

Electric Hose & Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC. Cases 17-CA-10037, 17-CA-10155, and 17-CA-10230

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 12 August 1982 Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief. Respondent thereafter filed an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and 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.³

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by publishing an employee handbook provision which encouraged employees to notify their supervisors if they felt that they were being pressured into making a commitment to the Union.⁴ We also affirm the Administrative Law Judge's finding that Foreman Kotschwar interrogated employee Gillen in violation of Section 8(a)(1) of the Act, but that Supervisor Modrell did not unlawfully interrogate

employee Knight.⁵ Additionally, we agree with the Administrative Law Judge's findings that Respondent discharged Marc Prochazka and Shirley Ashley in violation of Section 8(a)(1) and (3) of the Act.⁶ Further, we also agree with the Administrative Law Judge that Respondent did not violate Section 8(a)(1) of the Act in administering an employee attitude survey (the CCQ) in August 1980, or in reporting the results thereof to its employees in November 1980.⁷ Contrary to the Administrative Law Judge, however, we find that certain, specific conduct of Respondent's supervisors in conducting the three new communication programs violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and by promising employees improved terms and conditions of employment.

The pertinent facts are as follows: Respondent contacted and employed APC Skills, a private management consulting firm, in April 1979 to identify areas for management and supervisory training at its McCook, Nebraska, facility, the facility involved here. In August 1979, before APC Skills began its work at McCook, the Union commenced its organizational efforts, culminating in the Union's

⁵ Inasmuch as the Administrative Law Judge did not resolve the credibility issues surrounding Modrell's questioning of Knight about the identity of the drawer of a cartoon used by the Union and the remedy for such violation in any event would be cumulative in nature, Member Jenkins finds it unnecessary to pass on this allegation of the complaint.

⁶ In adopting the Administrative Law Judge's finding that Ashley was discharged in violation of the Act, however, we note the following: The Administrative Law Judge stated that Respondent's assertion that Ashley had left work without permission was "so absurd and incredible as to merit the unlawful inference" proposed by the General Counsel. Contrary to the Administrative Law Judge, we would not conclude that Respondent's proffered defense that Ashley left work without permission is "absurd and incredible," but rather that the preponderance of the evidence demonstrates that Ashley secured permission to leave and that her discharge resulted from her union sympathies. The Administrative Law Judge also stated that Ashley "ended up being accused by Sitzman of provoking the verbal assault" with Arendell. We correct the Administrative Law Judge by noting that, in actuality, Sitzman inquired, after hearing Ashley's version of her confrontation with Arendell, "Are you sure this was the way it happened?" and that Ashley responded, "Yes." Therefore, we find that Sitzman, in fact, did not accuse Ashley of provoking the verbal assault with Arendell, but rather merely questioned the veracity of Ashley's version of the incident. Lastly, we rely on the Administrative Law Judge's statement in his Decision that "nothing was ever done with the reprimand [Arendell] received," and we place no reliance on his conflicting statement that Bauer granted Arendell "absolution" for her role in the confrontation with Ashley. No such "absolution" was ever granted. Although Bauer told Arendell that her version of the confrontation was "good enough for him," the written reprimand stemming from the incident apparently was never removed from her file.

⁷ Member Jenkins would find that the administration of the CCQ in August 1980 and subsequent reporting of the results of the CCQ violated Sec. 8(a)(1), as alleged in the complaint. In his view, the CCQ clearly constituted an unlawful solicitation of grievances and Respondent's November 1980 letter unlawfully promised to remedy those grievances. In so finding, Member Jenkins notes that APC Skills, the company administering the CCQ, was not retained by Respondent until after the Union's organizing campaign commenced, and was brought into the McCook plant closely on the heels of the election—in fact, while election objections were pending. Under these circumstances, Member Jenkins regards *General Electric Co.*, 255 NLRB 673 (1981), as squarely on point and would follow that authority.

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 Consistent with his dissent in *Uarco Inc.*, 216 NLRB 1 (1974), Member Jenkins would disavow the Administrative Law Judge's reliance on that case. Member Jenkins also notes that he finds it unnecessary to pass on the Administrative Law Judge's citation of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), for the proposition that the implementation of Respondent's suggestion system was not a violation of Sec. 8(a)(1) of the Act because no exceptions were filed to this dismissal.

³ In light of Respondent's prior unfair labor practices found in *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982), and the unfair labor practices committed here, it is clear that Respondent has engaged in a continuing pattern of serious unlawful conduct and has demonstrated a proclivity to violate the Act. Accordingly, we conclude that, under the standard of *Hickmott Foods*, 242 NLRB 1357 (1979), a broad remedial order is warranted.

⁴ Consistent with his dissent in *Clifton Plastics*, 262 NLRB 1329 (1982), Member Hunter would find that the provision in the employee handbook was not violative of Sec. 8(a)(1) of the Act.

defeat in a March 1980 election. Ten days after the election, APC Skills arrived at McCook. There was a long lapse in time between the hiring of APC Skills and its arrival at McCook because APC Skills was employed at another Respondent plant in the interim.

The APC Skills team's primary purpose is to design and install management and employee training systems at various companies. APC Skills first analyzes the client's operations via onsite observation and "diagnostic" tests conducted with a limited number of supervisory and managerial employees. With the data derived from that testing, APC Skills develops and implements an "action plan" to alleviate the problem areas; its focus typically is on the management and supervisory staff. Thereafter, a series of diagnostic examinations are conducted with the entire supervisory and managerial staff, and management committees are established to solve plant problems. Additionally, APC Skills personnel conduct formal class training sessions with supervisors, observe supervisory personnel on the floor, and provide feedback to them. APC Skills' only direct contact with the rank-and-file employees is in administering the CCQ. According to the APC Skills' team leader at McCook, the results of the CCQ typically are relayed to employees by means of a company newspaper, a letter, or small group meetings.

In a letter to Respondent's employees on 20 August 1980, Respondent Plant Manager Bauer announced APC Skills' intent to administer a plant-wide survey, the CCQ, to all employees on a voluntary basis. He announced that the purpose of the survey was "to afford all employees (both hourly and salaried) a chance to give their point of view on important matters that effect [sic] the overall operation and management of the McCook Plant." The CCQ was administered in August 1980, while objections to the election were pending.

On 13 November 1980 Bauer reported the results of the CCQ in a letter circulated to Respondent's employees. Additionally, Bauer's letter set forth three new communication programs to be implemented to enhance supervisor-employee communications: the management-on-the-floor system; the inquiry-response system; and the meetings system. The management-on-the-floor system entailed appearances on the floor on the evening and night shifts by top local management officials. The inquiry-response system consisted of preprinted forms to be used by supervisors in supplying answers to employees' questions. Finally, the meetings system provided a forum for discussion about a range of topics at the monthly safety meetings held by supervisors with their subordinates and re-

quired supervisors to prepare a written agenda before the meetings and to report the contents of the meetings to higher management.

Four incidents, all outgrowths of the newly implemented communication programs, were alleged by the General Counsel to be violative of Section 8(a)(1) of the Act, as follows: (1) on 15 December 1980, as part of the management-on-the-floor system, Supervisor Conroy asked employee Anderjaska, an active union adherent, if any improvements were needed in her work area. Anderjaska later submitted a request for a regular inspection of worn rollers on the machines and, according to Anderjaska, the worn rollers on her machine were replaced 2 or 3 months later; (2) on 17 December 1980 Supervisor Pevoteaux conducted a safety meeting for his subordinates from a prepared agenda, apparently for the first time. According to Pevoteaux, he distributed a form to the employees several days before the meeting and instructed them to list any complaints or safety ideas thereon; (3) Supervisor Fringer conducted a safety meeting for her subordinates on 13 December 1980. According to Fringer, the meeting was conducted in the same manner as all prior safety meetings in that she always discussed safety matters in the first half of the meetings and left the second half of the meetings open for general discussion about "things [the employees] need, want that will improve the work [sic]"; and (4) Supervisor Modrell held a meeting from a prepared agenda on 13 January 1981 during which he asked if there were any complaints. Employee Vontz requested a heater for her work station. After Modrell responded that management was working on obtaining a heater, Vontz demanded written assurance of that fact. At the end of the shift, Vontz was supplied with written assurance stating that she would receive a heater by 14 February. After Vontz filed an accident report for an injury which she attributed to her cold hands, a heating system was installed.

In the complaint, the General Counsel alleged that, through these four incidents, Respondent solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment to induce them to forgo their support for the Union.

We agree with the Administrative Law Judge, for the reasons he set out, that Respondent did not seek APC Skills' services at its McCook facility in violation of Section 8(a)(1). Furthermore, we agree with the Administrative Law Judge that Respondent did not violate Section 8(a)(1) of the Act by administering the CCQ or by announcing the results of the CCQ in Bauer's 13 November letter. Contrary to the Administrative Law Judge, how-

ever, we find that the four incidents set out above involving Supervisors Conroy, Pevoteaux, Fringer, and Modrell violated Section 8(a)(1) without any reference to APC Skills or the CCQ because we find that these four incidents constitute classic unlawful solicitations of grievances.⁸ Thus, Respondent, through its Supervisors Pevoteaux and Fringer, in December 1980, solicited employee complaints and grievances and impliedly promised to improve the employees' terms and conditions of employment. Likewise, Supervisor Conroy, in December 1980, and Supervisor Modrell, in January 1981, solicited employee grievances and complaints and promised, and delivered, improved terms and conditions of employment.⁹ Respondent's supervisors' solicitations of grievances would naturally lead the employees to believe that Respondent was inviting direct dealing and, inferentially, suggested to employees that union organizational activities were unnecessary. At the very least, Respondent left the impression that, by bringing their complaints and grievances directly to the supervisors, the employees' grievances could be remedied. Under these circumstances, conduct of that nature constitutes an infringement of employee rights under Section 7 of the Act.¹⁰ Thus, by conducting meetings or individual gripe sessions and, more specifically, by Pevoteaux's distribution of forms, through which complaints and grievances were solicited actively, and by leaving the impression that those complaints and grievances would be cured, Respondent violated Section 8(a)(1) of the Act. Therefore, we shall modify the Administrative

⁸ We note that the Administrative Law Judge failed to make clear-cut credibility resolutions regarding certain conflicts in testimony between Respondent's witnesses and the General Counsel's witnesses concerning these incidents. Nevertheless, we find it unnecessary to resolve this conflicting testimony because, even accepting *arguendo* the supervisors' testimony as true, we find that the four incidents constituted unlawful solicitations of grievances.

Contrary to his colleagues, Member Hunter finds that the conduct of the four supervisors was not violative of Sec. 8(a)(1) of the Act. Member Hunter would treat these four incidents as the Administrative Law Judge did, and dismiss all of them on the basis that the General Counsel failed to prove that Respondent employed APC Skills, administered the CCQ, or implemented the three new communication programs, from which these four incidents stem, to defeat the Union. The General Counsel has not shown in any way, and indeed did not even allege, that these incidents were independently violative of Sec. 8(a)(1). Thus, contrary to his colleagues, Member Hunter would dismiss these allegations in the absence of finding other unfair labor practices relative to the introduction of APC Skills and the CCQ.

