>167</sup> Such conduct constitutes an unlawful restraint upon and interference with the employees' self-organizational rights guaranteed under the Act, because implicit therein is the promise that benefits will be awarded to them by their employer so long as they are not represented by a labor organization, and because it tends to frustrate the employees' organizational efforts by showing them that union representation is unnecessary. Thus, when the Respondent, in response to the Union's organizational campaign, solicited grievances from his employees and indicated that he would satisfy their demand, he violated Section 8(a)(1) of the Act and I so find.<sup>168</sup>

### 3. Threats

The amended consolidated complaint herein alleges that the Respondent threatened his employees with "unspecified reprisals," termination, and plant closure if the employees did not cease engaging in union and/or protected concerted activities, all in violation of Section 8(a)(1) of the Act. The Respondent denied these allegations.

### Analysis and Conclusions

According to Starbird's credited testimony during her conversation with Greg Bunker on July 22, 1980, Bunker told her, "Well, I'm very upset and I want this union business to stop because I don't want anyone to get hurt." When Starbird asked Bunker if he were threatening her, Bunker responded, "No, I'm just telling you I don't want anyone else to get hurt." While Bunker acknowledged having a conversation with Starbird after

such knowledge and also attempting to assign valid and lawful reasons for what occurred although this is contradicted by other evidence in the record, or by more believable testimony in contradiction thereof by other witnesses, or by their own testimony herein.

For example, Lynn Shelander testified that she knew nothing about the Union's attempting to organize the Respondent's employees until on or about July 22, 1980, when her husband, Michael Shelander, brought this to her attention. This is incredible and unbelievable testimony. The Respondent's laboratory is a "small plant" and, according to the record evidence, the employees, including the supervisors, are friendly and socialize together. That Starbird's and possibly Margherone's union activities were brought to the attention of the Shelanders and Bunker prior to July 21, 1980, can strongly be inferred herein. In fact, inference is not even needed since Eric Jensen, a witness for the Respondent, testified that he told Lynn Shelander about Starbird's "harassment" of him to join the Union on July 18 or 20, 1980, and Michael Shelander knew about Margherone before that. That Richard Isla, John Fritts, and the other supervisors were not entirely aware as to what was occurring until a later date is also hard to believe under the circumstances present herein.

<sup>167</sup> *Jefferson National Bank, supra; Stride Rite Corp.*, 228 NLRB 224 (1977); *Campbell Soup Co.*, 225 NLRB 222 (1976); *Uarco Inc.*, 216 NLRB 1 (1974).

<sup>168</sup> *Jefferson National Bank, supra; Briarwood Hilton*, 222 NLRB 986 (1976); *Teledyne Dental Products Corp.*, 210 NLRB 435 (1975); *House of Mosaics, Inc.*, 215 NLRB 704 (1974). Also see *NLRB v. Ayer Lar Sanitarium*, 436 F.2d (9th Cir. 1970); *NLRB v. Delight Bakery*, 353 F.2d 344 (6th Cir. 1965).

July 21, 1980, and as to basically what Starbird testified to as being discussed therein, he denied making any threats against her. For the reasons set forth hereinbefore I do not credit Bunker's denial thereof. Moreover Michael Shelander, the plant manager, was present during the conversation between Bunker and Starbird, yet he did not corroborate Bunker's testimony.

Margherone testified that on July 24, 1980, her supervisor, John Fritts, asked her to accompany him outside the plant and when she did told her, "If [Margherone] would keep talking union, on company time, that they were going to fire [her]." Fritts testified that he had received complaints from various employees concerning harassment by Margherone. He then told Margherone "to quit soliciting the people at their work stations . . . that she could do it on a break . . . but not when people were working." Fritts denied that he told Margherone that she would be fired and added that Margherone told him, "oh, you're just harassing me because of the Union."

While I credited Margherone's testimony generally and concerning the other incidents testified to herein, and do so again, I did not find Fritts to be the same kind of unbelievable and uncreditable witness as the Respondent's other witnesses were. In most part it appeared that Fritts was telling the truth as he recalled it. However it should be remembered that Fritts' is a supervisory employee presumably loyal to the Respondent. In the alternative Margherone is not a discriminatee in this case and is no longer employed by the Respondent, and would have no reason to testify as she did concerning a threat made to her by Fritts. Furthermore, the record shows a plan on the Respondent's part to interfere with, restrain, and coerce his employees in the exercise of the rights guaranteed in Section 7 of the Act, and, therefore, this reasonably raises the inference that Fritts, as a supervisory employee, had more to gain from denying any violative action on his part, than Margherone had in asserting truthfully that he did so. It should also be noted that Ellen Starbird had been discharged by the Respondent on July 23, 1980, the day before Fritts spoke to Margherone. Starbird and Margherone were the two most active union adherents at the plant, thus when Starbird was terminated this left only Margherone as a problem for the Respondent. The Respondent would have a significant interest therefore in curtailing her union activities and good reason to use strong language to accomplish this in furtherance of his plan to interfere with, restrain, and coerce his employees in the exercise of the rights under Section 7 of the Act.<sup>169</sup>

Jackie Shibata creditably testified that on July 29, 1980, while Lynn Shelander was driving her home, Shelander told her that she "felt" that Bunker would close the laboratory and move it elsewhere if the Union came in. Shelander denied telling Shibata that the plant would

be closed if the Union were to become the employees' bargaining representative. She testified that what she told Shibata was that she had been involved personally but indirectly with "Union related activities" on three prior occasions in the photofinishing business and, in one case the plant was closed, and in another the plant would have been closed if the union had succeeded in organizing the employer's employees. For the reasons indicated hereinbefore, I credit Shibata's version of what was said.

As stated by the Board in *General Stencils, Inc.*, 195 NLRB 1109 (1972):

A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative.

The express and implied threats made by Bunker, Fritts, and Lynn Shelander, of unspecified bodily harm and loss of employment if employees did not cease engaging in union activities, and plant closure if the Union came in, respectively, all constitute violations of Section 8(a)(1) of the Act since such statements clearly tend to coerce, intimidate, and discourage employees from engaging in any protected activity under Section 7 of the Act for fear of reprisals.<sup>170</sup>

The Respondent asserts in his brief that the circumstances surrounding Shelander's statement to Shibata about plant closure "is analogous to [*Cone Brothers Contract Co.*] v. *NLRB*, 235 Fed. 2nd 37." I do not agree. In the cited case, the U.S. Court of Appeals for the Fifth Circuit found that the "interferences with employees' rights . . . are extremely inconsequential and have a standing as a specific complaint only through extraordinary technicality: [emphasis supplied] . . . the finding of threatening to close its business comes down to a single outburst by a vice president described by the Examiner as, 'a declaration . . . made in a moment of deep emotional disturbance over an ultimatum he received from another union . . . that he would close the business before he would sign a contract . . .'" although the Board found, under these circumstances, that it would be fair to conclude that it could validly be said to have tended to restrain or coerce the employees to whom it was said or any employees who might later have learned of the incident.

However, in the instant case as indicated hereinbefore, the Respondent, by himself and through his representatives, engaged in a deliberate plan of interferences, intimidation, restraint, and coercion of his employees to compel them to cease or withdraw their support of the Union, clearly violative conduct under the Act,<sup>171</sup> the

<sup>169</sup> Furthermore, the Respondent's posted "no-solicitation rule" precluded employees from soliciting "during working hours for non-business purposes." The no-solicitation rule in the Phototron book prohibits "Unauthorized soliciting or collecting contributions" on the Respondent's premises. Legal advice was not secured until sometime later as to what supervisors could do or tell employees during a union organizational campaign. That Fritts used the actual language that he testified he did under the circumstances is highly unlikely.

<sup>170</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1968); *George C. Shearer Exhibitors Delivery Service*, 246 NLRB 416 (1979); *A.V.A. Foods, Inc.*, 238 NLRB 568 (1978); *Hanover House Industries, Inc.*, 233 NLRB 164 (1977); *Lemon Tree*, 231 NLRB 1168 (1977), *enfd.* 618 F.2d 51 (9th Cir. 1980).

<sup>171</sup> See *NLRB v. Gissel Packing Co.*, *supra*. Moreover, the fact that an 8(a)(1) statement is uttered by a "friendly supervisor" does not lessen the severity of impact of such statement. As the Board held in *Caster Mold & Machine Co.*, 148 NLRB 1614 at 1621 (1964):

*Continued*

threats being an integral part thereof. His interference with employee rights was not "inconsequential" nor was it violative conduct "only through extraordinary technicality."

#### 4. Surveillance

The amended consolidated complaint alleges that the Respondent engaged in surveillance of the union and/or protected concerted activities of his employees. The Respondent denies this allegation.

