

Metro Center, Inc. and Local No. 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 22-CA-9736 and 22-CA-10388

23 August 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 30 November 1982, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. Finally, Respondent filed a brief in opposition to the General Counsel's cross-exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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, Metro Center, Inc., Edison, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

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

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

² In the absence of exceptions, we need not pass on the 8(a)(1) violations found by the Administrative Law Judge. Rather, we adopt, *pro forma*, his findings.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was tried before me in Newark, New Jersey, on January 18, February 22, 23, 25, and 26, and May 20, 1982. The complaint and notice of hearing in Case 22-CA-9736 was issued on June 26, 1980, based on unfair labor practice charges filed on January 31 and February 25, 1980. The complaint and notice of hearing in Case 22-CA-10388 was issued on December 15, 1980, based on a charge filed on October 31, 1980. The charges were filed by Local No. 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union. An order consolidating cases was issued on December 30, 1981. The allegations in the consolidated complaint are that Metro Center, Inc., herein called Respondent, violated Section 8(a)(1) of the Act by interrogating its employees regarding their union membership, threatening its employees with loss of employment if they continued to support the Union, and asking its employees to divulge to Respondent the union membership and sympathy of the other employees. The consolidated complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by assigning employees Sergio Machuca and Hernan Cifelli on January 29, 1980,¹ to more arduous and less agreeable job tasks, thereby causing the termination of said employees, and by discharging James Moran on October 23, 1980, all because said employees joined, assisted, or supported the Union. The consolidated complaint also alleges, and Respondent agrees, that on June 4, 1981, Respondent offered reinstatement to Machuca, Cifelli, and Moran.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation which has maintained its principal office and place of business at 300 Raritan Center Parkway, Edison, New Jersey, herein called the warehouse, has been continuously engaged in providing and performing warehousing and related services. During the year 1980, Respondent provided and performed warehousing services valued in excess of \$50,000 for Wakefern Corporation, herein called Wakefern, which is located in the State of New Jersey, and itself derived gross revenue in excess of \$500,000 during this period from the retail sale of groceries and related products, and purchased and received goods valued in excess of \$50,000 which were shipped and delivered to it directly from States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ All dates herein refer to 1980 unless otherwise specified.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Since July 1979 Respondent has been engaged in providing warehousing services for Wakefern (a buying cooperative for a chain of supermarkets) at the warehouse involved herein. Respondent utilizes approximately 400,000 square feet of this warehouse for its operations. This warehouse contains cartons of food and other items normally dispensed at a supermarket. Some of these cartons are stored on shelves while others are warehoused one on top of the other. The employees operating in this area are classified as warehousemen, and there are two essential operations performed by warehousemen; operating a hi-low (forklift truck) and selecting. The hi-low operators transfer the cartons of merchandise from the delivery trucks to the proper location in the warehouse where they are stored. The selectors choose cartons of merchandise from this stock pursuant to an order form, place these cartons on a handtruck, and bring the entire order to a truck for shipment to the stores involved.

During the period in question, January through October, Respondent operated two shifts; in January, the day shift employed between 41 employees, while the evening shift employed between 55 and 75 employees.² The man in charge of these operations was Frank Coppola, Jr., director of operations for Respondent. Under him during the day shift (7 a.m.-5:30 p.m.) were James Mendler, shift manager, Ed Rich, warehouse manager, and Ken James, foreman in charge of receiving. In charge on the evening shift was Al Cetrulo, night-shift manager or warehouse manager, and Richard Iski, shift manager. Steve Tomaskovicz, who was the foreman in charge of the selectors, worked the day shift in January and the evening shift in October. All of the above are admitted by Respondent to be supervisors and agents of Respondent, and, for the most part, they spent their work hours on the warehouse floor.

The three discharges herein occurred during two unsuccessful organizational drives by the Union in January and October, with little or no organizing in between. In or about February 1981 Respondent recognized the Union as the representative of its warehouse employees. A collective-bargaining agreement was entered into in April 1981, retroactive to February 16, 1981.

A. *The Machuca and Cifelli Discharges*

Hernan Cifelli began his employ with Respondent at the warehouse in question in July 1979; he began as a warehousemen—hi-low driver on the day shift. Sergio Machuca commenced his employment with Respondent in August 1979, also on the day shift. He began as a warehousemen-selector although shortly thereafter he became a hi-low operator. He testified that he was employed for 2 months before he became a hi-low operator;

² These numbers include maintenance employees and supervisors. The wide range is due to absences and the high employee turnover; it appears that there were usually no more than 50 men working on each shift.

Respondent's records indicate that on November 21 Machuca began operating a hi-low almost exclusively.

In early January a number of employees of Respondent (including Machuca, but not Cifelli), while in Respondent's parking lot, were discussing unionizing. Somebody gave employee John Durand the telephone number of Local 469, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 469, and asked him to call. He and Machuca went to the phone and kDurand called Local 469 and said that he and his fellow employees wished to be unionized. The person he spoke to told him that he would leave Local 469 authorization cards for him in the mailbox in front of the Local 469 office. Durand drove to the Local 469 office, picked up the authorization cards, and gave them all to Machuca and told him to have the employees sign the cards and return them to Local 469. That was the extent of Durand's involvement, except that he signed a Local 469 card and mailed it in. Machuca testified that it was on Wednesday, January 16, that Durand gave him the Local 469 authorization cards and told him to get them signed by the employees and to return them to Local 469. Machuca then discussed the cards with Cifelli who told him that he liked the idea. That day, while driving his hi-low through the warehouse, Machuca discussed unionizing with some of the employees whom he knew, and gave them Local 469 cards to sign. While in the warehouse that day, Cifelli only discussed unionization with other employees; he handed out no cards in the warehouse. In addition, during lunch on that day, Machuca placed the Local 469 cards on the hood of his car in the parking lot and employees took the cards, signed them, and returned them to either Machuca or Cifelli. He received 27 signed authorization cards that day. He also gave a large number of authorization cards to Angel Vega, an employee on the night shift, and asked him to have the night-shift employees sign them.

On January 22³ Machuca and Cifelli drove to the Local 469 office where they met Walter Emerson, secretary-treasurer of Local 469. Emerson told them that he had spoken to some other union representatives and learned that the Union (Local 863) represented the truck-drivers employed by Wakefern and it would be more appropriate for Local 863 to represent the employees rather than Local 469; he said that he would arrange for a meeting with the Union's representative, Jerry Gallichio. On the next day Machuca and Cifelli returned to the Local 469 office where they met Gallichio and Emerson. They agreed that the Union would be more effective for them and Gallichio told them that they would have to solicit new authorization cards, on this occasion for the Union. On the following day Machuca and Cifelli solicited the employees on the day shift to sign the union authorization cards. They followed the same procedure as the prior week and they explained that they needed

³ The testimony is somewhat confusing regarding the date of this meeting and the subsequent meeting with the representative of Local 863. On the basis of all the testimony it appears that this meeting occurred on January 22, and the subsequent meeting on January 23, although it is not critical to the ultimate issues.

the new cards because it was a new union. They obtained 24 signed Local 863 authorization cards and on the afternoon of January 24 Machuca requested and received permission from his supervisor, James, to leave work early. He and Cifelli went to the union office and returned these signed authorization cards to Gallichio.

That was the extent of the attempt to organize the day-shift employees prior to Machuca and Cifelli's discharge. Respondent's witnesses testified that they had no knowledge of union activity at its warehouse prior to the discharges of Machuca and Cifelli, and, more particularly, they denied any knowledge of union activity on their part prior to their discharges. Respondent alleges that the first they knew of any union activity on their part was when they received the unfair labor practice charge herein on February 1.

There are a number of allegations of interrogation and coercion by Respondent. Machuca testified that sometime between January 16 and 24 James approached him while he was driving his hi-low and asked him, "Did you sign any paper for the union?" and Machuca said that he had not. James, who is still employed by Respondent, did not testify. Cifelli testified that Mendler and James (and possibly Tomaskovicz) asked him if anybody gave him a card to sign for the Union; neither Mendler nor Tomaskovicz specifically testified regarding this conversation. These events occurred in or about the week of January 21 while he was driving his hi-low. Employee James Murawski testified that at or about the end of January, while he was selecting, James asked him if he signed a card for the Union and Murawski answered, "Of course I did." (No action was taken against him.) Employee Robert Goodson testified that, a few days to a week after he signed a card for a union given to him by Machuca, Tomaskovicz approached him while he was selecting and asked him if he knew of anybody that was passing out cards or talking about starting a union and Goodson said that he did not. Tomaskovicz testified that he never asked Goodson, or any other employee, whether he knew of anybody passing out cards or talking about a union.