⁹ See *Kut Rate Kid & Shop Kwik*, 6 NLRB 106, 118 (1979).

¹⁰ We note that, in the typical case, the Board has found interference with a union's organizational efforts when solicitations of grievances occur in the course of the pre-election period. In the instant case, the Union had lost the March 1980 election, but timely filed objections to the election were pending when Respondent's supervisors solicited their employees' grievances. We note that the Board subsequently set aside the first election and directed that a second election be conducted. Thus, because the parties were still embroiled in a long, unresolved representation case, we find the solicitations of grievances to be violative in the instant case.

Law Judge's recommended Order to remedy this unlawful conduct.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs accordingly:

"3. By soliciting employee complaints and grievances and by promising employees increased benefits and improved terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act."

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, Electric Hose & Rubber Company, McCook, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly:

"(a) Soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment to induce them to forgo their support for the Union."

2. Substitute the following for new paragraph 1(d):

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

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

APPENDIX

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

After a hearing the National Labor Relations Board has concluded that we interfered with the rights of our employees and that we unlawfully discharged the employees named below. To remedy this matter the Board ordered us to post this notice and to comply with its terms.

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.

WE WILL NOT solicit employee complaints and grievances and promise employees increased benefits and improved terms and conditions of employment to induce them to forgo their support for United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC.

WE WILL NOT discharge any employee for engaging in union activities or otherwise exercising any of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT coercively interrogate our employees about their union activities or encourage our employees to report union activities to their supervisors.

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

WE WILL offer Marc Prochazka and Shirley Ashley immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings incurred from being unlawfully terminated, with interest.

WE WILL expunge from our employee handbook any reference which might lead employees to conclude that they should report the union activities of other employees to our supervisors.

WE WILL expunge from our records any reference to the unlawful discharges of Marc Prochazka and Shirley Ashley.

ELECTRIC HOSE & RUBBER COMPANY

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This consolidated matter was heard by me in August and September 1981 at McCook, Nebraska. The amended consolidated complaint (the complaint) which alleges that Electric Hose & Rubber Company (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), was issued on behalf of the General Counsel of the National Labor Re-

lations Board (the Board) by the Regional Director for Region 17 of the Board on June 9, 1981. It is based on unfair labor practice charges filed by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (Union), on November 17, 1980 (Case 17-CA-10037), February 4, 1981 (Case 17-CA-10155), and March 4, 1981 (Case 17-CA-10230).

Respondent filed a timely answer to the complaint which denies the commission of the alleged unfair labor practices.

On the basis of the record made at the hearing, my observation of the demeanor of the witnesses while testifying, and my careful consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE BOARD'S JURISDICTION

Respondent, a Delaware corporation, is engaged in the manufacture of rubber and plastic hoses at a facility located at 400 South Street, McCook, Nebraska. In the course and conduct of its Nebraska business operations, Respondent annually purchases goods and services valued in excess of \$50,000 directly from suppliers located outside Nebraska and annually sells goods and services valued in excess of \$50,000 directly to customers located outside Nebraska. On the basis of the foregoing admitted facts, I find that Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it will effectuate the purposes of the Act for the Board to assert jurisdiction over the instant dispute.

Only Respondent's McCook facility is directly involved in this proceeding. However, it is pertinent to the issues presented to note that Respondent is a wholly owned subsidiary of the Dayco Corporation, a conglomerate which operates at least 29 other facilities from coast to coast. Dayco operates hose plants similar to the one involved here in Alliance, Nebraska, Ocala, Florida, and Olney, Texas. The employees at these other locations are not represented by any labor organization. In its brief, Respondent advised that a similar plant in Dover, New Jersey, where employees were represented by the Union, had recently closed.

II. THE LABOR ORGANIZATION

The answer admits that the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find. The Union has been attempting to organize Respondent's production and maintenance employees at McCook since approximately August 1979.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Marc Prochazka on November 6, 1980, and Shirley Ashley on

February 2, 1981. It also alleges that the same sections were violated by Respondent's conduct in improving employee benefits on November 13, 1980, and January 2 and 7, 1981; its conduct in imposing more restrictive conditions upon the finishing department employees on February 25, 1981; and its conduct in issuing verbal or written warnings to employees Doreen Parsons and Dorothy Anderjaska. The complaint asserts that the foregoing conduct was for the purpose of discouraging union activities by the McCook employees. The complaint also alleges that Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by several separate instances of soliciting grievances, promising benefits, and interrogating employees, all for the purpose of discouraging union activity.

Respondent admits that it discharged Marc Prochazka albeit for lawful reasons but denies the remaining substantive allegations of the complaint.

B. *The Prior Case*

The General Counsel places substantial reliance on a prior unfair labor practice case involving the same parties and the same organizing effort in which Administrative Law Judge Joan Wieder found that Respondent was guilty of numerous unfair labor practices and in which Administrative Law Judge Wieder recommended that the Board (1) enter an appropriate remedial order, and (2) set aside the Board-conducted election of March 6, 1980, wherein the proposal for union representation by Respondent's employees was defeated. This prior case, in the General Counsel's view, demonstrates substantial hostility by Respondent toward union representation, shows some of the concerted activities engaged in by certain employees involved in this proceeding, and establishes a proclivity by Respondent to violate the Act. Although Respondent appears to concede that the activities of some of its employees is demonstrated by the findings in the prior case, it argued that as exceptions were filed to Administrative Law Judge Wieder's findings and conclusions, no significant reliance should be placed on her findings and conclusions. However, on June 15, 1981, the Board rendered its decision in the prior case wherein it adopted the findings and conclusions of Administrative Law Judge Wieder with certain specific modifications and directed a second election.¹

The conduct reflected in the prior case—a significant portion of which is based on demeanor credibility findings or uncontradicted employee testimony—reflects an attitude by Respondent that the representation of its employees by a labor organization is a concept which it was willing to resist by any means, lawful or unlawful. Thus, Administrative Law Judge Wieder summarized as follows:

In sum, the employer, from the outset of its campaign, repeatedly utilized the carrot and stick approach, employing potential layoffs and plant closings, in conjunction with the union campaign and the opening of the Ocala plant which was nonunion,

indicating that bargaining would be futile, announcing that no wage increases or other improvement in benefits would be granted during the campaign and negotiations even though negotiations may last years, and other adverse consequences would flow from unionization.

In addition, findings in the prior case show that Respondent's campaign against the Union was an effort coordinated from top to bottom. Thus in the critical period before the March 6, 1980, election 13 meetings were conducted by management officials with small groups of 25 to 30 employees, in which the process of collective bargaining was portrayed from the worst possible perspective. Followup inquiries of employees were made by foremen to obtain reactions to the meetings. Additionally, Respondent's president came to McCook to deliver an appeal against the Union and on the day before the election, a large advertisement appeared in the local newspaper, the McCook Gazette, exhorting employees to reject the Union. The theme of Respondent's campaign was laced with abundant assertions of gloom—employees were told that the selection of the Union would mean that there would be chaos; that the plant would never be the same; that customer confidence (on which business and, by inference, jobs depend) would be destroyed; that the plant would "wilt and die on the vine"; that there would be long protracted negotiations with bargaining beginning from scratch; that the Company bargains hard with unions; that employees would not get anything the Company was unwilling to give; that the unorganized employees would be given all benefits granted organized employees; that there would be layoffs; that the plant might close; that the plant would operate below capacity; that there was no worse time for a union; that there could be strikes; that strikers could be replaced; that strikes turn friend against friend; that employees could be fined by the Union for expressing their own personal views; and that promoting union sentiment was discouraged while promoting an antiunion sentiment was encouraged.

Although the prior case is not a substitute for the General Counsel's obligation to prove the complaint allegations by a preponderance of the credible evidence, Respondent's open and notorious hostility toward the establishment of collective bargaining is clearly relevant in assessing the motive for its actions during a union organizing campaign. It would be clear error for me to simply set the atmosphere portrayed in the prior case aside and treat it as though it did not exist. Respondent made its own bed, so to speak, and now it should not be heard to complain about having to lie in it. I find, therefore, Respondent was officially predisposed to oppose its employees' exercise of their Section 7 rights and that its official attitude contributed materially to some of the events which are the subject of the instant complaint.

C. *The Alleged 8(a)(1) Violations*

1. The employee handbook

The General Counsel amended the complaint at the outset of the hearing to allege that Respondent's hand-

¹ The Board's decision is reported as *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982).

book—published at some unspecified time in the summer of 1980—interfered with its employees' Section 7 rights. The provision found offensive by the General Counsel (which appears as an introduction) reads as follows:

We sincerely hope that if you are approached to join a union, you will consider the freedoms you will be relinquishing. If you feel you are being pressured into making a commitment to the union, notify your Supervisor and we will see that such pressuring is stopped. *IT IS OUR INTENTION TO OPPOSE UNIONISM BY EVERY PROPER MEANS AVAILABLE* to ensure that no employee ever has to give us the freedoms he or she has and deserves as an employee of Electric Hose and Rubber Company.

Respondent does not deny that its most recently published handbook contains the foregoing provision. Rather, it argues on the basis of testimony given by the McCook personnel manager, Jack Harootunian, that, as the provision was deleted from the handbook 2 or 3 weeks prior to the hearing, no remedial order is necessary.

There is no evidence that employees were ever informed that the handbook provision was deleted. As is self-evident, the provision encourages employees to report the union activities of fellow employees to management and announces that unspecified action would be taken to stop such activity—without regard to whether or not the reported activity was protected by the Act. As Respondent has failed to demonstrate that it has publicly rescinded the provision, I find that by maintaining this announced policy in effect, Respondent has thereby violated Section 8(a)(1) of the Act and that such conduct does require an appropriate remedial action.²

2. The Company's climate questionnaire (CCQ) and related actions

The complaint alleges that APC Skills was an agent of Respondent and that it, in conjunction with Respondent's plant manager, William Bauer, solicited grievances of employees, and promised and granted benefits to employees. More specifically, the General Counsel believes that an attitude survey (CCQ) administered by APC Skills among Respondent's McCook employees from August 26 through 28 and Bauer's written announcement related to certain findings resulting from the survey dated November 13, 1980, violated the Act. The essence of Respondent's defense is that the survey and Bauer's followup announcement occurred only coincidentally with union activity at McCook, that it was unrelated to the union activity, and that it was not violative of the Act. The thrust of the General Counsel's argument on brief was that it is obvious that a number of the questions on the CCQ were designed to elicit information from employees about their attitude toward a variety of topics including their pay, benefits, and working conditions,

² To the extent that Respondent's policy of stopping any "pressure" upon employees to join a labor organization is ambiguous, such ambiguity should be resolved against the promulgator. *NLRB v. Miller*, 341 F.2d 870 (2d Cir. 1965).

and that the ostensible purpose of the survey assigned by Respondent—to identify areas for management and supervisory training—is a subterfuge used to hide its true purpose; namely, to discourage employees from supporting the Union. The General Counsel contends that Bauer's letter of November 13 discloses that the object of the survey was to solicit complaints which Respondent could consider and remedy if it so desired.