#### Analysis and Conclusions

The evidence herein shows that, shortly after the Respondent learned that the Union was attempting to organize his employees, the Respondent's owner, Greg Bunker, spent the entire night shift of July 21-22, 1980, at the Meridian Avenue plant, something he had never done before.<sup>172</sup> Bunker spoke to each of the employees working that evening which took a relatively small portion of his time, and for the balance of the night shift generally remained seated at Shelander's desk, from which he watched the employees at work. His presence at the desk could be viewed by all the employees from their work stations, as well as Bunker being able to observe their every movement from the desk area. Bunker's awareness of the Union's organizing campaign, his admitted actual or suspected knowledge that Ellen Starbird and Gina Margherone were engaged in union activities, his unprecedented presence for the entire length of a night shift, and his holding of individual conversations with the employees during which he unlawfully solicited grievances and promised to remedy employee complaints expressly or impliedly lead me inexorably to the conclusion that among the reasons for his presence at the plant that evening was that of observing and surveying his employees and any union activities they might engage in, which he did. This is reinforced by Bunker's admission that he came to the plant that night, at least in part, to ascertain the cause of "morale" problems and "unrest" among the employees and suspected alleged harassment of employees by union adherents. Certainly no better example evidencing his intent and actual surveillance of employees is the incident occurring that evening wherein Bunker followed Starbird and Jensen into the parking lot to where the garage dumpster was, and what ensued thereafter as hereinbefore set forth.

Even if Bunker's action only created an impression of surveillance amongst the Respondent's employees it would be violative of the Act. In determining whether a respondent created an impression of surveillance, the test

[W]arnings from a friendly supervisor, close to management, are no less a threat than warnings from such a hostile supervisor. Indeed, warnings from such a friendly source may carry a greater aura of reliability and truthfulness and may therefore in a sense be doubly effective.

<sup>172</sup> While the evidence shows that Bunker often visited the plant and would remain there for a period of time, he had never stayed for a full shift, at least during the "night shift" hours. Moreover, the fact that there were other incidents which occurred that evening, as alleged by Bunker, the discovery of photographs depicting cocaine, and a burglary which happened next door, does not fully and adequately explain Bunker's presence throughout that entire shift at the plant. This remains an unusual occurrence.

applied by the Board is whether employees would reasonably assume from the actions or statements in question that their union activities had been placed under surveillance.<sup>173</sup> From the facts present herein such an assumption would be reasonable.

In view of the above, I find and conclude that the Respondent, by the actions of owner Greg Bunker, engaged in surveillance of his employees or at the least created the impression among his employees that their activities on behalf of the Union were under surveillance and thereby violated Section 8(a)(1) of the Act.<sup>174</sup>

#### 5. The Respondent's "No-Solicitation" rule

The amended consolidated complaint alleges that the "no-solicitation" rule promulgated by the Respondent was unlawful since its purpose was to discourage his employees from assisting the Union and engaging in concerted activities for the purposes of collective bargaining or other mutual aid or protection and therefore violative of Section 8(a)(1) of the Act. The Respondent denies this.

#### Analysis and Conclusions

The evidence shows that the Respondent posted a no-solicitation rule on July 22, 1980, which stated:

It is the policy of the company not to allow the *solicitation of employees during working hours* for non business purposes. [Emphasis supplied.]

Ellen Starbird testified that when she reported to work on the night shift that evening, July 22, 1980, Michael Shelander told her that he had learned that she was "soliciting union cards" and that the Respondent was "reinstating" his "no solicitation rule" and Starbird was not to "[talk] about the union during working hours, or [ask] anyone to *sign a card on company property*." (Emphasis supplied.)<sup>175</sup> Gina Margherone, whose testimony I also

<sup>173</sup> *7-Eleven Food Store*, supra, 257 NLRB 108; *Publisher's Offset, Inc.*, 225 NLRB 1045 (1976); *Schromenti Bros., Inc.*, 179 NLRB 853 (1969).

<sup>174</sup> *Harvey's Resort Hotel*, 236 NLRB 1670 (1978); *Community Cash Stores*, 238 NLRB 265 (1978). Also see *Florida Steel Corp. v. NLRB*, 529 F.2d 1225 (5th Cir. 1976).

<sup>175</sup> Shelander testified at the hearing that he actually told Starbird that he had received reports from fellow employees that she was harassing them soliciting their signatures. He related that he said, "In case you're not informed, we have a no solicitation rule in the company. . . . I want you to discontinue *solicitation of employees at their work station*." (Emphasis supplied.) I do not credit Shelander's account thereof for the reasons set forth hereinbefore. Particularly, Shelander stated in his Board affidavit that he told Starbird, after posting the no-solicitation sign, "We have rules against solicitation that are posted and I want you to *stop all solicitations*." (Emphasis supplied.) This is contrary to his testimony at the hearing.

Additionally, it should be remembered that the notice posted by Shelander prohibited all solicitation during "working hours." The no-solicitation rule in the Phototron manual prohibited all soliciting of employees on the Respondent's premises. Shelander testified that it was not until at least July 24 or 25, 1980, or possibly in August 1980, but significantly, after he had posted the Respondent's no-solicitation rule, that he learned from the Respondent's "General Counsel" presumably the legal aspects thereof. It is therefore reasonable to assume that he told Starbird to stop soliciting employees "during working hours," the same language used in the posted notice, or to ask anyone to sign an authorization card on "company property" as set forth in the Phototron manual, as Starbird so testified.

credited, related that on July 24, 1980, her supervisor John Fritts told her that "if she would keep talking union, on company time, they were going to fire [her]." (Emphasis supplied.)

The evidence further shows, as stated hereinbefore, that the Respondent had adopted as his own the rules and regulations of another film processing company, Phototron, which were encompassed in a manual made available to employees, including a "no-solicitation rule," prohibiting the "Unauthorized soliciting or collecting contributions on [Photo Drive Up] premises." However, the record clearly reflects that while employees were generally aware of the "Phototron manual" containing the rules and regulations, *per se*, they were never told about the specific "no-solicitation rule" contained therein, nor that there was even a no-solicitation rule in force at all, until the posted notice by Michael Shelander on July 22, 1980. Moreover, while the supervisors were aware of the rule, the production employees, whose testimony I credited, consistently testified that they were unaware of such a rule until its posting by Shelander.<sup>176</sup> As to the applicability of this no-solicitation rule to employee union activities and as to its clarity and ambiguity, Supervisor John Fritts' testimony thereon stands as a vivid indication thereof that "I never thought about it in such ways—to the Union. I thought about it as soliciting. Soliciting products, you know. Selling things on the side."<sup>177</sup>

In *T.R.W. Bearings*, 257 NLRB 442, 443 (1981), the Board held that:

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 them by Section 7 of the Act. . . .

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.<sup>178</sup>

The Respondent's no-solicitation rule, banning solicitation "during working hours" and the statements made by his representatives Michael Shelander and John Fritts, respectively, that the rule prohibited employee union solicitation, "during working hours or . . . on company property" and from "talking union on company time,"

<sup>176</sup> Jackie Shibata, Gina Margherone, and Ellen Starbird.

<sup>177</sup> Despite discrediting Fritt's testimony on other points I accept his testimony on this, for as Judge Learned hand stated, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Moreover, the evidence clearly shows that supervisors allowed employee solicitation regarding the sale of Avon and Amway products prior to the advent of the Union's organizational campaign, without any real effort to stop this although presumably it was against company policy.

<sup>178</sup> *Essex International*, 211 NLRB 749 (1974).

were invalidly broad. The Board has found the use of such phrases as "working time," "working hours," "company time," and "on company property" ambiguous because such terms are susceptible to the interpretation that solicitation and union activities would be prohibited during all paid time including nonworking time such as breaks and lunch periods and upon all of the employer's property.<sup>179</sup>

True, such rules are not conclusively invalid. An employer may rebut the presumption of invalidity by affirmatively showing that, despite the rule being overly broad, the employees' rights under the Act—that employees may engage in organizational activities during breaktime and mealtime and in properly allocated areas on the employer's property—have been expressly and adequately explained and communicated to the employees so that they become unequivocally aware thereof, or demonstrated positively to, employees by the employer's clear and lawful application of the no-solicitation rules in practice.<sup>180</sup> Additionally this presumption can be rebutted by an employer's showing that the no-solicitation rule "was justified by a need to maintain discipline or production in its plant."<sup>181</sup>

The Respondent contends that his no-solicitation rule, if found to be overly broad, was not invalid because it was "cured by the employer's oral explanation to all employees, that the rule did not restrict solicitation during non-working time." The credible evidence herein does not sustain this contention. The posted no-solicitation rule did not explain this and the statements made by the Respondent's representatives regarding this rule did not do so either. Moreover, in the case of Margherone, her supervisor, Fritts, added the threat of discharge if she failed to discontinue her union activities.

The Respondent also contends that he could enforce the no-solicitation rule because it was promulgated in good faith, had a "reasonable relationship to the efficient operation of the plant or business," and was "not merely a device to impede or obstruct self-organization." I do not agree. While the evidence herein shows that Starbird and perhaps Margherone did solicit employees during working hours prior to the posting of the no-solicitation rule, and even assuming this was disruptive of the other employees, yet both Starbird and Margherone testified that they did not do so thereafter, and be that as it may, the Respondent still could have promulgated and enforced a "no-solicitation" rule which was valid and lawful in that it prohibited soliciting during the time employees were engaged in their actual work, excluding breaktimes and mealtime, when they would be permitted to do so. In this case I do not find that the Respondent has made a convincing showing that his rule, in the words of *Plastic Film Products*, *supra*, "was justified by a

<sup>179</sup> *T.R.W. Bearings*, *supra*; *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Plastic Film Products*, 238 NLRB 135 (1978). Also see *Gerry's I.G.A.*, 238 NLRB 1141 (1978).