Employee Fred Schmidt testified that, after he signed the two union authorization cards given him by Machuca, Coppola "joking around he came up to me and asked me if I was out in the parking lot signing cards." Schmidt told him yes.⁴ Coppola testified that in early February, after he had received a copy of the unfair labor practice charge and while he was walking through the warehouse, Schmidt said to him that a lot of people were signing union cards. Coppola then asked Schmidt if he did "and then I realized . . . that I was probably doing something that I shouldn't be doing, and I ended the conversation."

At the time in question, Machuca and Cifelli were driving to work together in Cifelli's car. On Friday, January 25, they were unable to get to work because Cifelli's car was not operating. Machuca called Respondent

and informed "Jerry Spillar" (whose position is unstated) that they were having car trouble and would not be in, but if they were able to repair the car they would report for work. At or about 1 or 2 o'clock Cifelli's car was operating again. They then drove to the union office and dropped off the signed authorization cards; they then stopped at Vega's home where they picked up the signed union authorization cards for the night shift. At that time Machuca and Cifelli decided to report to the warehouse to work the night shift. They arrived at the warehouse at or about 7 p.m., without having called first to say that they would be reporting.

Machuca testified that when they arrived at the warehouse they did not see Cetrulo, the usual supervisor on the night shift; instead, they saw Coppola who said that they have been fired that morning. Machuca said that he had called at 7 that morning to report that they would not be in because of car trouble, and Coppola said that, if they wanted to work, they would have to work for Cetrulo, who had not yet arrived. Coppola then put his hand on Machuca's shoulder and said, "Someone told me you guys want to make trouble for me." Machuca asked, "What kind of trouble?" and Coppola said, "You know what kind of trouble." Coppola then asked Machuca if he knew anyone who signed a card for the Union and he said, "No." Coppola asked if Machuca had signed a card for the Union and again he answered, "No." Coppola then said that if a union came in everybody would have to look for a new job. Coppola then told Machuca and Cifelli that they would have to perform selecting work until Cetrulo arrived, and he took them to the head of the line of selectors who were waiting to receive their selecting orders from the order clerk. Coppola then walked away, and, shortly thereafter, so did Machuca and Cifelli, who, without waiting for a selecting order, on their own initiative, got on their hi-lows⁵ and began performing duties as if they were on the day shift. About 15 minutes later, Cetrulo saw them and said that he had enough hi-low drivers for the night and he only needed selectors; if they did not want to select they should go home. They said that they did not want to select,⁶ and Cetrulo told them to go home. Coppola then said, "I'll see if I can get the pay for you today" (they were not paid for that day), and Coppola told them not to forget to report to work the next day for inventory, which they did.

Cifelli testified that when they arrived for work that evening they saw Coppola, who said that he thought they were fired, and Machuca told him that they had called in that morning. They said they would like to work and Coppola put his arms around both their shoulders and said, "Somebody told me you two guys [are] trying to make a problem for me." Machuca asked what kind of problem and he told both that they knew what he was talking about. Coppola then asked if anyone

⁵ Hi-low drivers keep the keys to their vehicles in their possession, even during nonworking.

⁶ The next day, beginning at 7 a.m., they had to report for work for an inventory. They testified that they refused to select that evening because selecting work is more taxing physically than driving a hi-low, and they felt that if they selected from 7 p.m. to 5:30 a.m. that evening they would not be able to perform the inventory work the next morning.

⁴ As to why he felt that Coppola was joking, Schmidt testified:

He always thought I was a leader there . . . so he always fooled around with me . . . saying . . . anything that went on I knew everything . . . and I always admitted to him . . . the truth, hoping that he would never believe me.

asked them to sign a card for the Union and they both said, "no." Cifelli said, "Well, soon as I know somebody is for the union, I'll let you know." Coppola then said that the Union was not good for them because if the Union came in everybody would have to find another job. Unlike Machuca, Cifelli testified that Coppola did not take them to the head of the line of selectors waiting for orders; he testified that Coppola said that they should do whatever they could do until Cetrulo arrived. They drove their hi-lows, and when Cetrulo arrived, he told them he had enough hi-low drivers that night and if they wished to stay and work they would have to select. They said that they did not want to select. Coppola then said, "don't forget, I want you early tomorrow morning . . . for the inventory," and they left and reported the following morning at 7 a.m. for the inventory.

Coppola testified that while he was at the warehouse on January 25 he received a call from Cetrulo, who said that he was caught in traffic and expected to be about 20 minutes late arriving for work. At or about 7 p.m., he saw Machuca and Cifelli come into the warehouse and, since they had called in that morning to say they would not be able to report for work, he asked, "What are you doing here now?" They said that they had fixed the problems on their car and were ready to work. Coppola said Cetrulo was not in yet, and they would have to wait until he arrived before they would receive a permanent assignment for the evening;⁷ and when Cetrulo arrived he might assign them to their hi-lows, but meanwhile they would have them select. Coppola then took them to the place where the selectors receive their orders. About 40 employees were waiting, at the time, to receive their orders from the order clerk. Coppola went to the head of the line with Machuca and Cifelli and told the order clerk to give them orders that would take about 20 minutes (Coppola felt that by that time Cetrulo would arrive and he could assign them a job for the evening), and Coppola walked away without waiting to see them begin selecting. Shortly thereafter, Coppola saw either Machuca or Cifelli driving a hi-low. He asked the order clerk why he had not given them orders to select and the clerk said that he did not have an opportunity because they walked away without taking an order. A few minutes later Cetrulo arrived and Coppola told him that Machuca and Cifelli had arrived to work the night shift, he had attempted to get them to select until Cetrulo arrived, but "they had defied my instructions and what was he going to do." Cetrulo said that he did not need any hi-low drivers; he had his own. Machuca and Cifelli were paged and Cetrulo asked them what they were doing, and they said that they were hi-low drivers. Cetrulo said that Respondent did not need hi-low drivers that evening, but that they could select. They said that they did not want to select, and Cetrulo said in that case, he did not need them, and they left.

Regarding the testimony of Machuca and Cifelli that Coppola told them that they were making "trouble" or a

⁷ Coppola testified that a lot of the merchandise in the warehouse had already been precounted in preparation for the inventory the following day; he asked Machuca and Cifelli to await Cetrulo's arrival before receiving a permanent assignment to be sure that he did not assign them to a job that would involve some of this precounted inventory.

"problem" for him, Coppola testified that he did make some reference to this, but it was said as a joke. He testified:

I told them that by them coming in at night, not coming in during the day, was going to create a problem for me because I had to find work for them for the evening and I was going to be extremely concerned about the inventory that was going to be held the next day and by them coming in at night and working all night and then attempting to work the whole day the next day, I jokingly said they're causing me trouble and I could lose my job if the inventory went bad.

I was kidding them, and I told them . . . them coming in and possibly . . . being so tired they wouldn't be able to come in for the inventory the next day, they were going to create trouble for me and make me earn my job, possibly lose it if they didn't show up and we screwed up the inventory . . . trouble that now I have to work, to find work for them, to make sure that they were there for the inventory.

Coppola testified further that he was upset with Machuca's and Cifelli's conduct because they had defied his orders when he instructed them to select until Cetrulo arrived, and they, instead, drove their hi-lows. He expressed this feeling to Cetrulo that night and to Mendler sometime prior to Tuesday, January 29.

Cetrulo testified that he arrived for work at or about 7:20 p.m. that evening. Coppola told him that Machuca and Cifelli did not work that day during their regular shift, the day shift and that he told them to take a selecting order. At that point they drove by in their hi-lows. Cetrulo told them that they would have to select that evening because the hi-lows were all assigned to employees normally employed on the night shift. They said that they did not want to select and Cetrulo told them that they would have to go home and report to work on their next shift, and they left.

As stated *supra* Machuca and Cifelli operated their hi-lows on the inventory the following day; they had other employees on the arms of the hi-low who counted the inventory and called the count to somebody on the ground who was keeping the records. They were not scheduled to work on Sunday, January 27. On Monday, January 28, both Machuca and Cifelli operated their hi-lows for the entire workday.