APC Skills is a private management consulting firm which Respondent had previously used at its Dover and Alliance plants. Indeed, throughout most of the preelection period, a team of APC consultants were operating at the Alliance plant. APC initially came to the McCook plant shortly after the election in March 1980. The presence of the APC team members was announced by Bauer in a letter to all employees. The APC team leader at McCook, David Hall, testified that APC's primary purpose is to design and install management and employee operational training systems. APC's usual procedure is to begin analyzing their client's operation by means of onsite observations and by conducting certain "diagnostic" tests with a limited number of supervisory and managerial employees. Next, APC develops an action plan which, if accepted by the client, it thereafter undertakes to implement. Typically, the focus is on the management and supervisory staff and that appeared to be the case at McCook. According to Hall, a series of diagnostic examinations are conducted with the entire supervisory and managerial staff in the proposal implementation stage. APC also assists in establishing management committees (task forces) to solve plant problems and to identify methods to achieve company goals. Formal class training sessions with supervisors are conducted by APC personnel. APC team members also observe supervisory personnel on the floor and provide feedback to aid them in evaluating their performance. So far as APC's direct interaction with rank-and-file employees is concerned, it appears to be limited to the disputed CCQ. According to Hall, the results of the CCQ are typically relayed to employees by means of a company newspaper, a letter, or small group meetings. At McCook the CCQ "results" were conveyed by Bauer's November 13 letter.

The CCQ format consists of a series of statements to which employees are asked to respond by stating whether they strongly agree, strongly disagree, or are uncertain. The General Counsel believes the following sample of CCQ inquiries taken from the survey conducted at McCook supports a portion of his argument:

1. Most people at this company feel that the pay and benefits they get are fair for the work they do.

* * * * *

19. There are a lot of people in this company who are unhappy about their pay and benefits.

20. You can move up at this company if you have ambition and work hard.

* * * * *

37. The pay here is pretty good compared to what other companies like ours are paying.

38. Getting ahead at this company depends more on who you know than what you know.

39. People in this company do their jobs without griping about how they have to work harder than others.

* * * * *

55. Some people at this company get paid more than they deserve, but others get less than they should.

56. People are promoted fairly in this company.

* * * * *

58. The workers at this company really care if the company is successful or not.

59. There is too much bad feeling among the people I work with.

* * * * *

63. It often seems as if one part of this company is working against another part of the company.

In his November 13 letter—which was ostensibly to report the results of the CCQ—Bauer called attention to some areas where employees had responded in a positive fashion and other areas where there had been a negative response. Hall testified that he assisted Bauer in drafting the November 13 letter. The General Counsel argues that the letter announces the establishment of a new employee benefit; namely, three new programs to improve communications. The three communications programs announced in Bauer's letter were labeled the management on-the-floor system, the inquiry-response system, and the meetings system. Succinctly summarized, the management on-the-floor system amounted to having top local management make appearances on the plant floor on the "back" shifts; i.e., the evening and night shift.³ The inquiry-response system consisted of providing supervisors with a pad of preprinted paper to use in seeking answers to employee questions. The meetings system consisted of permitting discussion about a wider range of topics at the monthly safety meetings and requiring supervisors to prepare a written agenda in advance of the meetings as well as a written summary at the conclusion of the meetings.

The evidence discloses that the communications schemes announced in Bauer's November 13, 1980, letter were actually implemented. The General Counsel has complained of certain events which occurred at this stage. Thus, on December 15, 1980, plant engineer Tom Conroy, an admitted supervisor, visited the 11 p.m. to 7 a.m. shift as a part of the management on-the-floor system. In the course of the visit, Conroy asked Dorothy Anderjaska, an employee who had been openly active on behalf of the Union, if she needed any improvements in

her area. Anderjaska could not think of anything at the time so Conroy told her if she thought of something later she could drop a note in his mailbox. Later during the same shift, Anderjaska thought of a couple of matters—one item was never disclosed at the hearing and the other item was a request to inspect for worn rollers on the hose pullers more often and to be more diligent about replacing them. Anderjaska caused a note to be delivered to Conroy by a supervisor. On Christmas Eve 1980, Conroy approached Anderjaska on the steps of the church which they attend to inform her that he had not forgotten her requests. Two or three months later, according to Anderjaska, the worn rollers on her hose puller were replaced.

The General Counsel also complains about meetings conducted by three supervisors subsequent to Bauer's November 13 letter. On December 17, 1980, Supervisor Gary Pevoteaux held a meeting for the 17 employees he supervises. Although Pevoteaux operated from a prepared agenda (apparently for the first time), he characterized the meeting as a typical safety meeting like those which supervisors had conducted for several years. However, employee Dennis McFarland testified that Pevoteaux distributed a new form and asked those present to list any complaints or safety hazards of which they were aware on the form and return it. McFarland did not return his form. The following day Clara Fringer, a supervisor, conducted a meeting for the 30 employees she supervises. Employee Clyde Swartz testified that although Fringer, in calling the meeting characterized it as a safety meeting not much of it related to safety. According to Swartz, Fringer told the assembled group that if they had any problems or complaints they should come to her and she would see if there was something she could do about them. Swartz never registered any complaints with Fringer. Fringer and employee Golda Zwinkle testified that the December 1980 meeting was conducted in the same fashion that Fringer had always conducted such meetings, to wit, the first part of the meeting was devoted to any safety matters and thereafter the floor was thrown open for a discussion of any other problems. The third disputed meeting was conducted by John Modrell, a supervisor, on January 13, 1981. Attending were the employees Modrell supervises. Modrell prepared an agenda for the meeting and in the course of it he asked if there were any complaints. Employee Kathy Vontz, who characterized the meeting as a typical safety meeting of the type she had attended for 7 years, requested a heater for her work station. Modrell responded saying that they were working on it. Vontz replied that, as she had heard this response since the previous July, she wanted it in writing. By the end of the day, Vontz was given a written assurance that the heating problem in her area would be cured. Three days later Vontz ran a metal sliver under her fingernail. She testified she noticed no pain from the injury until she got home and her hands warmed. Subsequently, Vontz filed an accident report in which she attributed the injury to her cold hands. Following this injury, a heating system was installed. The General Counsel believes this action was a

³ The McCook plant operates on a three-shift basis with shifts starting and ending at 7 a.m., 3 p.m., and 11 p.m.

grant of a benefit to dissuade Vontz from supporting the Union.

The General Counsel analogizes Respondent's CCQ and improved communications system with the "Job Information Survey and Sounding Board" program found unlawful by the Board in *General Electric Co.*, 255 NLRB 673 (1981). Although I agree that the schemes involved in the two cases are somewhat analogous, I do not believe that it necessarily follows that Respondent here violated Section 8(a)(1) of the Act. The theory of the General Counsel's complaint is that APC skills acted as Respondent's agent to solicit grievances by means of the CCQ and to devise a response to the attitudes disclosed by the CCQ. This action, the General Counsel argues, was taken to discourage union activities.

In my judgment, the General Counsel's theory is not factually supportable. There is no evidence that APC Skills' services were sought by Respondent for the purpose of opposing the Union. Indeed, the evidence merits a contrary inference. Prior to the McCook election on March 6, 1980, APC Skills was working in the Alliance plant where there was no known union activity. The fact that APC Skills did not commence its work at McCook until after the election indicated that the procurement of its services was not motivated by Respondent's fixation with defeating the Union. In addition, the fact that practically all of the APC Skills' program other than the CCQ was directed at the supervisors and managers and the further fact that evidence is lacking that an object of the training was to oppose unionism is supportive of an inference that APC Skills' presence in McCook was for a legitimate business purpose. Such an inference is further warranted because the evidence shows that the APC Skills' team was at the McCook facility for over an 11-month period without becoming directly involved in the union activities at the plant. Furthermore, the General Counsel's analogy with the *General Electric* case becomes even less convincing when it is observed that some of the employee grievances here were not "solicited" until more than 6 months after the election nor remedied until 2-1/2 months after they were solicited.⁴ For the foregoing reasons, it is my conclusion that the General Counsel has failed to prove any nexus between the activities of APC Skills and the union activity at the McCook plant. Accordingly, I cannot make the critical finding that the administration of the CCQ and Bauer's November 13 announcement were for the purpose of interfering with employee union activity. On the contrary, the preponderance of the evidence here warrants the conclusion that Respondent's use of APC Skills and the implementation of its recommended programs were for legitimate business purposes and would have occurred even in the absence of any union activity. Therefore, I find that the General Counsel has failed to prove that Respondent

⁴In *Uarco*, 216 NLRB 1 (1974), the Board observed that soliciting grievances does not violate Sec. 8(a)(1). Rather, it is the promise which follows inferentially that the grievance will be remedied which is unlawful. The fact that the CCQ was a more formalized type of survey which gave no explicit indication as to whether or not any action would be taken on the wide variety of attitudes surveyed and the length of time before Respondent reacted to the CCQ detracts considerably from the inference that soliciting grievances by means of the CCQ implied a promise to remedy.

violated Section 8(a)(1) of the Act by administering the CCQ in August 1980, by Bauer's letter of November 13, or by the conduct of its agents, Conoy, Pevoteaux, Fringer, and Modrell in December 1980 and January 1981. *Logan Co.*, 171 NLRB 524 (1968).

3. The interrogation allegations

The complaint alleges that three supervisors interrogated employees about union activities on February 4 and 10, 1981. In support of one such allegation, employee Vicki Knight testified that on approximately February 4, 1981, she reported for work and approached Foreman Modrell's desk for her assignment. After Modrell finished that business, he reached in his drawer and pulled out a "Johnny Hosemaker" cartoon.⁵ The cartoon in question appears to depict a supervisor as a two-legged jackass. Also depicted are two nearby employees, one saying to the other, "I know. I used to like him too . . . when he was a person." On the surface, no attempt was made to identify the supervisor depicted. Showing it to Knight, Modrell asked if she had drawn it. Knight replied that she had not drawn the cartoon. Smiling, Modrell observed that the supervisor (depicted as a jackass) resembled himself. By this time—according to Knight—employee Ron Scott had approached Modrell's desk and agreed with Modrell's observation that the jackass bore a resemblance to Modrell. Scott denied that he ever observed Modrell discuss the cartoon with Knight. Modrell denied having asked Knight about the cartoon. I find it unnecessary to resolve any credibility conflicts about this matter as, in my judgment, the substance of Knight's testimony and her demeanor while delivering it made clear to me that this inquiry—assuming it did occur as Knight testified—was more in the nature of shop floor humor and lacked any coercive element whatsoever. Accordingly, I find Modrell did not violate Section 8(a)(1) as alleged.

Cheryl Gillen testified that on February 10, 1981, Kent Kotschwar, a supervisor, approached her in her work area and asked if she had the jackass cartoon. When Gillen said she did, Kotschwar asked for it. Gillen retrieved the cartoon from her billfold and gave it to Kotschwar who then asked if Parsons had drawn it. Gillen told Kotschwar that she had no knowledge as to whether Parsons had drawn the cartoon. Next Kotschwar asked if anyone in the plant had drawn the cartoon and Gillen said, "No." Kotschwar then left with the cartoon.