<sup>180</sup> *Allis Chalmers Corp.*, 224 NLRB 1199 (1976); *House of Mosaics*, 215 NLRB 704 (1974); *Essex International, Inc.*, *supra*.

<sup>181</sup> *Ace Machine Co.*, 249 NLRB 623 (1980); *Plastic Film Products*, *supra*; *Kern's Bakery*, 150 NLRB 998 (1965).

need to maintain discipline or production in his plant."<sup>182</sup>

Additionally, apart from the invalidity of the Respondent's no-solicitation rule, it is manifest from the record as a whole that the Respondent's enforcement of it, in this instance, was motivated by unlawful considerations. The Respondent's restrictions on employee union solicitation were imposed in direct response to Ellen Starbird's and Gina Margherone's solicitation of union authorization cards.<sup>183</sup>

From the foregoing, I find and conclude that the Respondent's no-solicitation rule was invalid on its face, and by his promulgation thereof and acts to enforce the rule in order to discourage his employees from assisting the Union and engaging in concerted activities for the purposes of collective bargaining or other mutual aid or protection, the Respondent violated Section 8(a)(1) of the Act.

#### 6. Promises of wage increases

The amended consolidated complaint alleges that the Respondent offered employees a wage increase and benefits in order to discourage their support for the Union in violation of Section 8(a)(1) of the Act, which allegation the Respondent denies.

#### Analysis and Conclusions

Jackie Shibata testified that sometime during August, September, or October 1980 Lynn Shelander, after attending a meeting with the Respondent's owner, Greg Bunker, told her and other employees that Bunker "was thinking about" and "would like" to give his employees "more pay and better medical benefits" and would that make the employees "happy." She also stated, as read from her Board affidavit, that "Shelander had told them that even if Bunker was thinking about giving the employees a 10 cent cost of living increase and provided us with a better plan that would perhaps include a dental plan, he couldn't do so until the union issue was resolved; or 'until Ellen's [Starbird] case was over.'"

Lynn Shelander gave a somewhat different version of what she told the employees. Shelander related that in response to an employee's question about a cost-of-living increase she responded that there was no legal requirement for the Respondent to grant a cost-of-living increase to its employees and, even if Bunker wanted to do so, "there could be no changes in accepted company policies, procedures, including a cost-of-living raise could not be given until the Union matter was resolved." She

<sup>182</sup> While there is testimony to the effect that there was a "morale problem" at the plant after the Union commenced its organizational campaign, the Respondent's assertion that productivity was also affected was never substantiated. That production was curtailed by the "pornographic incident" seems apparent but that occurred before any union activities occurred at the plant, and could not have caused the promulgation or "reinstitution" of the Respondent's no-solicitation rule. Additionally, what might be termed "unrest" or "problems," as viewed by an employer, generally occurs when a union commences organizing at the employer's plant. Some kind of heightened activity or "feeling in the air" or "employee enthusiasm," whether for or against the union is common and is not, without more, "disruptive of discipline or production."

<sup>183</sup> *Duralee Fabrics, Ltd.*, 246 NLRB 677 (1979); *American Tara Corp.*, 242 NLRB 1230 (1979).

stated that Shibata asked about obtaining a better medical plan to include dental coverage and Shelander told the employees that, even if Bunker wanted to do this, "We could not make any changes until the Union business is resolved."

For the reasons set forth hereinbefore and for those discussed hereinafter, I credit Shibata's account of what occurred over that of Lynn Shelander.

The conclusion is inescapable from the above that the Respondent, through these statements, communicated to his employees the implied promise that improvements in their terms and conditions of employment would be forthcoming, albeit presently forestalled due to the Union, once the problem of union representation was resolved in favor of the Respondent's acknowledged opposition thereto. The Respondent's main purpose, when considered along with his other unfair labor practices committed herein, could only have been to preclude the Union from organizing his employees and to influence the outcome of the subsequently scheduled election in the Respondent's favor.

This is bolstered by Shibata's testimony, not denied in fact by Shelander, that Shibata asked Shelander, in substance, if Bunker could be trusted to keep his promise of such benefits after the employees had "voted a union down," to which Shelander responded that Bunker was a "generous person" and his word was good. That Shelander had succeeded somewhat in the Respondent's purpose, that of making the employees think twice about supporting the Union with the alternate possibility of renouncing or opposing it, is exemplified by Shibata asking Shelander if Bunker was considering such wage increases and improved benefits because of the Union and the employees' union activities and sympathies. Albeit, Shelander's answer that there was no relation between the two, the whole tenor of the conversation contradicted and contrasted with her negative response. Moreover Shibata's subsequent admission to Shelander that she was now unsure as to the way she would vote in the upcoming Board election further strongly reinforces this.

I therefore find and conclude that the Respondent, by promising employees a wage increase and improved benefits, under the circumstances present herein, violated Section 8(a)(1) of the Act.<sup>184</sup>

As is true of any of the statements made herein and attributable to the Respondent concerning the Union and employee union activities, and as the United States Supreme Court said in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 618 (1969):

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the

<sup>184</sup> *Continental Manor Nursing Home*, 233 NLRB 665 (1977); *Hanover House Industries*, 233 NLRB 164 (1977); *Hubbard Regional Hospital*, 232 NLRB 858 (1977); *Planters Peanuts*, 230 NLRB 1205 (1977); *Buncher Co.*, 229 NLRB 217 (1977); *Baker Mfg. Co.*, 218 NLRB 1295 (1975), enfd. mem. 564 F.2d 95 (5th Cir. 1977); *Chris & Pitts of Hollywood, Inc.*, 196 NLRB 866 (1972).

proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . .

If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him the statement is no longer a reasonable prediction based on available facts. . . .

As the Supreme Court in the *Gissel* case further stated at 618:

[A]n employer is free to communicate to his employee any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain "a threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). [Emphasis supplied.]

#### D. The Unlawful Discharge of Ellen Starbird

Section 8(a)(3) of the Act prohibits an employer from discriminating against his employees in regard to hire, tenure, and other terms and conditions of employment for the purpose of encouraging or discouraging membership in a labor organization.

The amended consolidated complaint herein alleges that the Respondent discharged Ellen Starbird and failed and refused to reinstate her to her former position of employment because she joined or assisted the Union or engaged in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(3) and (1) of the Act. The Respondent denies these allegations and contends that Starbird was discharged for cause.

#### Analysis and Conclusions

Direct evidence of a purpose to discriminate is rarely obtained, especially as employers acquire some sophistication about the rights of their employees under the Act, but such purpose may be established by circumstantial evidence.<sup>185</sup> Under the law, if an employee's discharge is motivated by antiunion design such discharge is violative of the Act. Direct evidence of discriminatory motivation is not necessary to support a finding of discrimina-

<sup>185</sup> *Jefferson National Bank*, 240 NLRB 1057 (1979); *Corrie Corp. v. NLRB*, 375 F.2d 149, 152 (4th Cir. 1967); *NLRB v. Neuhoff Bros.*, 375 F.2d 372, 374 (5th Cir. 1967); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

tion and such intent may be inferred from the record as a whole.<sup>186</sup>

An appraisal of the entire record convinces me that Ellen Starbird was discharged because of her union activities and I so find. The evidence shows that Starbird was hired by the Respondent in late April 1980 as a laboratory employee and performed her work well until her discharge on July 23, 1980.<sup>187</sup>

That the Respondent knew in or about July 18, 1980, that the Union was attempting to organize his employees cannot be disputed.<sup>188</sup> That the Respondent had knowledge before her discharge that Starbird was the main union activist among its employees is also obvious from the record and Bunker and Michael and Lynn Shelander, in substance, so testified. In addition, that the Respondent entertained union animus is clearly shown by the evidence herein since, upon learning of the Union's involvement with his employees, the Respondent immediately embarked upon a course of action to discourage membership in and activities on behalf of the Union as found hereinbefore.<sup>189</sup> The record also clearly shows that such union animus was made patently obvious to his employees in the Respondent's vehement opposition to the Union.

The Respondent's alleged reasons for the discharge of Ellen Starbird, that she was "insubordinate" and had an "uncooperative attitude," even assuming they were not pretextual, do not tell the full story. In substance the Respondent points to three occurrences to exemplify, support, and justify his termination of Starbird for insubordination and uncooperative attitude. Let us examine these on the basis of the evidence in the record as a whole.

The facts and circumstances surrounding the first occurrence, the "pornographic incident," have been set forth in detail hereinbefore in the "Evidence" section of this Decision and need not be repeated again.<sup>190</sup> Even

<sup>186</sup> *Heath International, Inc.*, 196 NLRB 318 (1972).

<sup>187</sup> Starbird testified uncontradictedly that she had never received a reprimand or warning regarding her work during the course of her employment with the Respondent, and while Lynn Shelander attempted to portray Starbird as a less than satisfactory employee, this is contradicted by the evidence herein concerning Starbird's work. Starbird testified that when she reported for work that very same evening of the day upon which the "pornographic incident" took place, July 25, 1980, Plant Manager Michael Shelander told her, "You're a valuable employee. You'll be up for a review soon, you can expect a raise." Michael Shelander did not deny this testimony and even admitted praising Starbird that evening.