Machuca and Cifelli arrived for work on Tuesday, January 29, at or about 7 a.m. Because there are some significant discrepancies in the testimony regarding what occurred that morning, each witness' testimony will be recited separately. Machuca testified that at or about 7 a.m. he and Cifelli were paged over the intercom to report to Mendler's office. When they arrived Mendler "asked about the key, the key for the hi-low." On cross-examination, he testified that Mendler said, "Give me your keys . . . for the hi-low." Machuca asked why. On direct examination, Machuca testified that Mendler said, "Because now you're going to select." On cross-examination, Machuca testified that Mendler said "from now on"

they would have to select. Machuca asked why and Mendler said that they should see Coppola if they wanted "a better answer." Mendler then asked them, "You quit?" they said, "No. . . . We want to see Mr. Frank Coppola first." They then drove to Coppola's office and waited for him in the parking lot. He arrived at or about 8:15 or 8:30. When Coppola saw them he said, "What are you doing here?" They told him what occurred and that Mendler took away their hi-low keys and Coppola said that from now on they would select because they refused to select the prior week. Coppola told them to go home and call him later. At or about 2 o'clock Machuca called Coppola and told him that he would return to work the next day and select. Coppola said, "I'm sorry, Sergio, I can't help you. You're fired." He asked why and Coppola said that it was because he refused to select the prior week. Coppola then asked to speak with Cifelli and Machuca gave him the telephone.

In answer to questions from me regarding his conversation with Coppola in the parking lot, Machuca testified that he did not remember whether he told Coppola that he would not do selecting work. Shortly thereafter he testified that he did not tell Coppola that he would not do selecting work, but he did tell Coppola (in this parking lot conversation) that he did not want to be a selector. He testified that neither in this conversation nor any other did he say he was quitting his job.

Cifelli testified that on the morning of January 29 he and Machuca were called to Mendler's office. Mendler asked them to give him the keys to their hi-lows because, "You have to go to select."⁸ He and Machuca asked why they would have to select and they told Mendler that they did not want to select, but Machuca did not say that he was quitting, and Cifelli did not say that he would have to take Machuca home. Mendler told them that if they had any questions they should see Coppola. They drove to Coppola's office and waited for him in the parking lot. When Coppola saw them he asked what they were doing there. Either he or Machuca asked Coppola why Mendler took their keys for the hi-lows away and Coppola said that he did not have anything to do with it, but that he was mad at them for refusing to work the prior Friday. Cifelli said that he refused to work because they had inventory the following day and Coppola said that they should go home and call him later. That afternoon they called Coppola. Machuca spoke to him first and then gave the phone to Cifelli. Coppola told Cifelli, "I'm sorry, I can't help you. You're fired."

Mendler testified that on the morning of January 29 he realized that he needed more selectors. While in the warehouse he saw Machuca and Cifelli and told them that they would have to select for the day. Machuca said that he was not going to select. Mendler told them to go upstairs to the office. He met them in the office 5 to 10 minutes later. Tomaskovicz was also present. Mendler told them that he needed selectors that day and that he

did not have enough work for hi-low men, and therefore they would have to select that day. Machuca said that if he had to select he would quit. Mendler said, "You have to select because I need selectors," and Machuca said that he would not select and gave Mendler the key to his hi-low. Mendler asked Cifelli what he was going to do and he said that he was going to give Machuca a ride home because they rode together and Cifelli gave Mendler his hi-low key although Mendler testified he did not ask for it.⁹ He assigned one other hi-low driver to select that day and chose Machuca and Cifelli because he needed additional selectors that day, and "they had a poor work performance in the warehouse . . . lately," although, when asked if this was the way he always chose people to select, he answered, "Not all the time, no," but on that day he felt it was a good time to punish them for poor work performance because he needed more selectors.

Tomaskovicz testified that at the very beginning of the day shift on January 29 he was called to Mendler's office. Mendler was there with Machuca and Cifelli. Mendler told them that they would have to select for the day. Machuca said that he would not select. Mendler asked them if they would select for the day and Machuca repeated that he would not select. He handed Mendler the key to his hi-low (without being asked for it) and left the office. Cifelli said that he had to drive Machuca home, gave Mendler the keys to his hi-low, and left.

Coppola testified that on January 29, shortly after 8 a.m., he drove into his parking space and Machuca and Cifelli were waiting for him. He asked what they were doing there and they said that they were told to select.¹⁰ Machuca said that he was not going to select, that he quit. Cifelli said that they did not want to select. At another point in his testimony he testified that Cifelli said that he was not going to select, but that he would drive Machuca home and return to work. Coppola told them that he was upset at them for what they did on Friday evening. He is the head of the warehouse and gave them instructions on what to do, and they defied those instructions. Coppola said that he wanted to speak to Mendler, and Cifelli should not return to work until he called him. Coppola then called the warehouse and was told that they needed some selectors and Machuca and Cifelli were asked to select "and they refused. Sergio had quit. Hernan had indicated that he was not quitting but he wasn't going to select, but he was going to come back. Just what Hernan had told me." That afternoon Coppola received a call from Machuca who said that he was going to come back. Coppola said, "no you're not. As far as I'm concerned you quit, and if you didn't quit, I'm going to fire you, because you refused an order." Cifelli got on the phone and Coppola told him that he was also fired. Coppola testified that he did not learn of Machuca's and Cifelli's activities on behalf of the Union until he received the unfair labor practice charge in the very beginning of February, but at or about that time he heard

⁸ Mendler did not tell them for how long they would have to select. He testified that he always keeps the key to his hi-low and never previously was asked to return it. When he was told to select for a week as punishment for throwing a box on a pallet, he did not have to turn his key in.

⁹ He testified that Cifelli did not say that he was quitting.

¹⁰ Coppola testified that he had not directed Mendler to have Machuca and Cifelli select on that day.

"general talk" of a union, although he was not sure whether this occurred before or after he received the unfair labor practice charge.

Sometime between a few days to a week after January 29, Machuca and Cifelli received identical letters from Respondent. The letters, which were signed by Coppola, stated:

As stated above, your employment with Metro Center is terminated for the following reasons:

A) You reported to the wrong shift for work on Friday, January 25, 1980, without the permission of the shift supervisor. (reported to 2nd shift—normal shift is 1st).

B) When asked to do the normal warehousing work, you refused and insisted on operating a fork lift. Upon your refusal to do normal warehouse work you were sent home.

C) On Tuesday, January 29, 1980, the shift manager and a foreman of Metro requested that you do normal warehouse work. You verbally stated to them that you quit.

D) Based upon the information listed above, it is decided that you have terminated your employment with us and are not considered rehirable by Metro Center.

Machuca and Cifelli testified that they went with Machuca's wife to see Coppola. They spoke about the letters they received and Machuca's wife said that was not the real reason they were discharged, and everybody knew the real reason for this discharge. Coppola did not answer. Coppola testified that Machuca's wife asked why they were discharged and Coppola told her that it was because they had refused to do what they had been told. Machuca's wife said that was not the real reason they were fired and everybody knew what the real reason was. Coppola said that he did not know what she was talking about, and she never explained further what she meant. Coppola testified there was an error in the letter to Cifelli. He did not quit as Machuca had, and he (Coppola) did not read the letter carefully before it was sent to Cifelli. Coppola also testified that Respondent does not always send letters to employees it previously terminated, although it has done so in the past.

Produced at the hearing was the following employee disciplinary report dated January 29 and signed by Mendler and Tomaskovicz. This report was not given to either Machuca or Cifelli:

Warehouse Employees: Hernan Sifelli [sic]
Sergio Machuca

On January 29, 1980, Mr. Sifelli [sic] and Mr. Machuca were asked to do selection by the Shift Manager, Mr. James Mendler, and the Production Foreman, Mr. Steve Tomaskovicz. They were taken off the hi-lo and returned to selecting orders because:

1. Damage to goods
2. Interfering with other workers
3. Submitting false work sheets

The above mentioned parties, Mr. Sifelli [sic] and Mr. Machuca refused to return to selecting orders they were told to do by their immediate supervisors, stated they quit, and walked off the job.