Kotschwar's version of this incident is more innocent. Kotschwar testified that he came to the work area and Gillen asked if she could help him. Kotschwar said he was looking for the jackass cartoon which he thought he had observed earlier. Gillen told Kotschwar it was not there anymore and proffered her copy. Kotschwar remarked, "It's kind of neat. I wonder who the artist was." While looking at it, Gillen asked Kotschwar if he would like to copy it and Kotschwar responded, "Sure." Gillen

⁵ Johnny Hosemaker cartoons were the handiwork of union activist Doreen Parsons. Generally, the cartoons depicted Respondent in a poor light. The Union distributed them as handbills. The cartoon referred to by Knight was one of Parsons' earliest efforts.

told Kotschwar she wanted it back and he then left. Kotschwar denied asking Gillen who had drawn the cartoon, if Parsons had drawn the cartoon, or if anyone in the plant had drawn the cartoon.

I have credited Gillen's version of this incident. Gillen impressed me as a witness who was making a sincere effort to relate what occurred. By contrast, Kotschwar appeared in this and other instances to be straining for explanations for his conduct and some of those explanations are convoluted and inconsistent. As Gillen's testimony disclosed a repeated effort by Kotschwar to lease the identity of the artist, I find that it was coercive in tone and substance, and that the inquiry violated Section 8(a)(1) of the Act.

No evidence was offered to support the complaint allegation that Supervisor Trupp interrogated any employee on or about February 10, 1981, as alleged. Accordingly, that allegation will be dismissed.

4. The microwave oven offer

The General Counsel contends that Bauer violated Section 8(a)(1) of the Act by his letter to employees dated December 1, 1980, offering a microwave oven as an inducement to encourage increased participation in Respondent's suggestion system. This action, the General Counsel argues, constitutes an attempt to solicit grievances and directly promises a new benefit; i.e., the microwave oven. Bauer admitted the oven was offered as an extra inducement and testified that the idea for offering it came from a report by the manager at Dayco's Springfield, Missouri, plant (where the Union represents certain employees) who had successfully used the added inducement to spur interest in the suggestion program.

Respondent's suggestion program was initially established in February 1980, a month before the election. As initially established employees were assigned to one of five committees to review suggestions and cash awards ranging from \$5 to \$25 were granted for the best suggestions. Subsequently, in July 1980, the program was modified by eliminating the employee review feature in favor of a management evaluation team as was the apparent practice at other Dayco plants and by substantially increasing cash awards.⁶

In her decision, Administrative Law Judge Wieder sustained one of the Union's objections which concerned the original implementation of the suggestion program in 1980. Specifically, she found:

The initiation of a suggestion program less than a month before the election, accompanied by an awards program, when considered in conjunction with the threat of plant closure, layoffs, solicitation of grievances, the other promises of benefits, the threat and actual withholding of wage increases, as well as the other matters discussed hereinbefore, is coercive and interfered with the conduct of a fair election. See *Multi-National Food Service*, 238 NLRB 1031 (1979).

⁶ No evidence was presented in the instant proceeding concerning the establishment of the suggestion program and its subsequent modifications in July 1980. The findings herein with respect to those matters are based on Administrative Law Judge Wieder's findings in the prior proceeding.

A perusal of the complaint, the General Counsel's brief and the conclusions of law in the prior proceeding, fails to disclose that the implementation of the suggestion system was ever previously alleged as an unfair labor practice or that it was ever found to be such. Hence, in view of the fact that the General Counsel and the Union were obviously well aware of the implementation of the suggestion system at the time of the prior proceeding, I am now precluded from finding that either its implementation in February 1980, or its modification in July 1980, was coercive within the meaning of Section 8(a)(1) of the Act. *Jefferson Chemical Co.*, 200 NLRB 992 (1972); *Peyton Packing Co.*, 129 NLRB 1358 (1961). Accordingly, to the extent that the General Counsel now relies on the fact that the suggestion program was deemed to be coercive in the context of a prior representation proceeding, I am limited to treating that finding as background evidence only. Nevertheless, the question presented for resolution here is only tangentially related to the original establishment of the suggestion program.

As with several other instances of Respondent's conduct examined herein in the period following the election, there is no evidence directly linking this announcement related to the microwave oven with any ongoing union activity. Although it is true that Bauer's announcement of December 1 would tend to portray Respondent in a favorable light in the eyes of employees, it does not automatically follow that Respondent's action in offering the microwave would violate Section 8(a)(1). On the basis of the record before me, it cannot be rationally concluded that Respondent's conduct was undertaken for the expressed purpose of impinging on the employees freedom of choice for or against unionism or that it was reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Unlike the original implementation of the suggestion system a month before the election, the suggestion system in place in December 1980 appears to conform to that utilized at other Dayco plants and, as Bauer's testimony indicates, the offering of bonus prizes such as the microwave likewise conformed to similar actions at other Dayco plants where there was no ongoing organizational activity. Moreover, the fact that the microwave was offered approximately 9 months after the first election and at a time when there was complete uncertainty about a second election further supports the inference which I have made that the offering of the microwave was not related to the union organizational activity but rather conformed to what would have occurred in the absence of such activity. *Famous-Barr Co.*, 174 NLRB 770 (1969). Accordingly, I find that the microwave oven offer did not violate Section 8(a)(1) of the Act.

D. The Alleged 8(a)(3) Violations

1. The implementation of the safety shoe and eyeglass purchase programs

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) by the implementation of the safety shoe and eyeglass purchase programs on January 2 and 7, 1981, respectively. Respondent denies that the

object of these programs was to dissuade employees from supporting the Union.

The evidence discloses that on the aforementioned dates memorandums were posted on the plant bulletin boards signed by Safety Director Virgil Bamsey announcing the programs. Bamsey did not testify. Instead Personnel Manager Harootunian testified that he was responsible for actually seeing that the programs were implemented. According to Harootunian, he was apprised of the availability of the programs by corporate memorandums he received in the summer of 1980 shortly after his transfer to the McCook plant. When Harootunian approached Bauer about implementing the programs, Bauer advised Harootunian to proceed by checking the success of the programs at other locations. For reasons not fully explained by this record, Harootunian's efforts to comply with Bauer's instruction appears to have consumed more than 6 months. Insofar as this record shows, when the decision was made finally to announce the programs, the announcements were made by Bamsey at Harootunian's direction.

Both programs appear to have been arranged by Dayco corporate personnel with outside vendors. The safety shoe program provided for the purchase of a particular brand of safety shoes at a price below the retail price of the shoe or a comparable shoe. The cost of the shoes was to be paid entirely by the employee—the only benefit supplied by Respondent or its parent was the negotiated discount. Under the eyeglass program Respondent offered to pay the cost for prescription safety glasses. It was recommended that the employee secure a new prescription if their prior prescription was over a year old and the cost of an eye examination for prescription purposes was to be at the employee's expense. Nonprescription safety glasses had theretofore been available at the plant and continued to remain available. It likewise appears from the Union's handbills in evidence that Respondent granted its employees an across-the-board wage increase at approximately the same time but that matter was not alleged as a violation.

The announcements concerning the shoes and eyeglasses contained no reference to organizational activity and there is no other evidence of any kind that any of Respondent's managers or supervisors attempted to seize upon the announcements to gain an advantage *vis-a-vis* the Union. Harootunian testified that the sole object of implementing the programs was to provide employees with the opportunity to have safe shoes and safe glasses for work in the plant. No other object is discernible from this record. This conclusion is especially warranted where, as here, both programs were initiated at the Dayco corporate level and were not implemented in McCook with the slightest degree of haste. Indeed, a more serious dispute would have been presented if the General Counsel had alleged Respondent's delay in implementing these programs as a violation. Accordingly, I find that the announcement and implementation of the safety shoe and eyeglass purchase programs did not violate Section 8(a)(1) and (3) of the Act.

2. The restrictions on the 5-minute breaks

The complaint alleges that Respondent imposed more restrictive conditions of employment upon the finishing department employees in violation of Section 8(a)(1) and (3) of the Act by limiting the number of employees who could go on break at any one time after approximately February 25, 1981.

The undisputed evidence shows that, in late February 1981, the employees in the finish and inspection plastics department were instructed that they could no longer go on the authorized 5-minute work breaks at the same time as they had been doing. Darrell Brown, the manager of those departments, testified that he initiated this action after observing that the two 5-minute break periods were being extended from 10 to 15 minutes on all three shifts. According to Brown, this resulted from the fact that most of the 70 to 75 employees on each shift congregated in the cafeteria to use the limited number of food and beverage machines available there during the short break period. As a consequence, many employees had to wait for an extended period in order to use the machines and employees were routinely 5 or 10 minutes late in returning to their work stations. Brown initially held a meeting with the six departmental forepersons and later attended separate meetings of the finish department employees where he personally announced the change. Brown testified that he advised employees that only four finish operators and two balers would be permitted on the 5-minute break at any given time. Rosalie Madsen, one of the forepersons in the finish department, corroborated Brown's version of this change and the manner in which it was announced. Dennis Kennedy, the 11 p.m. to 7 a.m. foreperson for plastics inspection, testified that he informed employees that the 5-minute breaks were being abused. Accordingly, Kennedy told his crew that only two or three could leave their work stations at the same time and, when they returned, others could go. Clara Fringer, a foreperson on the 11 p.m. to 7 a.m. shift in the finishing department, testified that after Brown's meeting with the supervisors she told the employees she supervised that the break procedure would be altered so that they would be permitted to go on break in groups of five—three finish workers and two balers. All of the supervisors denied that union considerations had anything to do with changing the break procedure.

Although the General Counsel called numerous employee witnesses, only two were questioned in support of the allegation concerning breaks. One, Dorothy Anderjaska, testified that her group was advised by Supervisor Kennedy during a February 25, 1981, safety meeting in his office that the employees were to stagger their 5-minute breaks so only two were off the floor at any given time "until further notice." Following this announcement, Anderjaska noticed that Kennedy and Finishing Supervisor Fringer "staggered" their breaks so one or the other was present when she went on break.⁷

⁷ Although this testimony might suggest surveillance, the record is entirely insufficient to merit a conclusion that Respondent's supervisors were engaged in such activity.

According to Anderjaska, this procedure lasted about a week and then the employees began taking breaks as before; i.e., altogether. On cross-examination Anderjaska acknowledged that when everyone took their break at the same time the cafeteria would become "pretty crowded" and on occasion the breaks "possibly" lasted longer than the allotted 5 minutes. Anderjaska also conceded that the problem causing the change was "possibly" that breaks were lasting too long. Anderjaska gave no testimony which directly linked change in the break policy with the ongoing union activity. Clyde Swartz, a baler, testified that on February 25 his foreperson, Rose Madsen, advised him that there would be a change in the break policy—that henceforth only two employees at a time would be permitted on break and that there was to be no talking or standing around. Swartz asserted that he never returned late from a 5-minute break and never knew anyone else who did, but, according to Swartz, he normally went on break alone. He testified that the break policy (including the no-talking rule) was still in effect at the time of the hearing. Swartz gave no testimony directly linking the changed break policy with union activity.