<sup>188</sup> Michael Shelander admitted telling Bunker about union activity at the plant in or around this date.

<sup>189</sup> Of course an employer is free to dislike unions and so communicating his views to employees does not amount to an unfair labor practice. *NLRB v. Threads, Inc.*, 308 F.2d 1, 8 (4th Cir. 1962). Nevertheless, union animus is a factor which may be evaluated in ascertaining the true motive prompting the discharge of an employee. *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 304 (4th Cir. 1966); *NLRB v. Georgia Rug Mills*, 308 F.2d 89, 91 (5th Cir. 1962).

<sup>190</sup> The Respondent maintains that Starbird was fully aware of his "pornographic materials" policy and insubordinately, arrogantly, and in hostility deliberately circumvented it. Yet the evidence clearly shows that at least the female production employees were unaware of the details of this policy, only generally knowing that objectionable photographs were to be brought to the attention of one's supervisor. Lynn Shelander testified that the mechanics of the Respondent's "pornographic materials" policy "is explained to each new employee by the supervisor," a practice that the Respondent followed. Yet Supervisors Isla, Fritts, and Michael

*Continued*

assuming *arguendo*, since I credited Starbird's account of what occurred during the incident generally, that Starbird caused a major disruption of the Respondent's work schedule that night shift when she called the police to the plant, yet, when she returned to work the following evening, Michael Shelander, the plant manager, in effect commended her for what she had done, telling her that she was a "valuable employee" and would receive a raise after her employee evaluation review was held. Certainly not the kind of treatment usually afforded an "insubordinate" and "uncooperative" employee who had seriously disrupted production by knowingly violating the Respondent's rules and regulations.<sup>191</sup> The Respondent's proffer of this as one of the reasons in support and justification of his termination of Starbird strongly suggests the pretextual nature thereof. From the record evidence herein, I am inexorably led to the conclusion that the Respondent's reliance on the "pornography incident" was an afterthought to support his unlawful discharge of Starbird.<sup>192</sup>

Shelander, the plant manager, all testified that although aware of the policy they did not explain it in detail or thoroughly to new employees. This kind of contradictory testimony, other examples of which were pointed out hereinbefore, makes unbelievable much of the Respondent's evidence presented herein where it is contradictory to the testimony of the General Counsel's witnesses, and the Respondent's assertion herein.

Additionally, Starbird's account of what transpired leading to her calling the police is eminently credible. When she discovered the pornographic photos she immediately brought them to the attention of Fritts, the supervisor present at the time, in accordance with the general policy regarding this. Upon the return of her own supervisor, Swami, to the plant, and after the ensuing discussion between the supervisors resulted in the decision that since "only" a woman in distress was involved, not a child or animal, that there was nothing wrong with the photos except that they were good pornography, and that presumably nothing would be done about this except to leave the photographs for Michael Shelander's consideration, Starbird called the police hoping to somehow assist an apparently threatened and distressed woman. Lynn Shelander testified that she would have called the police under the same circumstances and although she is a supervisor, as I understand the Respondent's "pornographic materials" procedure, only the plant manager, Michael Shelander, had the authority to do this. Of some significance is the fact that Starbird, who allegedly committed an insubordinate, hostile, and arrogant breach of the Respondent's policy, was commended and continued in employment while her supervisor, Swami, who sent her home early from work because of what she had done, an act which could have been interpreted as a possible discharge and was so by Starbird, was terminated soon after this incident happened, and for some unknown reason.

<sup>191</sup> It should be remembered that Lynn Shelander testified that she considered Starbird's conduct in calling the police insubordinate and would have discharged her for it. Shelander is a supervisor and the wife of Michael Shelander and yet if she is to be believed, despite this and the fact that Starbird was a probationary employee, not only was no disciplinary action taken against Starbird, but also she was commended and promised a raise instead. Incredible testimony indeed. This gives rise to a strong inference that Lynn Shelander's additional testimony, that the Respondent gave Starbird the "benefit of the doubt" in not disciplining or discharging her because of the "pornographic incident," was contrived subsequently to mitigate the impact of Michael Shelander's apparent approval and praise of what Starbird had done and the Respondent's failure to discipline or reprimand her at that time. Shelander agreed that the matter was considered "closed" at the time and only became an issue again after the Respondent found out about the Union's involvement with its employees, whereupon Bunker now felt the need to clarify the Respondent's pornographic policy in detail to his employees, although they are alleged by the Respondent to have been previously informed about it.

<sup>192</sup> The Respondent, in his brief, while relying heavily on the pornographic incident as illustrative of Starbird's alleged "hostile and arrogant attitude towards management," apparently also realized this, and further stated therein, "The disruption, of the plant on July 15, 1980, was merely an event which had a [conscious] effect upon Mr. Shelander's decision.

As to the second occurrence, the Respondent asserts that Starbird's discharge was "precipitated" by her "continued violation of Respondent's no solicitation during work time rule after she had been specifically instructed not to solicit during work time." The credible evidence herein shows that while the Respondent may have had a no-solicitation rule set forth in the Phototron manual yet this was not brought to the attention of the female production workers at the plant, including Starbird. Again, albeit the supervisory employees who testified herein stated that they were aware of such a rule, employees Starbird, Margherone, and Shibata, all of whose testimony I credited, testified that they knew nothing about the rule until Michael Shelander posted a no-solicitation rule on July 22, 1980.<sup>193</sup>

There is much testimony in the record concerning Starbird's activities in soliciting employee signatures on union authorization cards. It would appear from this testimony that Starbird did solicit employees at their work stations and during working hours but this occurred prior to the Respondent's posting of his no-solicitation rule on July 22, 1980. Starbird was admonished by Michael Shelander that same day to cease soliciting "union cards," talking about the union during working hours, or asking any employee to sign an authorization card on company property.<sup>194</sup> Starbird testified that, after She-

There was much testimony about the plant disruption episode. However, the only relevance of this episode is it shows Mrs. Starbird's hostile, arrogant attitude and also demonstrates her lack of credibility." Of course I do not subscribe to the Respondent's contentions.

<sup>193</sup> I am not unaware that employee Eric Jensen testified that he knew about the Respondent's no-solicitation rule by having read it in the Phototron manual. But the rule was never particularly brought to his attention. He knew about the rule book and took it upon himself to read it. However, the testimony of Starbird, Margherone, and Shibata is supported by other evidence in the record that prior to the advent of the Union's organizational campaign, employees did solicit for sales of Amway and Avon products openly and with the knowledge of the Respondent's supervisors. While Isla testified that he told an employee to cease soliciting on company time and only on her break this was not conveyed to any other employee and no employee was admonished to cease all solicitation on company time, worktime, or on company property. From the employees' observations of other employees openly soliciting outside products sale, it was reasonable for them to assume that there was no prohibition against solicitation at the plant, and the fact that the Respondent had a manual full of rules including a no-solicitation rule, which was not brought to the employees' attention, does not change this. The Respondent cannot reasonably impute knowledge of its rules and regulations to its employees unless he actually either advised them about it, provided copies of the rules and regulations if in writing, or in this case perhaps he could have directed them to read his rules and regulations manual, none of which he did.

<sup>194</sup> The Respondent in his brief asserts that demonstrative of Starbird's "hostile, arrogant attitude towards management, which justifies her termination for insubordination," was her lying to Michael Shelander when he told her "not to solicit fellow employees at work stations" and she responded, "I am not soliciting individuals in the lab." Aside from the fact that Starbird's testimony is significantly different as to what Shelander said, i.e., Shelander told her to stop "talking about the union during working hours, or asking anyone to sign a card on company property," and entirely different as to what she answered, i.e., that he had no right to ask her about this and, "Well, I appreciate your letting me know how you feel about this," and, despite crediting Starbird's testimony over that of Shelander's even assuming *arguendo* that she did deny engaging in such activities this would not support the Respondent's contention.

It should be noted that during the previous night shift, when Bunker had remained at the plant the entire evening, the credited testimony of Starbird disclosed that during the incident involving Starbird, Jensen, and

*Continued*

lander had told her about the Respondent's no-solicitation rule, she did not hand out any authorization cards on her "working time."

Thirdly, the Respondent contends that Starbird's termination was also lawful, based on Lynn Shelander's testimony that she observed Starbird soliciting an authorization card from employee Karen Gomez on July 23, 1980, in contravention of the Respondent's no-solicitation rule and the instructions of Michael Shelander, and also Starbird's subsequent "insubordinate and insolent attitude toward Mr. Shelander when he requested she meet with him to discuss the problem created by her." The General Counsel asserts that "[Lynn] Shelander admittedly did not see the entire exchange between Gomez and Starbird. Thus, she did not see Starbird go to Gomez' desk for a work-related reason and then leave, only to be called back by Gomez, who wanted to give Starbird the authorization card she signed. It is therefore clear that the conduct for which Starbird was purportedly terminated was not even in violation of either the 'no-solicitation' rule on Michael Shelander's instructions, both of which were unlawful in any event."