In regard to the allegations contained in this disciplinary report, Machuca testified that neither Coppola, Mendler, or Tomaskovicz ever spoke to him about the subjects numbered 1, 2, or 3 and he never received any discipline or warning prior to January 29 for these offenses or any other offenses. Additionally, neither Mendler nor Tomaskovicz ever warned him about talking with other employees in the aisles.

Cifelli was given the following employee disciplinary report dated January 7 and signed by Mendler and Tomaskovicz:

Warehouse Employee: Mr. Hernan Sifelli [sic]

While being observed by James Mendler, Shift Manager, and Steve Tomaskovicz, Production Manager, the below mentioned employee, Mr. Hernan Sifelli [sic], had a case of goods on his hi-lo and went to the rack slot where the merchandise was supposed to go and without getting off the hi-lo, threw the case onto a pallet causing the case to brake [sic] open along with a case that was already on the pallet.

A decision by the Shift Manager and the Production Manager was made to keep the above mentioned employee suspended from the operation of a hi-lo for three days.¹¹

Cifelli testified that he did commit the offense referred to in this disciplinary report (he testified, ". . . because I throw the case and I'm not supposed to do that, and I did") and because of it he was assigned to select for a week. It was the only occasion that he selected for Respondent. However, according to Cifelli's testimony that was the only occasion on which he was warned or spoken to about his work. He was never warned or spoken to about interfering with the work of other employees or about falsifying work reports (items 2 and 3 on the January 29 employee disciplinary form).

Mendler testified that, at the time he assigned Machuca and Cifelli to select on January 29,¹² he did not suspect that they were active on behalf of a union and his decision to assign them to select was not motivated by any belief that they were involved in union activities. He instructed Tomaskovicz to prepare the January 29 employee disciplinary report "so I'd have this in my file to show why I asked him [sic] to select that day. He also testified that the three infractions listed in the January 29 Employee disciplinary report occurred about 2 or 3 weeks earlier. No prior written warning was given to Machuca and Cifelli about these incidents although James (who did not testify) informed him that (as regards the falsification of work sheets) "it was pointed out

¹¹ It was actually for a week.

¹² He testified that he was not sure whether he informed Coppola, on that day, that he chose them for selecting work because of their poor work performance recently.

to them." What this involved was: "They have hi-low work sheets to show how many moves they made and the date for the shift. And they put down ten when actually they moved two." As regards their interfering with other workers, Mendler testified that Tomaskovicz informed him that they were stopping other employees in the aisles and talking to them. Regarding the damage to goods, and whether Machuca and Cifelli were both guilty of this offense, Mendler testified: "Not the same thing, no. I think it was Cifelli, I think he was the one that threw it. And Machuca, he was just driving careless, losing stuff on pallets."¹³ This was also based on information given him by Tomaskovicz.

Tomaskovicz testified that sometime after Machuca and Cifelli were terminated Mendler told him that he chose them for selecting work on January 29 because of the damage to the goods, talking in the aisles, and the falsification of reports. He only had personal knowledge of one case of damaged goods (presumably involving Cifelli), which occurred about 2 weeks prior to their termination, and their talking in the aisles. This also occurred about 2 weeks prior to their termination. When he was walking through the warehouse he saw Machuca and Cifelli talking to other employees in the aisles. They usually stopped when they saw him. If they did not, he told them to stop. It was not until after their termination that he learned that there was union activity at the warehouse. Tomaskovicz testified further that he prepared the January 29 employee disciplinary report. Mendler asked him to prepare it a few days after they were terminated. Mendler told him that "he wanted a document in the file."

The nature of this case demands an analysis of the testimony regarding the frequency of and guidelines for assigning employees who ordinarily drive a hi-low to perform selecting work. A summary of Respondent's records establish that beginning October 17, 1979 (the date the summary begins), Cifelli selected only for the period October 29 through November 7 (presumably this was the week he was assigned to selecting for throwing the carton from his hi-low) for 3 hours on Monday, November 12, 1979, for 8 hours on Tuesday, November 13, 1979, for 4-1/2 hours on Saturday, January 6, for 3-1/4 hours on Tuesday, January 8, and for 9 hours on Wednesday, January 9.¹⁴ It was on November 24, 1979, that Machuca began working principally as a hi-low driver. From that date through January 28 he selected on only one occasion, Saturday, January 5,¹⁵ for 9 hours. He operated the hi-low for the remaining hour that day.

Machuca testified that he knew of some employees of Respondent who selected from time to time in addition to operating a hi-low. Murawski, who began his employment with Respondent in September 1979 as a selector, became a hi-low driver 6 months later, and is presently employed as a checker on the front dock for Respond-

ent. He testified that when he was a hi-low driver for Respondent and Respondent needed extra selectors they would first choose the hi-low driver with the least hi-low seniority. While he was a hi-low driver he selected twice a month, at the most, and less than that after he had earned seniority as a hi-low driver. It was generally when some of the regular selectors were absent from work or there was a heavy load of work that had to be picked that Respondent asked the hi-low drivers to select. On those days when he was assigned to select he kept the key to his hi-low.

Goodson began his employ with Respondent in November 1979 as a selector, and became a hi-low driver in February. During the first month that he was operating as a hi-low driver he was asked to select about once a week. After the first month he was never asked to select again. When he first became a hi-low driver Respondent chose the least senior hi-low driver to select. For a few days in February Respondent changed the method of choosing selectors to sharing among all the hi-low drivers. A few days later Respondent discontinued this method and returned to choosing the least senior hi-low driver to select. On those occasions when he was assigned to select while he was a hi-low driver, he kept the key to the hi-low in his possession. Schmidt, who was employed by Respondent beginning in September 1979 as a selector and became a hi-low operator 2 weeks later, testified that he was assigned to select on only one occasion, for 1 day as a punishment for talking to a selector in the aisle of the warehouse.

Coppola testified that on January 29 there were less senior hi-low drivers than Machuca and Cifelli. He also testified that in January orders for selecting did not arrive on Monday mornings. On Monday, at that time, selecting was done for orders that were not completed the prior week, although, generally, orders were received on the same day that they were to be selected. At that time, Tuesdays, Thursdays, and Saturdays were the days when most orders were received. Mendler testified that, in choosing hi-low operators to do selecting, he sometimes based his choice on work performance, as with Machuca and Cifelli, although, generally, Respondent attempted to use the seniority of the hi-low operators as the basis for selecting. However, during the end of December 1979 and the beginning of January they attempted to rotate the selecting work among all the hi-low operators, but there were too many complaints about this method and they returned to the seniority method of selection. He testified further that prior to January 29 Machuca and Cifelli had last selected sometime during the week of January 21. Tomaskovicz testified that when he became employed by Respondent, in January, the hi-low operators were being assigned to selecting on a sharing or rotating basis, and this method was not changed to a seniority system until about March or April.

Received into evidence was Respondent's daily shift roster for the day shift for January 28, 29, and 30, showing the number of employees in each job category on those days. On the day shift on Monday, January 28, Respondent employed seven hi-low drivers part time (6

¹³ Mendler testified that he was aware that Cifelli had previously been punished for this offense by being taken off his hi-low for a week.

¹⁴ Cifelli testified that, other than the 1 week he was assigned to select as punishment for throwing the carton, he was never assigned to selecting.

¹⁵ Machuca testified that since he became a hi-low operator he never was asked to select prior to January 25.

hours each) on rail receiving, while employing seven selectors an average of 8-1/4 hours. On Tuesday, January 29, Respondent employed 10 hi-low drivers: 4 in the warehouse (3 working there the entire day and the fourth driving for 6 hours in the warehouse and spending the remaining 4 hours in truck receiving), 4 in truck receiving (3 working the full 10 hours there, while 1 worked there for 3 hours and worked 7 hours on rail receiving), plus 1 who drove a hi-low in truck receiving for 2 hours while selecting for the remainder of the day. In addition, one employee spent 7 hours that day on a hi-low in rail receiving. On that day, Respondent employed 18 selectors, 16 of them for 9 hours each, 1 for 7-1/2 hours, and 1 for 8 hours. On Wednesday, January 30, Respondent employed five warehouse hi-low drivers full time in the warehouse and six hi-low drivers in truck receiving, four full time and two for 6-1/2 hours (one of whom spent the remaining 3-1/2 hours of his workday driving a hi-low in rail receiving). On that day Respondent employed 17 selectors an average of about 8-1/2 hours. The total number of pieces selected on those days were: January 28—9,325; January 29—19,215; and January 30—16,201.