On the basis of the foregoing and the entire record, I find that the evidence fails to establish that the change in Respondent's rest break policy interfered with its employees' Section 7 rights. Rather, the preponderance of the evidence merits the conclusion that the break policy was instituted for legitimate business reasons and that there was no attempt to convey a message to employees that it resulted from any of their organizational activities. Even assuming that Supervisor Madsen may have directed that there be no talking during the break periods as Swartz asserts, this evidence, at best, is ambiguous where there is substantial evidence that part of the problem resulted from the casual talk among employees during the break periods. Moreover, as Anderjaska's testimony shows, any such admonition about talking—or the new break policy itself—was routinely ignored after a short period without retribution. Accordingly, I find that the change made in the break policy on or about February 25, 1981, did not violate Section 8(a)(1) and (3) of the Act.

3. Doreen Parsons' December 1980 warning

The complaint alleges that the warnings issued to Doreen Parsons on December 11, 1980, and February 27, 1981, violated Section 8(a)(1) and (3) of the Act.

Parsons has been employed by Respondent since March 1979 as a tube machine operator. She appears to have been one of the more active and outspoken union adherents. Parsons openly displayed support for the Union by wearing a union organizing committee button and distributing handbills which included 10 or 11 of her cartoon caricatures which she named "Johnny Hose-maker." As noted above, the barbed messages directed at the management by Parsons' cartoons received wide attention in and about the plant. Considering Respondent's demonstrated—and continuing—animus toward unions, Parsons' activities were in all probability a sore spot for Respondent's managers.

In mid-December 1980 Parsons was on the 3 to 11 p.m. shift and her supervisor was Larry Randolph. Ac-

ording to Parsons, when she arrived at work on December 11, 1980, her tubing machine had been equipped with a new device called the "caterpillar" which functioned to pull the extruded tube through the cooling pans and sterate tanks, and on to a reel. Parsons testified that throughout the evening the caterpillar was a source of difficulty as its speed was not synchronized with the tube extruding machine. According to Parsons, the typical procedure is to adjust the speed of the ancillary devices to that of the machine but she found it impossible to do this with the caterpillar. After experiencing considerable difficulty with the operation of the tubing machine, Parsons adjusted the tubing machine speed to that of the caterpillar. However, in the meantime, Parsons ran approximately 2,000 feet of off-center tubing which was rejected by the quality inspectors. When her foreman, Randolph, was apprised of this, he issued Parsons a written notation of a verbal warning.⁸

The machine operated by Parsons is known as the T-6. The operators of this machine on the other two shifts at approximately the same period of time were Gerald Manley and Darrell Banzhaf. Richard Griffing, a cover machine operator whose work involves putting a final cover over the tubing after it has been reinforced, testified about repeated instances of off-center tubing produced by Manley which arrived at his machine for covering. In Respondent's production process, this defective tubing should have been intercepted by the tube machine operator or the quality control inspectors before it was sent to the "ward well" to have the reinforcement applied. Griffing testified that he called these defects to the attention of Kent Kotschwar and quality control inspector Dee Traphagan. On all but one of such occasions, Kotschwar told Griffing not to cover the defective tube. Cameron Martin, another cover operator, worked on the 3 p.m. to 11 p.m. shift. He testified that in January 1981 there were substantial amounts of off-center tubing sent to him for covering and, most frequently, the tubing came from the machines of Manley and Banzhaf.

Manley received a written notation of verbal warning on December 16, 1980, for running off-center hose. Apart from Manley's warning, there is evidence that several other warnings concerning off-center hose have been issued both before and after Parsons' warning.

According to Larry Randolph, Parsons' supervisor, Parsons had been verbally warned on two previous occasions about producing off-center hose, including an informal warning on the very day that the written notation of the verbal warning was issued. No attempt was made to rebut this assertion by Randolph nor was any attempt made to show that Parsons called Randolph's attention to the difficulty she perceived with her machine. Instead, the uncontradicted evidence shows that Parsons set the off-center tube out to be inspected, reinforced, and covered knowing it was defective.

⁸ The employee handbook discussed in sec. III.C.1. above, contains a section which details Respondent's rules and regulations and its disciplinary procedure. The disciplinary procedure is described in terms of "steps" ranging from a verbal warning (which is really written) to discharge. Respondent's disciplinary scheme appears to be progressive with regard to the less serious offenses but, in cases involving more serious offenses, immediate discharge is proscribed as the only penalty.

Having considered all of the circumstances, I cannot find on the basis of the evidence before me that the December 11, 1980, warning was discriminatorily motivated. The General Counsel's own evidence shows that another employee (Manley) was given a similar warning by a separate supervisor shortly after Parsons received her warning and that Banzhaf was being trained on the tubing machine operation at or about the time of his January errors. Respondent offered numerous similar warnings issued to employees both before and after Parsons' warning. There is no evidence Parsons attributed the problem to her machine at the time or called anyone's attention to the tubing which she knew to be defective. It is true that the nature of Parsons' cartoon activities may have focused considerable attention on her, but the evidence plainly shows that this activity did not commence until January 1981, after the warning issued. Although my conclusion about the December 1980 warning to Parsons is not free of doubt, I find that the General Counsel has failed to prove by a preponderance of the evidence that this warning was discriminatorily motivated.

4. Parsons' warning for insubordination

On February 27, 1981, Parsons received another warning—this time under Respondent's disciplinary scheme, the warning was written.

According to Parsons, during her workshift on February 26, 1981, she informed Foreman Randolph at 7:40 p.m. that she was taking her lunchbreak and thereupon went to the cafeteria. Parsons claimed that she returned to her work station in 20 minutes which is the length of time allotted for lunchbreaks. There is agreement that Randolph approached her shortly after her return and accused her of taking more than the allotted time—in excess of 25 minutes. According to Randolph, he noted the time of Parsons' departure from the work area as 7:35 p.m. and her return at after 8 p.m. on the restroom clock.⁹ When Randolph asserted to Parsons that she had returned from her lunchbreak late, Parsons proclaimed her innocence. There ensued a period of what appears to be a "yes, you did" and "no, I didn't" assertions back and forth while Parsons was attempting to set up her machine to begin working. Finally, upset at Randolph's persistence over the matter, Parsons told Randolph that his clock was "fucked" and that he should get his glasses checked. Parsons went on to say that she wanted him to quit harassing her. By this point, Parsons claims that she was nearly in tears so she turned and walked toward the drinking fountain and thence to the restroom. As she turned and began walking away, Randolph called to her but Parsons kept walking. She remained in the restroom until she finished crying and returned to her work station about 10 minutes later. Randolph did not approach her

⁹ At the hearing, Randolph was supported in the general assertion that Parsons overstayed her lunchbreak by employee Errol Brunk who claims to have left the cafeteria at approximately 7:20 p.m. when Parsons was just entering the cafeteria. However, as is obvious, Brunk's version is not consistent with Randolph's version. I am not surprised. Brunk impressed me as taking substantial delight from the disparaging testimony he gave about Parsons, not unlike one small child tattling on another. In his haste to be uncomplimentary about Parsons, Brunk appears to have become reckless with facts.

the rest of the evening. Instead, Randolph telephoned Division Manager Jim Trupp at home to advise him of the incident and Trupp instructed Randolph to report early the following day to discuss the matter further.

As directed, Randolph reported for work at or about 2:15 p.m. the following day so he could discuss the incident with Trupp. When Randolph arrived, Trupp and Randolph took the matter up with Harootunian, the personnel manager. According to Randolph, after Harootunian heard the story he wanted to investigate the matter further and asked to have Parsons sent to his office. Randolph complied with this instruction when Parsons reported for work.

During Parsons' meeting with Harootunian and Trupp, she readily acknowledged that she told Randolph his clock was "fucked" and that he should get his glasses repaired. In addition Parsons acknowledged that she had walked away from Randolph but explained that she was under a great deal of pressure because her auto had recently been vandalized and that she walked away because she was about to cry. Parsons asserted that Randolph had been harassing her. When she made this assertion, Trupp asked for specific examples and Parsons replied that she could not think of any at the moment but she had several instances written down in a notebook at her work station. The initial conversation ended with Harootunian telling Parsons that he wanted to investigate further. Following Parsons' interview, Harootunian interviewed Parsons' fellow employees, Mark Nelson and Brunk.¹⁰ After Harootunian's discussion with these two individuals, Harootunian asked Parsons to return to his office. On this visit Harootunian asked Parsons if she would mind if he looked at her notes. Parsons asserted that she preferred to consult with a fellow worker before consenting to Harootunian's request and she was permitted to do so. After retrieving her notes and seeking advice from a fellow employee, Parsons advised Harootunian and Trupp that she would not let them have the notes but that she was willing to read the notes to them. For the moment Harootunian agreed and listened as Parsons read. After a short while Harootunian asked if Parsons would mind if he xeroxed her notes. Initially Parsons agreed and the two adjourned to an adjacent office where Harootunian began to copy the notes. In the course of the copying, Parsons apparently began to have second thoughts and asked Harootunian if she could consult again with a fellow employee. Harootunian agreed and Parsons left, returning a short while later. At this time Parsons told Harootunian that if Young and Perl (Respondent's law firm) wanted her notes, they could wait until they were returned from Kansas City (where the NLRB Regional Office is located). Parsons went on to tell Harootunian that she did not trust Respondent's supervisors after hearing some of their testimony in the prior case and that she did not want to give up her notes

¹⁰ At the hearing Nelson testified that he observed the Randolph-Parsons "confrontation" from his adjacent machine on the evening of February 26 but overheard nothing because of the machine noise. To the extent that it may be deemed relevant, I am dubious of Nelson's testimony. Thus, Parsons readily admitted that she could hear Randolph call to her as she walked away which indicates, contrary to Nelson's assertion, that the machine noise was not that loud.

to them. According to Parsons, Harootunian told her that no one was pressuring her—he simply thought the notes would be helpful in resolving the problem between Randolph and herself. Parsons however declined to provide copies of her notes. After she expressed hope that Randolph's differences with her could be resolved, she was excused and she returned to work. Approximately 5 minutes later Randolph approached her and presented her with the disputed warning citing her for insubordination. Later that evening, Parsons sought an explanation for the warning from Randolph. Initially he declined to discuss it saying he was too busy but when Parsons persisted Randolph finally told her he had issued it because she had walked away from him.

At the hearing, Parsons asserted she had been unable to locate her notes since the interview by the Board agent who investigated the charge. The General Counsel made no effort to elicit any details from Parsons as to the basis for her belief that Randolph was engaged in a pattern of harassing conduct directed at her prior to the issuance of the February 27 warning. Randolph denied that the warning had anything to do with the Union or Parsons' refusal to give up her notes. Instead Randolph asserted that the warning was issued because of the manner in which Parsons had spoken to him, the tone of her voice, and the fact that she had walked away from him.