It is somewhat immaterial whether Lynn Shelander observed fully what had transpired between Starbird and Gomez, since her belief that Starbird had violated a posted policy rule and a supervisor's instructions would, under normal circumstances, constitute sufficient justification for employee discipline. However, under the circumstances in this case, it is obvious that the basing of Starbird's discharge in part on this occurrence was as pretextual as the other reasons asserted by the Respondent hereinbefore to sustain the alleged lawfulness of his discharge of Starbird. It should be noted that the Respondent did not even follow his own no-solicitation rule procedure in the Phototron manual concerning violations thereunder<sup>195</sup> and more importantly and obviously because of Starbird's union activities in effect summarily discharged her without really giving her the opportunity to explain what had happened albeit she had been a good employee.<sup>196</sup>

Moreover, I agree with the General Counsel that the Respondent's discharge of Starbird violated Section 8(a)(3) and (1) of the Act. The Board has long held that the discharge of an employee for the violation of an invalid no-solicitation rule violates Section 8(a)(3) and (1)

Bunker near the garbage dumpster, Bunker had told her he wanted to speak to "his employee" Jensen, and for Starbird to "get off my property," certainly ominous statements pregnant with possible threatening meaning. The very next evening Shelander confronted Starbird with her union activities and, if she then denied this, it would be more reasonable to infer that she was doing so in fear of the Respondent's retribution, rather than in hostility or in arrogance thereof. Besides, why would Starbird deny this since it was common knowledge throughout the plant that she was actively supporting the Union and she had engaged in these union activities openly. In fact, Bunker had obviously seen her do so with Jensen previously.

<sup>195</sup> See Resp. Exh. 1.

<sup>196</sup> I am aware that Michael Shelander asked Starbird to report to the laboratory that evening so that he could discuss her discharge with her but, as will be discussed and shown hereinafter, he had apparently already made up his mind to discharge her and actually did so during their telephone conversation on July 23, 1980.

of the Act.<sup>197</sup> Moreover, Starbird's discharge was unlawful because the Respondent allowed solicitation for other purposes without reprisal but discharged Starbird for allegedly soliciting signatures on authorization cards, a clear indication that the Respondent was motivated in firing Starbird solely because of her union activities.<sup>198</sup>

Furthermore, the Respondent's assertion that Starbird's "insubordinate and insolent attitude" toward Shelander when he requested that she meet with him to discuss "the problem created by her" and which allegedly finalized in Shelander's mind the determination to discharge Starbird only reinforces my belief that the reasons given by the Respondent for her termination were pretextual. Starbird had been threatened by Bunker the prior work shift for engaging in union activities. Shelander had admonished her also for doing so and when he called her at home the next day and, according to Starbird's credited testimony, asked her if she could arrange to have her mother drive her to work early that evening in order that she have a ride home if necessary, what reason, other than her probable discharge, could she have believed necessitated this. I do not accept the Respondent's assertion that Michael Shelander was undecided as to her discharge when he called Starbird. The evidence reasonably infers that he had already decided on the course of action he was going to pursue, Starbird's discharge to rid the Respondent of his main problem, the Union's most active adherent. As the most active union supporter she had to be terminated and the Respondent seized upon any reasons, feigned or otherwise, to do so, even if pretextual in nature. The Respondent's action directed against Starbird, the most prominent union activist, would serve as a strong and vivid reminder to the Respondent's employees not to assist or support the Union now or in the future.

Even assuming that the Respondent's asserted reasons for discharging Starbird were not pretextual, in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), the Board stated:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>199</sup>

<sup>197</sup> *Duralee Fabrics*, 246 NLRB 677 (1979); *Flav-O-Rich, Inc.*, 234 NLRB 1011 (1978); *Summit Nursing & Convalescent Home*, 196 NLRB 769 (1972); *Miller Charles & Co.*, 148 NLRB 1579 (1964).

<sup>198</sup> *Westinghouse Electric Corp.*, 240 NLRB 905 (1979); *Lauderdale Lakes General Hospital*, 227 NLRB 1412 (1977), enfd. in material part 576 F.2d 666 (5th Cir. 1978); *Capitol Records, Inc.*, 233 NLRB 1041 (1977). This is unaffected by Michael Shelander's testimony that he was unaware of other solicitation activity unrelated to unions, since this was known to other supervisory employees at the plant. *Westinghouse Electric Corp. supra*; *Jackson Sportswear Corp.*, 211 NLRB 891 (1974).

<sup>199</sup> In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its

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That Starbird was an able and competent employee is obvious from the evidence presented herein. That she was also the strongest proponent of the Union among the Respondent's employees, the Union's most active adherent, is also clear from the record. Moreover, that the Respondent was fully aware of her union activities was admitted by the Respondent's own witnesses. The Respondent's union animus is also obvious from the record evidence herein.

From all of the foregoing including my previous discussion of the evidence herein applicable to Starbird's discharge, I conclude that the General Counsel made a *prima facie* showing that Ellen Starbird's union activity was a motivating factor in the Respondent's decision to discharge her. This having been established and in accordance with the causation test enunciated by the Board in the *Wright Line* case, the burden of proof shifts to the Respondent to demonstrate that the same action would have taken place against Starbird even in the absence of her union activity.

The reasons offered by the Respondent for his discharge of Starbird were set forth above and discussed in detail. At this point I think it desirable to note that, throughout my consideration of the issues herein, I have been conscious of and have followed the principles that union membership or activity neither confers immunity, nor is a guarantee against being terminated for cause,<sup>200</sup> and that the Board may not "substitute its judgment for the Respondent's business judgment concerning the dismissal of or refusal to hire an employee."<sup>201</sup> Notwithstanding the foregoing principles, and in view of all of the above, I find that the Respondent has failed to demonstrate that he would have taken the same action against Starbird in the absence of her having engaged in union activities. Accordingly, for the reasons noted herein, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ellen Starbird.<sup>202</sup>

#### E. The Refusal To Bargain

Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representatives of his employees.

The amended consolidated complaint herein alleges that since on or about July 29, 1980, the Respondent has failed and refused, and continues to fail and refuse, to recognize or bargain with the Union as the exclusive collective-bargaining representative of his employees in a unit appropriate for the purposes of collective bargaining

burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

<sup>200</sup> *Maple City Stamping Co.*, 200 NLRB 743 (1972); *Whitcraft Houseboat Div.*, 195 NLRB 1046 (1972); *Hawkins v. NLRB*, 358 F.2d 281 (7th Cir. 1966).

<sup>201</sup> *Maple City Stamping Co.*, *supra*; *Thurston Motor Lines*, 149 NLRB 1368 (1964); *Portable Electric Tools v. NLRB*, 309 F.2d 423 (7th Cir. 1962).

<sup>202</sup> See *Wright Line, Inc.*, *supra*; *Weather Tamer, Inc.*, 253 NLRB 293 (1980); *Herman Bros., Inc.*, 252 NLRB 848 (1980).

in violation of Section 8(a)(5) and (1) of the Act. The Respondent denies these allegations.

#### 1. The Union's majority status

As I previously found herein, the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

All full-time and regular part-time laboratory employees and drivers employed by the Respondent at his Meridian Avenue, San Jose, California facility; excluding all retail clerks, retail sales clerks, guards and supervisors as defined in the Act.

Also it was stipulated by the parties that as of July 25, 1980, the date upon which the Union requested recognition and bargaining, there were 20 employees in the appropriate bargaining unit above described. These employees were: Mistee Strawn, Bernice Cervantes, Linda Coker, Brenda Flowers, Karen Gomez (Hooker), Eric Jensen, Pamela Kidder, Pamela Kline, Vincent Ridgeway, Donald Alan Slater, Mary Sweeney, Linda Sue Basim, Jackie Shibata, Lee Ann Willhite, Darla Jean Espinoza, Larry Dula, Elaine Brewer, Diane Long, Jennifer Paet, and Gina Margherone. In addition, as previously found by me, Lea Powers and Ellen Starbird are also includable in the appropriate unit as of July 25, 1980, making a total of 22 employees therein on that date. The evidence herein shows that, of the above employees, 14 signed authorization cards between July 18 and 23, 1980.<sup>203</sup>

The authorization cards signed by the Respondent's employees in the unit authorize the Union to represent the signatory employees as collective-bargaining agent, and to negotiate with the Respondent on their behalf concerning wages, hours, and other conditions of employment.

#### Analysis and Conclusions

The General Counsel and the Union contend that the Union represented a majority of the Respondent's employees in the appropriate unit on July 25, 1980, when the Union made its demand upon the Respondent for recognition and bargaining. The Respondent disputes this, challenging the validity of four of the signed authorization cards: Ellen Starbird's card, because she was allegedly terminated prior to the demand for recognition and bargaining; Mary Sweeney's card, because it was "not properly authenticated"; and Donald Alan Slater's and Pamela Kline's cards because "they were obtained through misrepresentation."

*Ellen Starbird's Card:* As I found previously herein, Ellen Starbird was unlawfully discharged on July 23, 1980, therefore her employee status continued unimpaired in point of law because of the illegality of her discharge and her signed authorization card should be validly counted toward determining the Union's majority status.

<sup>203</sup> Flowers, Gomez, Kidder, Kline, Slater, Sweeney, Basim, Shibata, Willhite, Espinoza, Brewer, Paet, Margherone, and Starbird. (G.C. Exhs. 4, 5, 6, and 10 through 20.)