Because of the lack of direct evidence of knowledge on the part of Respondent's agents of Machuca's and Cifelli's activities on behalf of the Union (and Local 469) from January 16 through 29, the General Counsel presented evidence of the layout of the warehouse. Presumably, the General Counsel's position is that this type of facility, plus the testimony of Tomaskovicz that during the period in question he observed Machuca and Cifelli talking in the aisles to the other employees, establishes that Respondent was aware of what they were discussing. As previously stated, this is a warehouse of approximately 385,000 square feet. In some areas (about 75 percent of the warehouse area) there were racks with cartons of merchandise on them; in other areas cartons were piled on top of each other without the benefit of racks. The racks are about 12 feet wide and the aisles are about 10 feet wide. The testimony was that the supervisors (more particularly, in the situation involving Machuca and Cifelli, Mender and Tomaskovicz) spent their workday walking throughout the warehouse. Cifelli, Murawski, and Moran testified that you could generally hear people talking from one aisle to the next. Goodson testified that about 10 percent or more of the racks in the warehouse were usually empty, and in those areas you could overhear conversations taking place in the adjacent aisle; where the racks were half full, according to Goodson's testimony, you could probably overhear such a conversation.

B. Moran's Discharge

James Moran began his employ with Respondent in November 1979 as a warehouseman on the night shift whose primary function was selecting. Sometime thereafter, he became an assistant foreman whose primary function was operating as a hi-low driver. The parties stipulated that under that title he was not a supervisor within the meaning of the Act. On September 18, while remaining assistant foreman, he returned to being primarily a selector at his own request. Between that date and Octo-

ber 23, the date of his termination by Respondent,¹⁶ he was in the top 20 percent for productivity of those employees whose primary job was selecting, approximately 15 in number.

Moran testified that he signed a card for the Union in February. In September he was asked to sign another card for the Union by Steve Durek, assistant foreman.¹⁷ He said that he had signed one in February, and he did not like what had happened after signing that card, and he wanted to be sure that everybody signed before he signed a new card. About 2 to 3 weeks later, on September 30, after he learned that most people were signing union cards, he signed one.

Moran testified that from about September 15 through October 23 he had numerous discussions with fellow employees about the Union while at work. "Everybody in the place was talking about the union everyday," according to Moran. On these occasions he was asked if he thought the Union was good, and he answered he did because there was no way they would get anything unless they had a union. During the last few weeks before his discharge these conversations occurred about five or six times on each shift, on an average, and they took place while the employees were selecting in the same aisle, although he felt that it did not have any effect on their work. On most of these occasions he was not the one who initiated the discussion.

Beginning a few weeks before Moran's discharge, there were discussions between employees (at least on the night shift) about what they perceived as an increase in disciplinary notices given by Respondent. On the evening of October 23, Moran was approached by a fellow employee, Charlie Peterson, who said that he was concerned about the increased number of disciplinary notices and he felt that the employees could put a stop to the practice by convincing all the night-shift employees to call in sick the following day.¹⁸ During the 9 p.m. break Moran was sitting with three or four employees who said that they were going to call in sick the next day. Moran said he would speak to some other employees about it. He then turned around and asked some other employees if they would take part by calling in sick the next day to protest the discipline slips. Between that time and the dinner break Moran spoke to between 15 and 20 employees about the proposed sick-out. He spoke to them in all areas of the warehouse while they were working. "Their response was very favorable; everybody was agreeing with it," according to Moran.

At or about 1:10 a.m. Moran took a cigarette break in the locker room with Clark Jago and six other employees. They discussed the proposed sick-out the next day. Moran did most of the talking and said that they were attempting to have 100 percent participation by the night shift. This break lasted about 5 minutes, and as Moran was leaving the locker room he saw Cetrulo, Iski, and

¹⁶ Actually, his discharge occurred on October 24 as it took place after midnight.

¹⁷ Durek was still employed by Respondent when Moran was discharged.

¹⁸ The affidavit Moran gave to the Board makes no mention of a proposed sick-out.

Tomaskovicz standing about 100 feet from him looking toward the locker room. Moran then returned to his aisle to continue selecting. Jago was also in the aisle at the time and they again discussed the proposed sick-out. About three of the employees whom he had previously spoken to in the locker room stopped him while he was in the aisle, as he was just beginning to return to selecting, and asked him if he were going to participate in the sick-out. He said that he was, but "you'd better get out of here, go do your job because we're being watched." At the time Mendler, Tomaskovicz, and Iski were staring at him from a distance of about 25 feet. This continued for about 5 minutes. Mendler, Iski, and Tomaskovicz walked toward them and Moran and Jago continued working and talking. The supervisors walked by them, and Moran saw them enter the office.

Jago testified that about a week before Moran's discharge he asked Cetrulo a question about the Union coming in.¹⁹ Cetrulo told him that there was a union trying to organize the warehouse employees, and if it were successful the employees would lose their overtime and bonus checks. Jago testified that he and Cetrulo "always talked. If I had a problem or question I talked to him, so I didn't think anything about it, just bringing it out in the open and asking him." Cetrulo denied any such conversation.

Jago testified that he signed a card for the Union in August or September. The card was given to him at the gate entrance to the warehouse by an individual who was not employed by Respondent. That evening he and Moran discussed the Union's organizational attempt. Subsequent to that time, on at least two or three occasions, he overheard Moran discussing the Union with other employees in the warehouse. On the evening of October 23 there were discussions among the employees of a possible sick-out the following day due to what the employees perceived to be an unwarranted increase in disciplinary warnings—pink slips. He first learned of it from Peterson. Afterward he had approached a number of other employees, including Moran, informed them that he had heard about the proposed sick-out from Peterson, and asked if they had heard of it and whether they were going to participate. He did not remember what their answers were.

Coppola testified that during the late summer or early fall he became aware of the Union's organizational attempt at the warehouse. He said, "You'd have to be blind not to see it." He observed the shop steward for the trucking company that Wakefern used, and occasionally Gallichio, handing employees Union authorization cards by the door to the warehouse on about a dozen occasions. He made no effort to stop it.

Cetrulo testified that during the week prior to October 23 he had warned Moran about excessive talking and excessive breaks on four or five occasions. On each of these occasions, Moran was alone, smoking. He had

¹⁹ The precise question Jago asked is not clear from the record. He testified, "I can't remember my questions that I asked him other than the union coming in and I believe he said . . ."

never similarly warned him prior to that.²⁰ On October 23 at or about 7:10 p.m. he saw Moran smoking a cigarette in the men's room. He told him that the shift had just begun and he was already smoking a cigarette. He also told him that as assistant foreman he should set a better example. Moran then returned to work. Later that evening, Iski told Cetrulo that he had warned Moran twice that evening about excessive breaks. In addition, both he and Iski observed Moran spending excessive time conversing with the employees in the aisles interfering with their work. Cetrulo testified further that as of October 23 he had no knowledge that Moran was engaged in any activities on behalf of Local 863, nor did he have any knowledge on that day, or the next day, of a proposed sick-out, nor did he believe on that evening that on those occasions when Moran was observed conversing with other employees the subject of these conversations was the Union. Cetrulo also testified that on October 23 he was unaware of union activity at the warehouse or that the employees signing authorization cards for the Union or any union.

Tomaskovicz testified that on the evening of October 23 he observed Moran (and Jago) taking extended breaks; i.e., staying in the breakroom for 10 or 15 minutes after the break was over. He testified that unscheduled breaks were allowed for employees to go to the bathroom and have a quick cigarette, which should take about 5 minutes. Tomaskovicz further testified that sometime earlier in October he became aware of union activity at the warehouse—he saw a man distributing union cards outside—"it was apparent to everybody, what was going on."