Viewed in an objective sense, Parsons' conduct on the evening of February 26 could be easily construed as insubordinate. In the absence of evidence that the incident was somehow provoked, it is, in my judgment, impossible to conclude that the discipline was not justified. A contrary conclusion is not warranted by Harootunian's investigation which the General Counsel labeled on brief as "puzzling." However, I do not find Harootunian's investigation all that "puzzling" since Parsons asserted in her first interview with Harootunian that Randolph was harassing her. Harootunian's pursuit of Parson's evidence of Randolph's harassment is consistent with a good-faith effort to learn all the facts before taking action. The fact that the issuance of the disciplinary notice followed Harootunian's unsuccessful efforts to obtain Parsons' notes does not merit the inference that the discipline resulted from her refusal to provide her notes. It may as easily be inferred that Parsons' refusal to provide her notes merely brought Harootunian's investigation to a conclusion. Nor do I find it unusual that Randolph would have cautioned Parsons about the amount of breaktime she used. Thus, as other findings indicate above, stricter adherence to the allotted breaktime was the subject of other legitimate actions by Respondent at this same time. For these reasons, it is my conclusion that the General Counsel has failed to prove by a preponderance of the credible evidence that the warning notice received by Parsons on February 27, 1981, was discriminatorily motivated.

5. Dorothy Anderjaska's warning

The complaint alleges that the warning given to Dorothy Anderjaska on February 16, 1981, violated Section 8(a)(1) and (3) of the Act. Anderjaska, who had been employed by Respondent for about 5-1/2 years, had worked as an inspector for approximately 2-1/2 years at

the time of the disputed warning. At that time, Anderjaska was working on the 11 p.m. to 7 a.m. shift and her foreman was Dennis Kennedy who, between the time of the disputed incident and the hearing, was "relieved of his duties." Anderjaska was an open and active supporter of employee organization. Among other things she attended many union meetings, often wore a button proclaiming sympathy for the Union, and distributed handbills at the plant soliciting support for the Union. Although the organizational campaign had been in progress since August 1979, the evidence shows that, at or about the time of the disputed warning, Anderjaska was actively engaged in handbilling activities.

The written warning issued to Anderjaska was for purportedly careless workmanship. Other evidence shows that Anderjaska had received similar warnings on two prior occasions. The essence of the General Counsel's case is that the February 16 warning was undeserved as Anderjaska did only what she was instructed to do by Kennedy. The General Counsel's theory is, therefore, a familiar one—it is reasonable to infer a discriminatory motive because the discipline was grossly unfair.

Most of the evidence pertaining to the disputed warning was supplied by Anderjaska on behalf of the General Counsel and Kennedy on behalf of Respondent. With regard to the specifics of what occurred on the night of February 13-14, 1981, there is a wide variance between the testimony of Anderjaska and Kennedy. The General Counsel urges that I credit Anderjaska's version of the events because Anderjaska was currently employed by Respondent at the time she testified. Ordinarily that fact is entitled to be accorded significant weight in resolving credibility issues, but it is obvious that where the issue pertains to the self-interest of the employee testifying—as would be the case with Anderjaska's testimony about her own warning—the weight accorded her current employment for credibility purposes is significantly diminished. By contrast, the fact that Kennedy, the supervisor, has apparently been terminated is a very significant fact favoring his credibility. No reason was shown to exist for Kennedy to fabricate or color his version of the events to curry favor with Respondent. The interest alignment question notwithstanding, Respondent was able to demonstrate on cross-examination that: (1) Anderjaska was an experienced inspector, (2) that the work which resulted in the disputed warning was not unusual, (3) that Anderjaska was peeved at the condition of her work station when she reported to work, (4) that Anderjaska did not bother to heed the written instructions which accompanied the disputed work, and (5) that Anderjaska made a statement in a prehearing affidavit about a vital part of her claim which was inconsistent and contrary to her hearing testimony. By contrast, Kennedy's testimony of the events in question was delivered in a straightforward, detailed fashion without the noxious embellishments and canards which infected the testimony of many of Respondent's other witnesses. In sum, I have concluded that where any conflict exists, Kennedy's testimony about the circumstances giving rise to Anderjaska's disputed warning is the more reliable version.

When Anderjaska arrived for work on February 13, 1981, a rack containing 25 pans of hose was present at her station awaiting inspection. The first four pans were marked as experimental hose indicating that it was to be inspected and kept separate from the other hose used for regular production because it was a test sample involving a compound or process not yet approved for production. The inspectors are familiar with the procedures involving experimental hose. Anderjaska only glanced at the accompanying paperwork which likewise indicated there were only four pans of experimental hose and then called to Kennedy to ask him how to run the hose. Kennedy told her to run it as she normally would. Kennedy then left to telephone the technical department per the usual procedure to let that group know the hose was at the inspection stage. Oblivious to the accompanying paperwork and the markings on the hose, Anderjaska continued to inspect and mark hose in pans beyond the first four as experimental hose. The sum and substance of this error was that the error was discovered, it was necessary to sort through all of the hose previously inspected by Anderjaska that evening in order to find the experimental hose. While this was going on it was necessary for Kennedy to shut down the finish department so the experimental hose would not be covered as production hose. Once the mistake was rectified, Kennedy spoke to Anderjaska about the matter and told her to complete inspecting the rack as regular production hose.

After Anderjaska completed the inspection of the first rack of hose she started a second rack which was hose produced under a different specification than the first rack. Again paperwork accompanied the rack and Anderjaska's usual procedure required that she mark the inspected hose with the specification number for use later in the production process. Instead of marking the second rack of hose with the specification number contained in the accompanying paperwork, Anderjaska marked it with the specification number from the first rack. Subsequently Kennedy discovered the error and proceeded again to shut down the finishing department until all of the mis-marked hose was located. On this occasion, however, about 2,000 feet of hose from the second rack was finished under the specification from the first rack and was lost.

On February 16—the next workday—Kennedy cleared the issuance of a written warning with Personnel Manager Harootunian and issued it to Anderjaska over his signature that evening. Numerous other similar warning notices were placed in evidence as exhibits by Respondent. Toward the end of the shift on February 16, Anderjaska remarked to Kennedy that she was aware that another individual (an employee named Griener) had made a similar error the same evening. Kennedy acknowledged that was the case, admitted that the other individual had not received a warning, and said that both of them had been chewed out over that incident. Yet later, Anderjaska asked Kennedy if she got a warning because she wore a union button. Anderjaska said Kennedy replied, "No, I would not do that to you." Kennedy denied that Anderjaska's warning related to her union activities. The General Counsel made no attempt to show a similarity

between the incident involving employee Griener and Anderjaska.

In my judgment the foregoing clearly establishes that Anderjaska's warning of February 16, 1981, was issued for cause and not for discriminatory reasons as alleged. Accordingly, I find that no violation of Section 8(a)(1) and (3) occurred in connection with Anderjaska's February 16 warning.

6. The discharge of Marc Prochazka

The complaint alleges and the answer admits that Respondent discharged Marc Prochazka on November 6, 1980. Respondent contends Prochazka was fired for cause, namely, sleeping on the job. The General Counsel believes that the cause advanced by Respondent was a pretext used to mask the discriminatory motivation behind the discharge because others were not summarily dismissed for the same offense.

Prochazka was one of the nine original leading union advocates in the organizing campaign. He engaged in a variety of visible activities and testified in the prior proceeding about matters adverse to Respondent. There was no attempt on Respondent's part to deny knowledge of the nature and scope of his activities.

There was likewise no attempt on Prochazka's part to deny the occurrence of the event Respondent ostensibly relied on for his discharge; namely sleeping on the job. Prochazka was employed on the 11 p.m. to 7 a.m. shift. His immediate supervisor was Willie Orman. Prochazka worked as a tube machine operator on a combined tube and cover machine. The cover operator who worked in conjunction with Prochazka was Marty Cantrell. According to Prochazka, shortly after the shift commenced on November 5, 1980, the two operators ran out of pans in which the covered tube is rolled after it comes out of the machine. This necessitated shutting down the machine. Prochazka's uncontradicted testimony was that it appeared at the time that it would be approximately 1 hour before pans would be available and the machine would be returned to operation. Prochazka testified that he assisted Cantrell in cleaning the machine and completing some paperwork. Then he sat down on a nearby bench and dozed off. The next thing Prochazka realized, Orman had put his hand on his shoulder, awakening him. Prochazka testified that Orman instructed him to clock out and go home. Prochazka asked why and Orman merely repeated the command so Prochazka complied. Prochazka clocked out at approximately 11:38 p.m.

Cantrell did not testify. The morning he was to be called as a witness by Respondent, he was killed in an automobile accident. For this reason, I received into evidence an out-of-court statement signed by Cantrell on August 6, 1981, which he provided to counsel for Respondent.¹¹ The version contained in that statement reads, in *haec verba*:

¹¹ The statement was proffered as an "affidavit." Although the statement is labeled as such, a careful perusal will show that it is not a sworn statement. The General Counsel objected to the receipt of the statement solely because I had declined to receive the affidavit of Shirley Ashley at a time when she was temporarily unavailable as a witness. In my view, the Cantrell statement proffered by Respondent is adverse to its position. For that reason, I am relying on it notwithstanding its hearsay nature.

On the night of November 6, 1980, near the beginning of third shift, Marc was sleeping on the workbench as he sat facing south. He had been asleep for about twenty minutes. At approximately 11:30 p.m. my machine went down and I cleaned up around it for about 2-3 minutes before going to look for my supervisor, Willie Orman, to tell him it was down. As I passed Marc on the bench, I told him I was going to the lunchroom and then to the cage. Marc didn't move or acknowledge that he heard me. As I approached the lunchroom, I ran into Orman and told him the machine was down and asked him to wake up Marc and send him home. Orman acted surprised and said, "Sleeping?" I said, "Yea, he's sound asleep on the work bench." Orman then looked toward my work area and I turned and saw Marc still sleeping on the workbench. Orman headed toward Marc and I went to the lunchroom and the cage.

The next time I saw Marc he was headed towards one of the exits. Later, I heard Marc had been fired and I asked Willie Orman if it was true. He said it was.

Orman testified that Cantrell approached him in the vicinity of the lunchroom and stated, "I need a helper." Orman asked, "What is the matter with the help you have got?" and Cantrell replied, "He is asleep." Orman testified that he then went to Prochazka's bench and shook him several times before he awakened. Orman testified that he "advised" Prochazka to go home. Shortly afterward, Orman called the Department Manager Jim Trupp at home to advise Trupp of the action he had taken with respect to Prochazka. Trupp told Orman that they would discuss the matter further with Harootunian the following morning. Orman was not questioned about the work being performed at the time or whether or not the machines were shut down. Orman denied that he had ever observed anyone else sleeping during worktime.

Shortly after 7 the following morning, Harootunian met with Trupp and Orman in his office. When asked what he said at this meeting on direct examination, Orman testified, "I probably explained again what I had done to . . . Prochazka, by waking him up and sending him home." Orman said that the three then discussed what to do with Prochazka and it was decided "[t]hat the procedure was to terminate him."