*Mary Sweeney's Card:* Concerning the authorization card of Mary Sweeney, Starbird testified that she gave Sweeney an authorization card on July 20, 1980, and that Sweeney handed the signed card back to her and Starbird gave it to union representative Ronald Lind. However, on cross-examination Starbird testified that Pamela Kline and Sweeney had given her their cards at the same time and she was unsure as to "which person gave [her] which card." Moreover, in a prior affidavit given to a Board agent during the investigatory stage of this proceeding, Starbird had stated, "I remember collecting on this day, three cards signed by twin checkers, but I don't remember exactly which persons gave me which cards."

The Respondent contends in his brief that "there is no evidence that Ms. Sweeney was unavailable to testify about her signature or lack thereof on the union authorization card. Yet, the charging party did not produce Mrs. Sweeney. The testimony of Mrs. Starbird does not demonstrate she gave the card to Mrs. Sweeney and received it from her, signed. Mrs. Starbird is unable to tell us how it came into her possession. Based on this testimony, there is a failure of proof, and Mrs. Sweeney's card should be disregarded." I do not agree.

Starbird testified unequivocally that she had given Sweeney an authorization card to sign. While there is some ambiguity about her testimony concerning the return receipt of the card, still Starbird testified that she did receive the signed card of Mary Sweeney back which she turned over to Lind. The card was unequivocal on its face, without any disfiguring or confusing writing thereon and Sweeney's signature is clearly readable. The Respondent does not allege that the signature is not Sweeney's or is a forgery, and offered no evidence to dispute Starbird's testimony.

Under the circumstances in this case I consider that Starbird's testimony, which I credit, satisfies the General Counsel's burden of authenticating the authorization card of Mary Sweeney and the Respondent thereafter failed to show any valid reason to disregard the card. I therefore find that Sweeney's card is valid and should be counted.<sup>204</sup>

*The Cards of Pamela Kline and Donald Alan Slater:* Pamela Kline<sup>205</sup> testified that when Starbird gave her an authorization card to sign, Starbird told her that "the Union would make it possible for us to get \$7.00 an hour and that if a certain percentage of people signed it there would be an election." Kline stated that she read the authorization card before she signed it. Starbird testified that she told Kline that "some of us wanted to join a union and that we were signing cards and that there was going to be a meeting on the 23rd . . . I told her that we were joining to get a union at Photo Drive Up." She denied telling Kline that the Union needed a certain number of cards signed in order to secure an election.

Donald Alan Slater<sup>206</sup> testified that when Starbird had given him an authorization card to sign, "We were

more or less talking about the benefits and a raise," and that Starbird told him, "all it would do is bring an election. It didn't mean it was a vote for yes or no. It would just bring on election." He stated that he had been told that "over 50% of the employees" had to sign authorization cards before an election could be obtained. Slater added that he read the card, understood what it said, and signed it. Starbird testified that when she first gave an authorization card to Slater to sign she advised him that "we were collecting cards to get a union at the plant." She denied ever telling Slater that the sole and only purpose of the card was to get an election.

The Board in *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1963), held that authorization cards which clearly designated the union as bargaining representative even though procured through representations that they were to be used to obtain an election would be counted to establish the majority status of the union unless it is proved that the employees were told that the card was to be used solely for the purpose of obtaining an election.

Thereafter the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606-608 (1969), after approving the Board's *Cumberland* rule, considered the evidence pertinent to the validity of the disputed authorization cards as follows:

In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. . . . We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else. . . .

We agree, however, with the Board's own warnings, in *Levi-Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employees free choice by a too easy mechanical application of the *Cumberland* rule.<sup>207</sup> We also accept the observation that employees are more likely than not, many months after a card drive . . . to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1).

<sup>204</sup> *Garland Knitting Mills*, 170 NLRB 821 (1968).

<sup>205</sup> Kline, called as a witness for the Respondent, commenced her employment with the Respondent in May 1980 and at the time she testified herein was still so employed.

<sup>206</sup> Slater, a witness for the Respondent, testified that he began working for the Respondent in December 1979 and at the time of the trial was still employed at the Respondent's laboratory.

<sup>207</sup> In this regard, the Board stated in *Levi Strauss & Co.*, 172 NLRB 732 (1968), enfd. 441 F.2d 1027 (D.C. Cir. 1970), "The Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election."

We therefore reject any rule that requires a probe of an employee's subjective motivation as involving an endless and unreliable inquiry. . . .<sup>208</sup>

[F]or cards to be invalidated on the basis of such misrepresentations, it is necessary that the asserted reliance on the misrepresentations be established by objective evidence corroborating or supporting the subjective assertion.<sup>5</sup>

<sup>5</sup> Such objective evidence would, of course, include oral statements immediately preceding or concurrent with the signing of the card.

The question to be determined then is not what the employees believed when they signed the cards but what they were told, orally or in writing. Accordingly, employees may have believed that the cards were to be used only to obtain an election, but the Board still will count such cards if the employees were not solicited on this basis.<sup>209</sup> A misrepresentation will be disregarded when it is clear that the employee did not rely upon it in executing the authorization card.<sup>210</sup> And if the card unequivocally and unconditionally gives the union authority, then misrepresentation, to invalidate the card, must have indicated that the card would be used only for a different, more limited, purpose than that stated on the card.<sup>211</sup>

In light of the above Board and court rulings it is clear from the evidence that the authorization cards of Kline and Slater are valid and should be counted toward establishing whether or not the Union represented a majority of the employees in the appropriate unit. This becomes even more strongly warranted where, as here, I credit Starbird's testimony as to what was said.<sup>212</sup>

That the authorization cards given to the above employees, and to all the employees applicable herein, were unambiguous is evident from the record. These were single purpose authorization cards. The card states on its face that the signer authorizes the Union to represent the employee for collective-bargaining purposes.<sup>213</sup>

As stated before under the *Cumberland Shoe* doctrine,<sup>214</sup> such a card will be counted unless it is proved

<sup>208</sup> As stated by the Board in *Marie Phillips, Inc.*, 178 NLRB 340, 341 (1969), *enfd.* 443 F.2d 667 (D.C. Cir. 1970).

<sup>209</sup> *Henry I. Siegel, Inc.*, 165 NLRB 493 (1967); *Peterson Bros.*, 144 NLRB 679 (1963), *enfd.* in part 342 F.2d 221 (5th Cir. 1965).

<sup>210</sup> *Engineers & Fabricators, Inc.*, 156 NLRB 919 (1966), enforcement denied in part 376 F.2d 482 (5th Cir. 1967).

<sup>211</sup> *NLRB v. Gissel Packing Co.*, 395 NLRB 575 (1969). "This must be done on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards." *Aero Corp.*, 149 NLRB 1283, 1290 (1964).

<sup>212</sup> As noted hereinbefore, both Kline and Slater were still employed by the Respondent at the time they testified in this proceeding. Moreover, as will be more particularly set forth hereinafter, after the Respondent embarked upon a campaign of unlawful restraint and coercion against his employees, both Kline and Slater were sought to retrieve their authorization cards and withdraw their support from the Union. Additionally, as indicated hereinbefore Slater's loyalty to the Respondent as against the Union, in view of his allegedly feigned desire initially for union representation, makes his credibility as a witness suspect.

<sup>213</sup> *WCAR, Inc.*, 203 NLRB 1235 (1973).

<sup>214</sup> *Cumberland Shoe Corp.*, *supra*.

that the employee was told that the card was to be used solely for the purpose of obtaining an election. The Supreme Court in *Gissel*<sup>215</sup> approved the Board's *Cumberland Shoe* rule but also agreed with the Board's warning in the *Levi Strauss* case,<sup>216</sup> concerning a "too easy mechanical application" of such rule.<sup>217</sup>

Further, that at no time in the solicitation of the cards were the signers told that the cards were to be used solely for the purpose of obtaining an election is also obvious from the "totality of circumstances surrounding the card solicitations."<sup>218</sup> The Board has continuously held that a statement by a solicitor that cards will be used to secure a representation election are insufficient in and of itself to invalidate the cards as evidence of majority status, since such representation is not inconsistent with the text of an unambiguous card unless the signer is specifically informed that the card will be used solely to secure an election.<sup>219</sup> Moreover, "the fact that the solicitor stated to them [employees] that the cards would be used to get an election cannot be construed as misrepresenting the purpose of the card as unambiguously stated thereon."<sup>220</sup>

It is the Respondent who must show clear and convincing evidence of material misrepresentations to invalidate otherwise unambiguous authorization cards and he has failed to do so herein.<sup>221</sup>

Accordingly, I find that, on the day the Union made its demand for recognition and bargaining,<sup>222</sup> it represented a majority<sup>223</sup> of the Respondent's employees in the appropriate unit.<sup>224</sup>

<sup>215</sup> *NLRB v. Gissel Packing Co., Inc.*, *supra*.

<sup>216</sup> *Levi Strauss & Co.*, *supra*.

<sup>217</sup> *Levi Strauss & Co.*, *supra*.

<sup>218</sup> *Levi Strauss & Co.*, *supra*.

<sup>219</sup> *Walgreen Co.*, 221 NLRB 1096 (1975); *Great Atlantic & Pacific Tea Co.*, 210 NLRB 593 (1974); *Area Disposal, Inc.*, 200 NLRB 350 (1972).