Returning to the events of early morning on October 24, Moran testified that at or about 12:45 a.m. he was called into the office. Cetrulo, Iski, and Tomaskovicz were present. Cetrulo told him, "There's no secret about what's going on in this warehouse, and we're going to put a stop to it." He told Moran that he was taking too many breaks and spending too much time talking to employees in the aisles. Moran answered that since he was assistant foreman he was supposed to be talking to the employees. Cetrulo said that he was not talking about company business so he should do it on his own time. Moran told him that since he was doing his job there was nothing wrong with talking to the other employees. Cetrulo said that he was "putting a stop to everything." Cetrulo then slid a paper over to where Moran was and told him to sign it. Moran did not look at the paper, and said that he would not sign it.²¹ Without any further ex-

²⁰ As Moran was, admittedly, one of Respondent's most productive selectors, the following testimony of Cetrulo was brought out on cross-examination:

Q. So, in other words, if, for example, for the sake of argument, if you felt taking eight smoke breaks as an abuse, during a shift, that it wouldn't matter to you whether the person taking those breaks was a marginal employee or an exceptional employee in terms of productivity?

A. Yes, it wouldn't matter to me.

Q. It wouldn't matter to you. You'd put them both in the same category?

A. Yes.

²¹ Moran testified that although he did not look at this piece of paper he knew it was a disciplinary slip—"Well he told me that I was taking

Continued

planation, Cetrulo said, "If you don't sign it, go punch your card out and go home," although, according to Moran's testimony, he was never told that if he refused to sign the slip he would be fired, and, after refusing to sign the slip, he was never informed that he was fired. Moran punched out, and informed Peterson that he would meet him outside at the 2:30 a.m. break. At that time, Jago told him that he was also given a disciplinary slip, and was told that if he did not sign it he would be fired just as Moran had been. Moran said that he could not understand how they could discharge an employee for refusing to sign a disciplinary form.

The next day, Moran called the warehouse in order to contact Cetrulo "to get it straightened out." He could not get in touch with Cetrulo, but he spoke to Rich, who told him that he did not think they could fire him for refusing to sign a disciplinary form. At or about 7 p.m. that day, Moran received a call from one of Respondent's office employees who said that she had a message from Cetrulo that Moran was fired for refusing to sign the disciplinary form.

Cetrulo testified that, after Moran had been given a number of warnings on October 23 about excessive breaks and excessive talking in the aisles, he was called up to the office. Iski and Tomaskovicz were also present. He gave Moran a form entitled "Employee Disciplinary Form." It contained Moran's name. The box marked "Reprimand" (rather than "Suspended" or "Discharged") was checked, and under "for the following reasons" there were checks for "Loitering" and "Excessive Breaks." Below, under "Additional Comments," was written: "Employee has been observed taking excessive unauthorized breaks and participating in repeated conversations with other selectors."²² Moran read the form and Cetrulo asked him to sign the form and Moran refused. Cetrulo asked him why he was refusing since he said that he agreed with its contents and Moran said, "I just don't want to sign it." Cetrulo said that unless he signed the form he would be terminated and Moran said that he still refused to sign it. Moran put the form down and left. Cetrulo testified that the form was a warning to stop him from engaging in the excessive breaks and excessive conversations with other employees, and, if Moran had signed the form, that is all it would have been.

Tomaskovicz testified that he was not present when Moran was in the office on that morning, although he was present shortly thereafter when Jago was given a written warning. At this time, Cetrulo informed Jago that Moran had been discharged. Jago signed his disciplinary form and returned to work. Jago testified that he was called up to the office, and, on his way up, he passed Moran, on his way down, who said to him, "Don't sign anything." He walked into the office and Cetrulo, Iski, and Tomaskovicz were present. They gave him an Employee Disciplinary Form—a warning for taking excessive cigarette breaks. Cetrulo told him,

too many breaks and I was talking to too many employees . . . I assumed that was what was on the slip."

²² The words on the bottom of the form—"Terminated, Refused to sign disciplinary report"—were written after Moran refused to sign the form.

"Your friend Moran did not sign it, and he is no longer with us." Jago signed the form and returned to work. Later that evening, during a break, Jago met Moran in the parking lot. He asked Moran why he would not sign the form and Moran "said something like he didn't feel it was right or something like that." Jago told Moran that Cetrulo told him, "Your friend is no longer with us," and the way Moran reacted, Jago felt, indicated that he did not previously know that he had been fired.

Coppola testified that prior to May Respondent did not have any standard forms for discipline to employees and no rule requiring them to sign disciplinary notices, and, in fact, the record contains a number of such pre-May notices unsigned. At or about that time, Respondent issued the Employee Disciplinary Form (the form given to Moran), and Coppola informed his supervisors, orally, that employees had to sign these forms or be terminated.²³ The reason for this rule was to prevent an employee from later denying that he had previously been disciplined. Coppola testified that once this new form was instituted, and he established the rule that employees must sign these forms, he knew of no situation where an employee refused to sign the form and remained in Respondent's employ. He testified that he instituted this new policy in response to an Employee Disciplinary Form for M. Broad. This form was dated May 9 and Coppola received it on the following Monday. It indicated that the offenses were poor work performance and "visiting" (excessive talking in the aisles). None of the boxes—"Reprimand," "Suspended," or "Discharge"—was checked because (as Coppola later learned) Tomaskovicz believed that the offense involved was not serious enough to merit any such action. On the line where the employee was to sign the form was written, "Employee Refused to Sign." Coppola testified that after seeing this form, and speaking to Tomaskovicz about it, he instituted the new rule that employees were required to sign these forms. In fact, after looking through Broad's prior work record and seeing that he had a poor work history, he terminated Broad. Cetrulo testified that, in or about May, shortly after Respondent began using the new Employee Disciplinary Form, Coppola told him that employees were required to sign these forms, although this did not represent any change in policy for him as he had always required employees to sign these forms. Tomaskovicz testified that sometime between January and May, after Respondent instituted the new form, Coppola told him that the employees had to sign these forms.

Respondent gave its night-shift employees two 15-minute breaks in addition to a 35-minute meal break. Moran testified that the employees who smoked would occasionally take a 5-minute cigarette break in the bathroom or locker room, especially between orders. Respondent was aware of this practice. In fact, Cetrulo told him on a number of occasions (the last occasion being a

²³ Jago testified that prior to Moran's discharge he was not aware of any rule that an employee who failed to sign a warning would be fired. Although Moran was never specifically asked this question, I can assume (from his conduct in the early morning of October 24 and later in the day) that he would have also testified that he was not aware of the rule. Coppola testified that the employees were not notified of this change in policy.

week before his discharge) that he did not mind "too much" the employees taking these breaks as long as they were doing their work. Schmidt testified that in September 1979 Cetrulo told him that if he wanted a cigarette to smoke it in the bathroom, but not to make a habit of it.

IV. DISCUSSION AND ANALYSIS

A. *The 8(a)(1) Allegations*

Machuca's testimony that James asked him if he signed a paper for the Union is undenied. It is also clearly a violation of Section 8(a)(1) of the Act. I likewise find that Mendler, James, and Tomaskovicz, by asking Cifelli if anybody gave him a union card to sign, violated Section 8(a)(1) of the Act. *Struksnes Construction Co.*, 165 NLRB 1062 (1967); *Los Angeles New Hospital*, 244 NLRB 960 (1979). For reasons to be more fully discussed, although this statement was never specifically denied by Mendler or Tomaskovicz, it should be noted that I found Cifelli to be a highly credible witness and would credit his testimony over that of Mendler and Tomaskovicz regardless. The testimony of Murawski (who I found to be credible, although somewhat hostile, at times) that James asked him if he signed a card for the Union is undenied. Although Murawski answered this question affirmatively, and with assurance, "[T]he test is whether the interrogation tends to be coercive, not whether the employee was in fact coerced." *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981). This question therefore violated Section 8(a)(1) of the Act. I found Goodson to be an extremely credible witness. He was no longer employed by Respondent and has nothing to gain from the outcome of this matter and appeared to be attempting to testify in an honest and truthful manner. Although I would not totally discredit Tomaskovicz' testimony, I would credit Goodson's testimony that Tomaskovicz asked him if he knew of anybody who was passing out cards or talking about starting a union. This question is a violation of Section 8(a)(1) of the Act. *United Oil Mfg. Co.*, 254 NLRB 1320 (1981). I also found Schmidt to be a credible witness. He appeared to be testifying about the events without additions or exaggerations. I was not impressed with Coppola's testimony generally. It appeared to have been partially engineered to fit the situation, and I would credit Schmidt's testimony over that of Coppola. Although Schmidt testified that Coppola appeared to be "joking around" when he asked him if he was signing cards in the parking lot, this interrogation violates Section 8(a)(1) of the Act. *Bill Johnson's Restaurants, supra; Amoco Fabrics Co.*, 260 NLRB 366 (1982).