Orman told him that Cantrell approached him asking for help because the tube operator was asleep. When Orman went to check into the matter he found Prochazka asleep and sent him home. Trupp's terse testimony about the meeting in Harootunian's office the next morning is as follows:

Q. What was said at that meeting?

A. We had discussed the incident. He had found him asleep—

Q. (Interrupting) Now, who said what, if you can, please.

A. We had Mr. Orman relate the incident.

Q. What did he say about the incident?

A. The same thing that he told me over the phone the night before.

Q. Then what was said?

A. We then decided that we should follow up with a disciplinary action.

Q. What was that disciplinary action?

A. Dismissal.

Harootunian's testimony followed the same theme, to wit, that the incident arose as a result of Cantrell's request for help. His testimony was:

Q. Could you please tell us what was said during that meeting in your office and by whom?

A. Yes. Willie Orman told me that early into the shift the previous night at approximately 11:30 Marty Cantrell came over to them, came over to him and told him he needed some help, and Willie had asked Marty why he needed help, and he said the fellow he was working with, Mark Prochazka, was asleep . . . Willie went over and called to Mark. He did not answer, and Willie said he had to shake Mark. . . . [W]hen Mark did wake up, Willie [told him] to punch out and go home.

Q. What else was said?

A. Willie Orman said that Mark did not question or say anything, he just punched out and went home. We then discussed what type of discipline, if any, should be taken.

Q. What was said in that regard, Mr. Harootunian?

A. Well, we did review the rule book. I guess I am the one that pulled the rule book out and reviewed the rule book. Willie had already stated what had happened, and we felt Mark had been sleeping on the job, and the penalty for that was discharge.

Trupp essentially corroborated the foregoing testimony of Harootunian. Orman, however, testified:

Q. And what was said at the meeting with Mr. Prochazka, and if you could, tell us who said it?

A. Well, to the best of my knowledge we explained to him—

Q. (Interrupting) Who was doing the talking, Mr. Orman?

A. I did some of it to explain to him why he was fired and then Mr. Harootunian.

Q. What did you say?

A. I explained to him that he was caught sleeping on the job and that he was terminated, and he admitted sleeping on the job.

Q. What did Mr. Harootunian say, if you know?

A. He explained to him basically the same thing that I did. That he was terminated for sleeping on the job. Marc Prochazka asked him then if he could fill out an application and be rehired. He was told he could fill out an application but there would be no guarantee that he would ever be hired.

According to Prochazka, Harootunian told him at this time that he had been discharged under rule 12, section 5. Prochazka then testified:

And I said, "What is that? I do not know." He said, "That is a discharge for sleeping on the job." And at that time I asked him, I said, "I would like to have my job back, I like working here."

And he said, "Well, there is nothing we can do. It is a discharge." I asked him, I said, "Is there any other way I can possibly get my job back," and he said, "No." I even asked him if I could fill out a job application and he said I sure could.

I then asked my foremen if either one of them had any say in what happened, and they both replied, no. Both Willie and Jim replied, no, to having [a] say in the reprimand.

I then stated again that I would like to have my job back, and Jack said, "There is nothing I can do." I then left the office.

The rule alluded to is contained in the handbook which issued in the summer of 1980 while Prochazka was on layoff. Rule 12 lists discharge as the penalty for sleeping "during working hours." Prochazka testified that prior to his discharge he never received the new handbook. The old handbook which Prochazka acknowledged he received contains no similar disciplinary system and makes no reference otherwise to sleeping on the job.

Prochazka testified that he was in layoff status from April through September 1980 when the new handbook was issued. Respondent apparently agrees with Prochazka's assertion that he was not present when the new handbooks were distributed because it attempted to prove Prochazka's familiarity with the rules by means of a written warning Prochazka was given in October.

Although it is clear from the foregoing that the decision to terminate Prochazka, even accepting the Respondent's version of the events, was based solely on the events of November 5, Respondent chose to offer evidence that Prochazka slept on other occasions. Prochazka himself admitted this was the case and among other instances recounted an occasion in 1979 when he was awakened by his supervisor, John Modrell. Modrell confirmed this incident in his testimony saying he had awakened Prochazka by slapping a clipboard down beside him. Modrell testified at this time he warned Prochazka that if he caught him sleeping again "more severe" disciplinary action would be taken. Another supervisor, Ed Curtis, testified that he observed Prochazka sleeping on one occasion in 1979. Whether the incident was the same as the incident referred to by Modrell and Prochazka is not known. Curtis did nothing because Prochazka did not work for him. Although other evidence demonstrates that Respondent used a written warning system throughout 1979, there is no evidence that Prochazka was even given a written warning about having fallen asleep on the job.

The General Counsel offered evidence showing that only minimal informal disciplinary action was taken against other employees found sleeping at or about the time of Prochazka's discharge. Sharlyn Weber credibly testified that in the latter part of 1980 she worked on the 11 p.m. to 7 a.m. shift as a rubber stacker in the mill department with Rick Shafer, a probationary employee.

The foreman of the mill department on that shift was Andy Brown. According to Weber, right after lunch (which was from 3 a.m. to 3:20 a.m.) on November 4, 1980, Shafer, a couple of other employees and herself were waiting for material before starting back to work. Shafer put his hand and head down on a nearby rail and closed his eyes. According to Weber, after a few minutes Brown came by, looked at Shafer, poked him, and told him, if he could not stay awake, he should get up and walk around. Brown left, and Shafer got up and walked around the rail and then sat on the rail. Weber said that Shafer put his hands on his knees and laid his head down again. After a few minutes Brown returned and kicked the side of the rail with his cowboy boots, making a loud noise. Shafer did not move so Brown poked Shafer awake and told him, if he could not stay awake, he could sweep the rest of the night which he did. Weber testified further that a couple hours later Brown came by and said he had caught Shafer sleeping in the restroom.

Other similar testimony was provided by the General Counsel concerning employee Michael Sitzman, the son of Production Manager William Sitzman. In this instance, employee Paul Winder, a cover machine operator on the 7 a.m. to 3 p.m. shift, testified that Sitzman works with him on the other half of his machine. According to Winder, around Christmas 1980, Supervisor Kent Kotschwar came by the machine on one occasion while young Sitzman was sitting on his desk, slumped back, with his arms folded and his eyes closed. Kotschwar walked over near Sitzman, stood by leaning on some nearby tubs watching Sitzman for awhile. Kotschwar then left for about 20 or 30 minutes and then returned and approached Sitzman at which time Sitzman looked up. Winder could not tell if Kotschwar said anything to Sitzman at this time because of the machine noise. According to Winder, Sitzman appeared to be asleep at this time. Winder said Sitzman did this quite often.

A 3 p.m. to 11 p.m. shift employee, Betty Martinez, testified that on July 27, 1981, when she reported for work she observed Sitzman asleep at his work station with a big mess around the hopper. After speaking with the cover operator, Martinez went to her foreman, Randolph, and told him she was not going to clean up the mess around the hopper while Sitzman was sitting there sleeping. Martinez returned to her machine as Randolph instructed and in a few minutes Randolph came by. By this time, according to Martinez, Sitzman was starting to move and, looked as though he was trying to focus his eyes. Randolph approached Sitzman and, although Martinez could not hear what was said, he appeared to take Sitzman to clean up around the hopper. Martinez testified that Randolph told her later that he asked Sitzman if he thought he was on vacation and that he told Sitzman that if he worked for him he would be on a permanent vacation. Respondent called Randolph. He agreed, practically word for word with Martinez' testimony.¹²

¹² As Martinez said Sitzman was coming to when Randolph arrived at Sitzman's work station, there is even agreement between these two witnesses that Randolph did not actually catch Sitzman asleep.

Respondent also called Brown and Shafer to rebut Weber's testimony and Kotschwar and Sitzman to rebut Winder's testimony. In each instance it was confirmed that incidents occurred which gave rise, at the very least, to an accusation that the employee had been sleeping. Brown and Kotschwar contradicted the assertions by Weber and Winder that Shafer and Sitzman were caught sleeping on the job. I find the denials by Brown and Kotschwar are incredible and false. The testimony provided by Shafer and Brown is so inherently inconsistent and lacking in mutual corroboration as to cause one to wonder if the two witnesses were describing the same set of circumstances as they claimed. Likewise, Kotschwar's testimony concerning Sitzman was convoluted, strained, and inconsistent.¹³ Having observed Kotschwar labor on the witness stand to explain away Winder's very straightforward description of young Sitzman left no doubt in my mind whatsoever that he caught Sitzman dead to the world in the middle of the day and that Kotschwar knew it to be so.

It is my finding that Respondent (which made no bones about its opposition to the Union) chose to strictly enforce its rule against sleeping on the job against one of the leading union activists while it routinely made a practice of being exceedingly lenient toward others for this offense notwithstanding its rulebook. As described by Weber, the Shafer incident when compared to Prochazka's discharge could do nothing other than send a message to its employees that union proponents would be shown no mercy. On November 4, 1980, Respondent displayed amazing tolerance for the drowsy Shafer, a probationary employee. On November 5, 1980, Prochazka was summarily suspended and then discharged. As Respondent chose to attempt to hide this dichotomy in its actions with false explanations, it is my judgment that the inference that Prochazka's discharge resulted from his union activism and not his innocuous sleeping is clearly warranted. Accordingly, I find that Marc Prochazka's discharge on November 6, 1980, was discriminatorily motivated.

I have reached the conclusion notwithstanding other evidence that Respondent discharged Supervisor Kennedy in or about June 1981 for sleeping on the job. At the conclusion of the hearing I called particular attention to this evidence and asked that the parties address this matter in their briefs. Respondent argues that Kennedy's termination supports its position that no unlawful motive existed in Prochazka's discharge as Kennedy was "the one person at the plant who, in addition to Prochazka, was found asleep and he also was terminated." The General Counsel argues that Prochazka's discharge is distinguishable in that Prochazka was caught sleeping during downtime whereas it is unlikely that a supervisor ever has "down time." In this sense, the General Counsel argues, it is logical that supervisors should be held to a standard higher than rank-and-file employees. Recognizing that the basic question to be resolved in Prochazka's case is what motivated his discharge, the total circumstances relating to his discharge and Respondent's similar

or contrasting actions in the other instances are relevant. Thus, the General Counsel is correct in this observation that Prochazka fell asleep during downtime—even his partner on the machine had gone off to the lunchroom. In this sense, the circumstances are similar to that shown in Shafer's case and in marked contrast to that in Sitzman's case where the machine was operating and his duties included monitoring the operation. Because Respondent chose not to develop the circumstances surrounding Kennedy's discharge, it is not even reasonable to speculate if his dereliction occurred at a critical time or at a time in his workday which was not particularly busy. Likewise, the fact that the details surrounding Kennedy's discharge were not developed does not permit any conclusions to be made as to whether or not serious consequences resulted from his dereliction. In instances involving Prochazka, Shafer, and Sitzman, no serious consequences directly affecting production resulted. Hence, the evidence pertaining to Kennedy's discharge is not in my judgment sufficient to rebut the inference which I have drawn that Prochazka's discharge was motivated primarily by considerations related to his union activities. Accordingly, it is my conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Marc Prochazka.