<sup>220</sup> *Hedstrom Co.*, 223 NLRB 1409 (1976); *Federal Sink Div. of Unarco*, 197 NLRB 489 (1972).

<sup>221</sup> *NLRB v. Gissel Packing Co.*, *supra*; *Cato Show Printing Co.*, 219 NLRB 739 (1975).

<sup>222</sup> July 25, 1980.

<sup>223</sup> The Union had valid signed authorization cards from 14 of the 22 employees in the unit.

<sup>224</sup> See *Jefferson National Bank*, 240 NLRB 1057 (1979); *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977). While not mentioned in his brief, the Respondent adduced evidence at the hearing apparently to show that Kline and Slater revoked their signed authorization cards by requesting the return thereof from the Union. Kline testified that she contacted the Union during the first week in August 1980 requesting the return of her card. Slater's testimony concerning when he asked the Union for his card back is equivocal but suggests that he did this at the end of July 1980. However, Lind testified that Slater's request for the return of his card came in September 1980. Be that as it may it is well established that an employee seeking to revoke an authorization card, and thereby preclude having the card counted in determining the issue of majority status, must actually notify the union of that desire prior to the demand for recognition. *Struthers-Dunn, Inc.*, 228 NLRB 49 (1977), enforcement denied 574 F.2d 796 (3d Cir. 1978); *Southbridge Sheet Metal Works, Inc.*, 158 NLRB 819 (1966), *enfd.* 380 F.2d 851 (1st Cir. 1967); *Payless*, 157 NLRB 1143 (1966), *enfd.* 405 F.2d 67 (6th Cir. 1968). Also see *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432 (8th Cir. 1965), cert. denied 384 U.S. 1002 (1966). Therefore, since Kline and Slater did not revoke their designations of the Union as their bargaining agent prior to the date on which the Union made its demand for recognition and bargaining, their withdrawals did not cause the invalidity of their authorizations for the purpose of establishing the Union's majority as of the Union's demand date, July 25, 1980. *Payless, supra*, and cases cited at 1150 therein.

## 2. The applicability of a bargaining order

The amended consolidated complaint alleges, in substance, that by the unlawful acts and conduct engaged in by the Respondent he has precluded the holding of a fair election among the employees in the unit found appropriate herein. The Respondent denies this. Further, the General Counsel asserts in his brief that "Respondent's course of unlawful conduct requires the issuance of a bargaining order." The Respondent in his brief opposes this as inappropriate.<sup>225</sup>

### Analysis and Conclusions

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court approved the Board's use of bargaining orders to remedy an employee's independent 8(a)(1) and (3) violations which undermined a union's majority status and fatally impeded the holding of a fair election. In doing so, the Court held that such orders would be appropriate in two situations. The first involves unfair labor practices which are so "outrageous" and "pervasive" that traditional remedies cannot eliminate their coercive effect, with the result that a fair election is rendered impossible. The second, as described by the Court at 614-615 is:

... in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by bargaining order, then such an order should issue. . . .

The Court additionally stated elsewhere in *Gissel* that "perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the

<sup>225</sup> The Respondent gives as reasons therefor, in substance: that there was no showing that the Union represented a majority of the Respondent's employees in the appropriate unit; that even if the Union had "majority support through valid authorization cards, it was a bare majority"; that the Union's "majority through valid authorization cards" was lost "due to no unfair labor practices of respondent"; that any unlawful acts or conduct on the Respondent's part "was not so coercive, pervasive or extensive as to require a bargaining order to remedy its unlawful effect"; and that "the lapse of time which has occurred since the alleged unfair labor practice, and the significant change in the employee complement, now make a fair election possible."

employer's unlawful campaign,"<sup>226</sup> by means of a bargaining order.

The Board itself stated in *Ship Shape Maintenance Co.*, 189 NLRB 395 (1971):

It is now settled that serious illegal activity accompanying an employer's refusal to grant recognition and to bargain with the majority representative of its employees destroys the necessary conditions for the holding of a free and fair election. . . .<sup>7</sup>

The foregoing unlawful conduct not only precluded the holding of a fair election in the representation proceeding the Union had instituted, but, in our judgment, was of a sufficiently pervasive and extensive character . . . to have likely served its intended purpose of undermining the Union's preexisting majority. In these circumstances we believe that restoration of the *status quo ante* is required in order to vindicate employee rights and prevent Respondent from profiting from its own unfair labor practices. We are further of the opinion that the lingering effects of Respondent's past coercive conduct render uncertain the possibility that traditional remedies can ensure a fair election. We therefore conclude, on balance, that the Union's majority card designations obtained before the unfair labor practices occurred provided a more reliable test of employee representation desires, and better protect employee rights, than would a rerun election.<sup>227</sup>

<sup>7</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575.

The Board's decision to issue a bargaining order is based on all the circumstances of the case including the nature of the violations and the context in which they occurred. It is pursuant to such an overall evaluation that the Board makes its findings.<sup>228</sup> Normally the Board bases its *Gissel* bargaining orders upon all unfair labor practices committed by a particular respondent which interfered with, restrained, and coerced employees in the exercise of their Section 7 rights.<sup>229</sup>

The evidence herein shows that the Union commenced its organizational campaign at the Respondent's plant on or about July 15 or 16, 1980. On July 16 or 17, 1980, upon learning that its employees were engaging in union activities, the Respondent commenced his unfair labor practices, continuing thereafter to engage in various flagrant violations of Section 8(a)(1) and (3) of the Act clearly to undermine the Union.

The Respondent, through his representatives, Michael and Lynn Shelander,<sup>230</sup> unlawfully interrogated his employees concerning their own and other employees' union and/or protected activities and sympathies. The Respondent, by himself and through his representative,

<sup>226</sup> 395 U.S. at 612.

<sup>227</sup> See also *Petrolane Alaska Gas Service*, 205 NLRB 68 (1973); *Honda of Haslett*, 201 NLRB 855 (1973), *enfd.* 490 F.2d 1382 (6th Cir. 1974).

<sup>228</sup> *Rensselaer Polytechnic Institute*, 219 NLRB 712 (1975).

<sup>229</sup> *Rapid Mfg. Co.*, 239 NLRB 465 (1978); *Baker Machine & Gear, Inc.*, 220 NLRB 194, 195 (1975); *Idaho Candy Co.*, 218 NLRB 352, 358-359 (1975).

<sup>230</sup> The respective actions attributable to the Shelanders which constitute the unfair labor practices have been set forth in detail hereinbefore.

Lynn Shelander, solicited employee grievances and promised, expressly and impliedly, to remedy the same.<sup>231</sup>

The Respondent himself unlawfully surveyed and created the impression that the union activities of his employees were under surveillance. He also, through his representative Lynn Shelander, promised employees a wage increase and other benefits in order to discourage their support of the Union.

Moreover, the Respondent, by himself and through his representative Lynn Shelander, expressly and impliedly threatened his employees with "unspecified" harm, with termination if they did not discontinue their union activities, and with plant closure if the Union were to become the collective-bargaining representative of the employees in an appropriate unit. As stated hereinbefore, a direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can dissuade employees from selecting a bargaining representative.<sup>232</sup> Additionally, the Respondent by promulgating and enforcing his unlawful "no-solicitation rule" sought to restrain, coerce, and interfere with the exercise by his employees of their Section 7 rights under the Act.

Further, the record clearly shows that the Respondent's actions, as set forth above, were not mere isolated and haphazard instances of misconduct but were part of a plan to discourage and dissipate the Union's majority status. Most significantly, the Respondent unlawfully discharged Ellen Starbird, the leading supporter of the Union, as a serious and effective reminder to all his employees of the dangers inherent in continuing to support the Union.<sup>233</sup>

<sup>231</sup> As the Board stated in *Teledyne Dental Products Corp.*, *supra* (210 NLRB at 435):

In essence, we are presented with a situation wherein the Respondent has deliberately embarked upon a course of action designed to convince the employees that their demands will be met through direct dealing with the Respondent and that union representation could in no way be advantageous to them. Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence. We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain. Neither is there any conduct which could constitute a greater impairment of employees' basic Section 7 rights under our Act, especially since such conduct by its very nature has a long-lasting, if not permanent, effect on the employees' freedom of choice in selecting or rejecting a bargaining representative.

<sup>232</sup> *General Stencils, Inc.*, *supra*; *Devon Gables Nursing Home*, 237 NLRB 775 (1978); *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 523, 536 (4th Cir. 1941).

<sup>233</sup> *Jefferson National Bank*, *supra*; *Twilight Haven, Inc.*, 235 NLRB 1337 (1978); *Panchito's*, 228 NLRB 136 (1977); *Motel 6*, 207 NLRB 473 (1973); *A. J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970). As the Board stated in *A. J. Krajewski Mfg. Co.*, *supra* (180 NLRB at 1071):

It is a well-established fact that a discriminatory discharge of an employee because of his union affiliation goes to the very heart of the Act. Furthermore, the discharge of the union leader, as here, serves as a warning to the employees that the employer has the power to take action which affects the employees' livelihoods and that it is willing to implement such power against Union adherents. The implementation of such power against the union ringleader is just as likely to accomplish the destruction of employee support for unionization as would a greater number of unfair labor practices which individually have a lesser impact.