When Machuca and Cifelli arrived for work at or about 7 p.m. on January 25, Coppola told them that he heard that they wanted to make trouble (or a "problem" according to Cifelli's testimony) for him. When they asked what kind of trouble he said, "You know what kind of trouble." Coppola's explanation of this statement is too contrived to be believed. Although he testified at length about this statement, I am still unable to fully understand it. According to the testimony of Machuca and Cifelli (whom I credit over Coppola because I found

them to be more forthright²⁴ in their testimony), Coppola then asked them if they signed a card for the union (or, according to Cifelli's testimony, if anyone asked them to sign a card for the Union). This also violates Section 8(a)(1) of the Act, *Bill Johnson's Restaurants, supra*, even though they answered the question in the negative. Finally, according to their credited testimony, Coppola threatened them with the loss of their jobs if the Union came in. This also clearly violates Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Jago testified that in late October he asked Cetrulo about the Union "coming in." Cetrulo's answer (according to Jago's testimony) was that a union was attempting to organize the warehouse employees, and, if it were successful, the employees would lose their overtime and bonus checks. Cetrulo denied this statement. Jago testified that because he and Cetrulo "always talked" he "didn't think anything about it." For reasons more fully discussed *infra*, I did not find Cetrulo to be a credible witness. Jago, on the other hand, appeared to be testifying in a frank and open manner. For example, he testified openly that he brought up this subject with Cetrulo and often spoke to him. Cetrulo's answer to Jago that if the union campaign were successful the employees would lose their overtime and bonus checks violates Section 8(a)(1) of the Act. Such a "prediction as to the precise effects he believes unionization will have on his company . . . must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel, supra* at 618. Cetrulo's statement does not satisfy this requirement. Jago's portrayal of this as a friendly conversation is no defense:

[S]tatements spoken as a friend which convey a threat of severe consequences are violative of Section 8(a)(1), adopting the reasoning that the impact of such statements, coming from a "friend" who is part of management, is probably greater in view of the authenticity and credibility of the source.²⁵

The fact that Jago initiated this conversation is immaterial. *Peninsula Association for Retarded Children & Adults*, 238 NLRB 1099 (1978).

B. *The 8(a)(3) Allegations*

There is no direct evidence that prior to January 29 Respondent had knowledge of the activities of Machuca and Cifelli in soliciting its employees to sign authorization cards for the Union and Local 469. There is substantial evidence, based upon the credited testimony of Machuca, Cifelli, Murawski, Goodson, and Schmidt, *supra*, that Respondent was aware that there was an organizational attempt at its warehouse during the last half of January, but no direct evidence that Respondent knew that Machuca and Cifelli were responsible for it, or that

²⁴ Although there were some differences between the testimony of Machuca and Cifelli, this is not unexpected since the events involved occurred in excess of 2 years prior to the trial.

²⁵ *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977).

they obtained all the authorization cards from the day-shift employees. In fact, on the occasions when they were asked by Respondent's agents about the unions, they denied any knowledge of any such activity, Cifelli going so far as to tell Coppola that if he heard anything he would let him know.

Although there is no direct proof of such knowledge, the General Counsel urges that I infer that Respondent knew of their activities on behalf of the unions through the "small plant doctrine." The difficulty with this argument is the mammoth size of this facility, almost 400,000 square feet, and the large number of employees employed there—in excess of 100, on both shifts, in January. The General Counsel urges that, rather than using this number in determining the appropriateness of this doctrine, I use the number of employees employed on each shift. However, the Board has held that "the small plant rule is based upon the size of the *plant*, not the size of the department or appropriate bargaining unit." *J. S. Dillon & Sons Stores Co.*, 144 NLRB 1235, 1240-41 (1963); *Springfield Garment Mfg. Co.*, 152 NLRB 1043 (1965). In *Breuer Electric Mfg. Co.*, 184 NLRB 190 (1970), the small plant doctrine was applied where both shifts employed 72 employees. In *American Grinding & Machine Co.*, 150 NLRB 1357 (1965), the Trial Examiner inferred knowledge based on the small plant doctrine in a physically small facility with 31 employees. The Board, in *Atlantic Metal Products*, 161 NLRB 919, 920 (1966), stated: "[T]he size of the plant—some 180 employees—attenuates any inference of knowledge which might otherwise be drawn." Without examining the other factors necessary to infer knowledge based upon the small plant doctrine, I reject the application of this doctrine herein because of the physical size of this plant, together with the large number of employees employed on both shifts.

Although I have rejected inferring knowledge by Respondent of Machuca's and Cifelli's union activity based on the small-plant doctrine, I would infer such knowledge based upon the overall facts of this case. Machuca and Cifelli engaged in their card solicitations rather openly in the aisles of the warehouse while they were working and in the parking lot during lunch on at least two occasions, on January 16 for Local 469 and about a week later for the Union. As Respondent's supervisors spend their time on the floor of the warehouse it is not unreasonable to assume that one of them saw Machuca or Cifelli handing out authorization cards in the warehouse or in the parking lot. However, there are numerous other reasons for inferring knowledge on the part of Respondent. As stated *supra*, I found Machuca and Cifelli to be highly credible witnesses, and would credit them over Respondent's witnesses. They appeared to be testifying in an honest and frank manner and willingly made admissions against their interest. Although there were occasional conflicts between the testimony of Machuca and that of Cifelli, this is to be expected as they were testifying about events that occurred more than 2 years earlier. I therefore find that I can infer knowledge of Machuca and Cifelli's union activities on the part of Respondent from the following:

(a) Coppola's statement to them on January 25 that they made "trouble" or caused a "problem" for him. The

reasonable inference from this, and the one that I make, is that he was referring to their organizing activities.

(b) Coppola's question to Schmidt whether he had signed a union card in the parking lot establishes that he was aware that solicitation was taking place there, which also establishes that he was aware that Machuca and Cifelli were doing the organizing.

(c) Mendler's testimony that approximately 2 weeks prior to their discharges Machuca and Cifelli were spending excessive time talking to the other employees in the aisles.

(d) Tomaskovicz' testimony that 2 weeks prior to the discharges he observed Machuca and Cifelli talking to other employees in the aisles.

(e) The pretextual nature of the discharges.

As regards this final reason, Mendler testified that on January 29 he needed additional selectors, and the records bear out that substantially more selecting was performed that day than the prior day. However, the vital question herein is why he chose Machuca and Cifelli to select that day. I credit the testimony of the employees that, at the time, selectors were chosen from the hi-low drivers by seniority, and, on the day in question, there were hi-low drivers with less seniority than Machuca and Cifelli (especially Cifelli, who probably had the highest seniority of all the hi-low drivers). (Although more selecting was performed on January 29 than on January 28, Respondent used one more hi-low driver on January 29 than it had used on January 28.) Since November 23, 1979, Machuca had selected on only one occasion for 9 hours. Since November 8, 1979, when Cifelli concluded selecting as punishment for throwing the carton, he had spent approximately 28 hours selecting, and never for an entire day. Since Machuca became a selector on November 24, 1979, they never both selected on the same day. Finally (as I have credited Machuca and Cifelli), the fact that Mendler asked them for the keys to their hi-lows further establishes the pretextual nature of the termination. The other employee witnesses testified that on the few occasions when they were asked to select they kept the keys to their hi-lows. When Cifelli selected for a week as punishment for throwing the cartons he kept the key to his hi-low. When Mendler asked them for the keys to their hi-lows, it was meant to signal to them that it was a permanent change in the hope that they would quit, which I find they did not do, and, instead, they were discharged.

Further reinforcing the General Counsel's case here is Respondent's purported reason for choosing Machuca and Cifelli to select on January 29. Mendler testified that he assigned Machuca and Cifelli to select on that day because of their poor work performance, of late, and more particularly the items specified in the January 29 Employee Disciplinary Report. However (as I credit Machuca and Cifelli), these three items were unknown to them and untrue except item 1 as to Cifelli and Cifelli had previously been punished for this one offense by being ordered to select for a week. On that occasion, Cifelli was told that he was being assigned to select as punishment for throwing the cartons. On January 29, they were told no such thing. It is my belief that this January

29 Employee Disciplinary Form was a fabrication to conceal Respondent's real purpose in assigning them to select—to start them on the road to termination. Mendler testified that he had Tomaskovicz prepare it so that he would have it in his file to show why he asked them to select that day. This form, rather, appears to me as something Respondent prepared after the fact to conceal the real purpose for the assignment. It, together with the January 29 letters to Machuca and Cifelli, is an indication that Respondent "doth protest too much."