As detailed above, the Respondent here engaged in serious violations of Section 8(a)(1) and (3) of the Act, which were calculated to defeat the Union's organizational effort then and in the future, and to decisively and permanently undermine its status among the employees.<sup>234</sup> Consideration must also be given to the speed with which the Respondent reacted to the knowledge that his employees were engaging in union activities. I therefore believe that the unfair labor practices committed by the Respondent herein were so severe, extensive, outrageous, and pervasive that the application of traditional remedies afford no guarantee that an election will provide a more accurate index of employees' sentiment than the authorization cards executed by a majority of the employees. In these circumstances I find that "employee sentiment, once expressed through cards, would on balance, be better protected by a bargaining order."<sup>235</sup>

As the Supreme Court has held, an employer has a right to a Board election so long as he does not impede the election process.<sup>236</sup> However, when he so obstructs the process, he forfeits his right to an election and must bargain with the Union on the basis of other clear indications of the employees' desires, and his bargaining obligation commences as of the time that he embarked on a clear course of unlawful conduct or engaged in sufficient unfair labor practices which undermine the union's majority status and subverts the Board's election process.<sup>237</sup>

In the instant case, the Respondent embarked on his campaign to destroy the Union's support among unit employees on July 16 or 17, 1980, when he commenced his unfair labor practices by unlawfully interrogating his employees. However, inasmuch as the Union's demand for recognition was made on July 25, 1980, after it had attained majority representation of the Respondent's em-

<sup>234</sup> No better illustration of the successful results thereof is employee Jackie Shibata's subsequent indecision and wavering of her support of the Union after the Respondent's unfair labor practices commenced and were in full sway. Initially and at the commencement of the Union's organizational campaign, Shibata had fully supported the Union, attending the union meeting on July 18, 1980, and signing a union authorization card. After the various unlawful actions of the Respondent, she then became unsure as to how she would vote in the election and as to her support of the Union. Additionally, the actions of Pamela Kline and Donald Alan Slater, in seeking the return of their signed authorization cards and to withdraw their support of the Union, only after the Respondent had engaged in pervasive and coercive unfair labor practices during a crucial period in the Union's organizational campaign, vividly underscore this.

<sup>235</sup> *NLRB v. Gissel Packing Co.*, *supra*; *Armcor Industries*, 227 NLRB 1543 (1977); *Multi-Medical Convalescent & Nursing Center of Townsen*, 225 NLRB 429 (1976), *enfd.* 550 F.2d 974 (4th Cir. 1977); *Trading Port, Inc.*, 219 NLRB 298 (1975).

I am not unmindful that the Respondent argues against a bargaining order herein on the grounds that "The lapse of time which has occurred since the alleged unfair labor practice, and the significant change in the employee complement, now make a fair election possible." I have considered the Respondent's high turnover of employees, allegedly 50 percent, and the passage of time as affecting the dissipation of the lingering effect of the unfair labor practices but do not find these sufficient to offset the Respondent's severe, egregious, and substantial unfair labor practices committed in this case.

<sup>236</sup> *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

<sup>237</sup> *Trading Port, Inc.*, *supra*; *Baker Machine & Gear, Inc.*, 220 NLRB 194.

ployees in the appropriate unit, I conclude that the Respondent should be required to recognize and bargain, upon request, with the Union as of July 25, 1980.<sup>238</sup>

From all of the above, I find and conclude that by refusing to recognize and bargain with the Union, upon request, and engaging in the unfair labor practices found herein, the Respondent violated Section 8(a)(5) and (1) of the Act, and that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and to otherwise remedy the violations committed.<sup>239</sup>

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

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

As the unfair labor practices committed by the Respondent were serious and go to the very heart of the Act, I shall recommend that he cease and desist therefrom and in any other manner from interfering with, restraining, and coercing his employees in the exercise of the rights guaranteed them in Section 7 of the Act.<sup>240</sup>

Having found that the Respondent did unlawfully discharge Ellen Starbird, it is recommended that the Respondent offer her immediate and full reinstatement to her former position or, if said position no longer exists, to a substantially equivalent position, without loss of seniority or other benefits, and make her whole for any loss of pay resulting from the discrimination against her by payment to her of a sum of money equal to the amount she normally would have earned as wages from the date of her discharge to the date of a bona fide offer of reinstatement, less net interim earnings. The backpay due under the terms of the recommended order shall be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>241</sup>

<sup>238</sup> *Peninsula Assn. for Retarded Children & Adults*, 238 NLRB 1099 (1978); *Trading Port, Inc.*, *supra*. Also see *Crawford House*, 238 NLRB 410 (1978).

<sup>239</sup> *NLRB v. Gissel Packing Co.*, *supra*; *Trading Port, Inc.*, *supra*.

<sup>240</sup> *Hickmott Foods*, 242 NLRB 1357 (1979); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941).

<sup>241</sup> See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Also see *Olympic Medical Corp.*, 250 NLRB 146 (1980); *Pioneer Concrete Co.*, 241 NLRB 264 (1979).

In view of the Respondent's extensive and pervasive unfair labor practices which were calculated to destroy the Union's previously enjoyed majority status, and since I am persuaded that the application of traditional remedies for the said unfair labor practices cannot eliminate the lingering and restraining effects thereof and makes the holding of a fair, meaningful, and free election virtually impossible, I regard the employees' signed authorization cards as a more reliable measure of their representation desires. I will therefore recommend the issuance of an order requiring the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the appropriate unit.<sup>242</sup>

#### CONCLUSIONS OF LAW

1. The Respondent, Greg Bunker, a sole proprietor d/b/a Photo Drive Up, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has interfered with, restrained, and coerced his employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Coercively interrogating his employees regarding their own and other employees' union and/or protected activities and sympathies.

(b) Soliciting employees' grievances and promising expressly or impliedly that such grievances would be adjusted for the purposes of influencing their selection of a labor organization as their bargaining representative.

(c) Threatening his employees with discharge and with plant closure if they engaged in union and/or protected concerted activities or supported the Union.

(d) Engaging in or creating the impression of surveillance of the union and/or protected concerted activities of his employees.

(e) Promulgating and maintaining an invalid no-solicitation rule, and applying it in a discriminatory manner.

(f) Expressly and impliedly promising wage increases and other benefits to his employees for the purpose of discouraging their support of the Union.

4. By discharging Ellen Starbird because of her union activities and refusing to reinstate her, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

5. All full-time and regular part-time laboratory employees and drivers employed by the Respondent at his Meridian Avenue, San Jose, California, facility; excluding all retail clerks, retail sales clerks, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

<sup>242</sup> *NLRB v. Gissel Packing Co.*, *supra*; *Trading Port, Inc.*, *supra*; *Westminster Community Hospital*, 221 NLRB 185 (1975).

6. Since July 23, 1980, the Union has been the exclusive collective-bargaining representative of all employees employed in the unit found appropriate in Conclusion of Law 5, above, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing on or after July 25, 1980, to recognize and bargain with the Union as the collective-bargaining representative of his employees in the unit found appropriate above, the Respondent violated Section 8(a)(5) and (1) of the Act.

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

Upon the basis of the foregoing findings of fact and 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>243</sup>

The Respondent, Greg Bunker, a sole proprietor d/b/a Photo Drive Up, San Jose, California, his agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Coercively interrogating his employees regarding their own and other employees' union and/or protected activities and sympathies.

(b) Soliciting employees' grievances and promising that such grievances will be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(c) Threatening his employees with discharge and with plant closure if they engage in union and/or protected concerted activities or supported the Union.

(d) Engaging in or creating the impression of surveillance of the union and/or protected concerted activities of his employees.

(e) Promulgating and maintaining an invalid no-solicitation rule and applying it in a discriminatory manner.

(f) Expressly and impliedly promising wage increases and other benefits to his employees for the purpose of discouraging their support of the Union.

(g) Discouraging membership or support of United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, or any labor organization, by discharging employees or otherwise discriminating against them in their hire and tenure.

(h) Refusing to recognize and, upon request, to bargain with United Food & Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive collective-bargaining representative of his employees in the unit found appropriate herein.

<sup>243</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.<sup>244</sup>

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

(a) Offer Ellen Starbird immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Ellen Starbird whole for any loss of pay suffered by her by reason of the discrimination found herein, in the manner described in the section entitled "The Remedy."

(c) Expunge from his files any reference to the discharge of Ellen Starbird on July 23, 1980, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.<sup>245</sup>

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Rescind his invalid no-solicitation rule.

(f) Upon request, recognize and bargain with United Food and Commercial Workers Union, Local 428, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive collective-bargaining representative of his employees in the appropriate bargaining unit set forth above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written signed agreement.

(g) Post at his Meridian Avenue, San Jose, California, facility copies of the attached notice marked "Appendix."<sup>246</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by him 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.

(h) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>244</sup> A broad order is warranted herein as indicated by the serious unfair labor practices found. *Backstage Restaurant*, 232 NLRB 1082 (1977); *Stride Rite Corp.*, *supra*; *Ann Lee Sportswear, Inc.*, 220 NLRB 982 (1975).

<sup>245</sup> *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

<sup>246</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."