Finally, even if I were to credit Respondent's witnesses, Cifelli never quit his employment. The most he did was request time to drive Machuca home, yet he also was discharged for reasons that Respondent never adequately explained.

Therefore, considering the timing of the discharges (1 and 2 weeks after their card solicitations) and the pretextual nature of the discharges, I find that the real reason Respondent discharged Machuca and Cifelli was because of their solicitation of authorization cards for the Union and Local 469, and these discharges were therefore in violation of Section 8(a)(1) and (3) of the Act.²⁶

I find that I cannot infer that Respondent was aware of Moran's union or concerted activities. Unlike Machuca and Cifelli, Moran was not engaged in any activities that differentiated him from the other employees. He signed an authorization card for the Union (although somewhat reluctantly), but it appears that most of the employees did likewise. On and before October 23, he was involved in discussions with fellow employees about the proposed sick-out the following day, but many of the other employees were also involved in these discussions. Moran was not a leader in either of these movements and no statements were made to him by Respondent's agents indicating that they thought he was. The sole protected activity he was engaged in was talking to fellow employees about the Union and the proposed sick-out in the aisles, the bathroom, and the locker room shortly prior to his discharge, but there is no evidence that Respondent was able to differentiate this from simply talking too much during working hours.

The Board, in *Hillside Bus Corp.*, 262 NLRB 1254 (1982) stated:

To establish a violation of Section 8(a)(3), it is incumbent on the General Counsel to adduce evidence supporting his contention that an employee was unlawfully discharged. Should a *prima facie* case of unlawful discharge be shown, the burden of persuasion shifts to the respondent to establish a lawful reason for the discharge. However, in assessing whether a *prima facie* case has been presented, an administrative law judge must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense. It is only after the General Counsel's *prima facie* requirement has been met that an Administrative Law Judge must consider the respondent's defense.

²⁶ The Board has often held that, where an employer asserts a false reason for a discharge, it can properly infer that the real reason for the discharge was unlawful. *E. Mishan & Sons*, 242 NLRB 1344 (1979); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

The protected activity engaged in by Moran was his discussions with fellow employees about the Union during the last 5 weeks of his employment with Respondent (like all the other employees) and his numerous discussions about the proposed sick-out with fellow employees on the final night of his employment. Although Respondent admittedly had knowledge of the Union's organizational drive at the time, there is no evidence that it believed that Moran was involved in either of these campaigns. On the evening in question, Moran was observed by a number of Respondent's supervisors conversing with fellow employees, including Jago. Moran testified that he discussed the proposed sick-out with approximately 25 employees. That many discussions had to affect his work that evening, as well as the work of his fellow employees, which may have been a valid reason for the proffered reprimand that evening.

A crucial issue herein is what was said to Moran when he was handed the Employee Disciplinary Form that evening. Even according to Moran's testimony,²⁷ Cetrulo told him, "If you don't sign it, go punch your card out and go home." When he continued to refuse to sign the form, he punched his timecard in the middle of the shift. Shortly thereafter, and still prior to the completion of the shift, Jago informed him that he was also given an Employee Disciplinary Form, and was told that, if he refused to sign the form, he would be fired *just as Moran had been*. Moran therefore knew at that time, *at the latest*, that he had been discharged, yet he did not immediately attempt to speak to Cetrulo about it. I find that Cetrulo's words to Moran, although not artistically framed, were enough to convey the message that if he refused to sign the form he would be discharged. Because I have found that Respondent had no knowledge of any union or concerted activity on Moran's part, and because Jago, who was similarly involved that evening discussing the sick-out, was not discharged when he signed the form, as demanded by Cetrulo, I find that the Employee Disciplinary Form directed at Moran, and the resulting discharge, were not discriminatorily directed at Moran due to union or other protected concerted activities. In this regard, I have credited Respondent's witnesses that, at the time, Respondent had a rule that refusal to sign these forms was grounds for discharge.

It should be noted that this matter is not entirely free from doubt. It is somewhat suspect to reprimand an employee who is one of its most productive employees for engaging in excessive discussions with fellow employees. Additionally, when Cetrulo called Moran into his office he told him, "There's no secret about what's going on in this warehouse and we're going to put a stop to it." However, this is subject to a number of interpretations, one of which is that Respondent was aware of the excessive breaks and conversations of the employees and was going to put a stop to it. Because of the lack of distinguishing union or protected concerted activity engaged

²⁷ Cetrulo was an obviously incredible witness. The most glaring example of this was his testimony that he was unaware that the Union was organizing the warehouse employees at the time, when Coppola and Tomaskovicz testified that the Union's organizational drive was evident to everybody at the time.

in by Moran, and the lack of evidence that Respondent thought he was engaged in such activity, that is the interpretation I accept.

On the basis of all the above, I find that the General Counsel has sustained a *prima facie* case that Moran was unlawfully discharged, but that Respondent has sustained its burden under *Wright Line*, 251 NLRB 1083 (1980), and this allegation is therefore dismissed.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent described in section III, above, occurring in connection with Respondent's operations 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.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating its employees regarding their membership in the Union.

(b) Interrogating its employees whether anybody solicited them to execute an authorization card for the Union.

(c) Interrogating its employees whether they were aware of the identity of individuals soliciting employees to execute authorization cards on behalf of the Union.

(d) Threatening its employees with loss of employment, overtime, and bonus checks if the Union became their collective-bargaining representative.

4. Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of employees Sergio Machuca and Hernan Cifelli because they engaged in activities of behalf of the Union.

5. There is insufficient evidence to establish that Respondent violated Section 8(a)(1) and (3) of the Act by discharging James Moran.

THE REMEDY

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

As I have found that Respondent unlawfully terminated Sergio Machuca and Hernan Cifelli, I would normally recommend that Respondent be ordered to reinstate them. However, the General Counsel agrees that Respondent made a valid offer of reinstatement to them on June 4, 1981. I shall therefore solely recommend that Respondent make them whole for any loss of earnings they suffered from January 29, 1980, through June 4, 1981, as a result of the discrimination by payment of a sum equal to that which they would have earned during this period absent the discrimination, with backpay and interest

computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

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

ORDER²⁸

The Respondent, Metro Center, Inc., Edison, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees regarding their membership in the Union.

(b) Interrogating its employees as to whether anybody solicited them to execute an authorization card for the Union.

(c) Interrogating its employees whether they were aware of the identity of individuals soliciting employees to execute authorization cards for the Union.

(d) Threatening its employees with loss of employment, overtime work, and bonus checks if the Union became their collective-bargaining representative.

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

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

(a) Make Sergio Machuca and Hernan Cifelli whole for any loss of pay suffered as a result of the discrimination against them during the period January 29, 1980, through June 4, 1981, in the manner set forth above in the section entitled "The Remedy."

(b) Expunge from its files any reference to the discharges of Sergio Machuca and Hernan Cifelli on January 29, 1980, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Post at its Edison, New Jersey, location copies of the attached notice marked "Appendix."²⁹ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

²⁸ 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.

²⁹ 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."

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaint herein be dismissed insofar as it alleges violations of the Act not specifically found herein.

APPENDIX

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

WE WILL NOT interrogate our employees regarding their membership in Local No. 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), or any other labor organization.

WE WILL NOT interrogate our employees as to whether they were aware of the identity of individuals soliciting employees to execute authorization cards for the Union or any other labor organization.

WE WILL NOT interrogate our employees as to whether anybody solicited them to execute an authorization card for the Union or any other labor organization.

WE WILL NOT threaten our employees with loss of employment, overtime work, and bonus checks if the Union became their collective-bargaining representative.

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

WE WILL make whole Sergio Machuca and Hernan Cifelli, with interest, for any loss of earnings they may have suffered because of our discriminatory conduct against them.

WE WILL expunge from our files any references to the discharges of Sergio Machuca and Hernan Cifelli on January 29, 1980, and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

METRO CENTER, INC.