5. The Discharge of Shirley Ashley

The General Counsel contends that Ashley was discharged in order to discourage support for the Union. Respondent contends that Ashley walked off the job during working hours without permission and, for this reason, Ashley was treated as having resigned from her position with Respondent.

Prior to Ashley's February 2, 1981, discharge she had been employed by Respondent for approximately 8-1/2 years. At the time of her termination Ashley was an inspector on the 7 a.m. to 3 p.m. shift. There is evidence that Ashley was a very good worker. Thus, in the year preceding her discharge Ashley received written commendations on two separate occasions for exceptional work which she had performed. In addition, the rating shown on Ashley's termination notice does not reflect as unfavorably as might be expected where, as here, such a deliberate effort was made to terminate Ashley.

Ashley and her husband, Bill, who is also employed by Respondent, were both active on behalf of the Union. Both were on the organizing committee. Shirley Ashley displayed prounion stickers on her machines, distributed literature and kept literature available at her machine for distribution. Bill Ashley regularly wore a prounion insignia to work. Production Manager Sitzman asserted that, although he was aware that Bill Ashley favored the Union, he was unaware of Shirley Ashley's attitude. Other of Respondent's witnesses proclaimed a lack of knowledge as to Shirley Ashley's attitude about the Union one way or the other. I find these assertions to be false and indicative of a discriminatory motive. Thus, Department Manager Darrell Brown—in an attempt to contradict Shirley Ashley's testimony that he had removed prounion stickers from her machine—testified that the stickers he removed were "Vote No" stickers.

¹³ Kotschwar, for example, testified that he observed Sitzman's head nod a few times. Later Kotschwar said that he determined from this observation that Sitzman was "decidedly awake."

No other witness called by Respondent corroborated Brown's testimony that Ashley displayed "Vote No" stickers on her machine.

In addition to the aforementioned activity, other evidence shows that Ashley had numerous disputes with Joy Arendell, another inspector on the same shift who was a vigorous opponent of the Union. The findings in the prior case show that Arendell was an outspoken critic of the Union and that she went to great lengths to campaign against the Union.¹⁴ The genesis of Arendell's displeasure with the union advocates was the rudeness Arendell perceived on their part toward Plant Manager Bauer. Ashley credibly asserted that Arendell and herself had had such heated disagreements over the question of union representation that she (Ashley) ceased going to the cafeteria in order to avoid Arendell.¹⁵ Department Manager Brown had been aware of a separation in the department for some time and observed, on the morning of January 30, one group of employees gathered around Ashley and another group gathered around Arendell. Sitzman's testimony disclosed a familiarity with the differences between Ashley and Arendell. Ashley testified that Brown had instructed her on more than one occasion not to go into Arendell's station.

The events leading to Ashley's termination began on January 29, 1981, when Ashley ordered a storage box (called a "king-pak" or "whirl-pak") for remnant hose she was inspecting. David Allen, whose job as a finish serviceman included supplying the inspectors with storage boxes, was busy with other matters at the time and, by the time that Allen was able to fulfill Ashley's request, she had commenced work with a different hose. Observing that she had no need for the box, Allen looked about and observed that Arendell would be able to use the box for the hose she was inspecting. Accordingly, Allen carried the box over to Arendell's station. Arendell quickly pointed out to Allen that she had not ordered the box. Allen responded noting Ashley had ordered the box when she was inspecting the same type of hose which Arendell was inspecting at that time. According to Allen, Arendell then told him to tell Ashley to label the box. Allen was about to comply with the instruction when he observed Ashley approaching the station with some remnants and a label. Allen left to do other work. According to Ashley, when she approached Arendell's station, Arendell unleashed a vitriolic, personal attack on her.¹⁶ "You fuckin ass," Arendell said to Ashley, "you had no right ordering a whirl-pak for my station." Ashley explained that she had not ordered the box for her station and then Arendell continued, "Well, get your ass off my station. Don't you ever come back on here." Ashley told Arendell she would do just that as

soon as she finished putting the remnants in the box and putting the label on it. As Ashley did so, Arendell's loud vilification of Ashley continued.

Ashley returned to her station. A short while later Rosalie Madsen, her supervisor, approached Ashley and told her that Arendell had turned her in for not labeling the remnant box. When Ashley protested, Madsen told Ashley to go back and label the box with a magic marker. Complying with Madsen's instruction, Ashley again approached Arendell's station. The vilification began anew. "Get your damn ass off here, you have no right. You know you are not supposed to be on mine. You son-of-a-bitch, get off of here. I am going to go to the front office," Arendell said to Ashley. When Ashley protested that she was doing only what her supervisor had told her to do, Madsen approached and chimed in, "Yes, she is following my instruction."¹⁷ Arendell retorted, "Well, I don't care. She is supposed to get her ass off of here. She is not allowed on my station." Obviously frustrated by this point, Ashley told Madsen, "I am going to hit her if you don't shut her up." Madsen counseled Ashley to return to her station, finish her paperwork, and go home.

There is no indication that Madsen discussed the incident further with Arendell. According to Madsen, after thinking about the matter for awhile she did conclude that the loud arguments were something which had to stop. On her way to talk to Harootian about the matter, Madsen encountered Production Manager Sitzman and informed Sitzman of the incident. Nothing further happened that day to Madsen's knowledge. The following day, Sitzman and Brown met first with Arendell. Madsen was not present for this meeting nor did it appear that she became aware that it had taken place until it was over. After Sitzman and Brown had met with Arendell, Madsen was requested to bring Ashley to Sitzman's office for a meeting. Madsen was present for the meeting which ensued with Ashley. Ashley was asked to explain her version of what happened. According to Madsen, Ashley "explained it to him, and she kind of started to cry a little." Ashley's detailed version was as follows:

Sitzman said, "I would like to know about this fight yesterday. We want to know what is going on." He said, "We had Joy up here and she told her side. Now I want to know yours."

So I commenced to telling the same thing I told you earlier about it, and as I was telling him, Rosalie Madsen agreed. She said, "That is the way it happened, yes."

So then I said, "Well, I don't know why she feels this way." And Bill Sitzman says, "Well, you have harassed Joy on other occasions." And I said, "I was not aware of it." So he came back and he said, "Are you sure this was the way it happened?" And I said, "Yes." And by that time I was crying and I was shaking all over. My nerves were really bad.

¹⁷ Madsen acknowledged that Ashley was following her instruction at the time.

¹⁴ See, e.g., *Electric Hose & Rubber Co., supra*.

¹⁵ By contrast I am totally skeptical of Arendell's assertion that she never discussed the Union with Ashley. Instead, Arendell asserted that the basis for her dislike of Ashley stemmed from the fact that Ashley had caused a fight between her daughter and herself but at the hearing Arendell could not recall what it was that Ashley had done.

¹⁶ I have credited Ashley's version of the events which followed as her recollection was clearly more detailed. Moreover, Ashley's testimony comports with the impression Arendell made on me while testifying. Thus, Arendell appeared as a surly and argumentative curmudgeon fully capable of the type of verbal attack described by Ashley.

So he said, "Well, you sit here for 15 or 20 minutes until you calm your nerves down and we are going to have a meeting in the conference room with all of the inspectors. We are going to get to the bottom of this."

Madsen did not dispute Ashley's assertion that she (Madsen) agreed with Ashley's version of the events. Sitzman testified, "Shirley was sort of broken up, so I asked her if she would be able to attend the meeting or if she needed some time to regain her composure."

After a short while, Ashley went to the conference room where Sitzman was going to meet with the inspectors. Everyone acknowledges that Ashley was only present for a short period, perhaps 2 minutes. According to Ashley, she began to cry again, so she turned to Brown and said: "Darrell, can I go home? My nerves are shot and I cannot take this." Ashley said Brown just looked at her and said nothing so she got up, left the conference room, and walked back toward her work area. Sitzman, Brown, and Madsen said nothing when Ashley left. In route Ashley spoke briefly to her husband and then went on to her machine, completed some paperwork, and put on her coat. Ashley said she observed Clara Fringer, then a supervisor on the 11 p.m. to 7 a.m. shift and went to her and said, "My nerves are shot, Clara, can I go home?" Ashley states that Fringer replied, "Yes." Then Ashley told Fringer that she would not be in the following day because she needed the rest and asked Fringer if she would tell Madsen.¹⁸ Ashley identified three employees in the vicinity at the time—Larry Hager, Sandy Corey, and David Allen. Hager was not called by either the General Counsel or Respondent. The General Counsel called both Corey and Allen and both corroborated Ashley's assertion that she asked permission of Fringer to leave and that Fringer granted permission.¹⁹ Fringer disputes the assertion that Ashley asked to leave. Instead, Fringer claims that Ashley merely announced that she was leaving, that Ashley did not ask permission to leave, and that she did not grant permission for Ashley to leave. Nevertheless, Fringer left a note reading as follows for Madsen:

Shirley Ashley *checked out*. Said to tell you she would not be in tomorrow. [Emphasis supplied.]

Upon reporting for work on February 2, 1981, Madsen informed Ashley that she was to report to Harootunian's office. When Ashley arrived at Harootunian's office, Brown was present. Ashley testified as follows:

¹⁸ In 1977, Ashley was hospitalized for a few days with a nervous condition.

¹⁹ Allen described the conversation between Ashley and Fringer in this manner:

And she said to Clara, this is Shirley Ashley to Clara, that she was nervous, her nerves were shot, and that she had to go home. Clara then nodded affirmatively and Shirley walked around her, and as she was walked away Clara turned around and said something about her card in the box, but Shirley did not acknowledge, she just kept walking.

Corey testified:

Shirley said to Clara that she was going home, and Clara nodded her head and said, "O.K."

In the office was Jack Harootunian and Darrell Brown, and when I walked in Jack Harootunian said, "You resigned because you left the plant without asking."

And I said, "No, I asked Clara." And he said, "No, you did not. You left the plant without permission." And I said, "No, I asked Clara." And Darrell Brown said, "No, you told Clara you were leaving."

And Jack Harootunian hit his fist on the desk and he said, "You left without permission and you resigned." And I said, "No, I did not resign. I asked Clara to leave." and he said, "Well, you go out in the waiting room and we will call you back in a few minutes."

So I went back in the waiting room and waited about 15 minutes. I came back in and he said, "You did not ask to leave." And I said, "I asked to leave." He said, "No, you told Clara." And I said, "No."

And he said, "Well, what about Saturday?" And I said, "I told Clara I would not be in on Saturday because my nerves were so bad I needed that day for a rest." He said, "Well, you go back out in the waiting room."

Well, I went back out in the waiting room again. This went on for a couple more times and then he told me to go in with the nurse in this other little office. And as I was sitting in there with the nurse, Bill Sitzman came and told the nurse to take me up to the waiting room.

As we went and walked out in the waiting room I looked back at the window and Sitzman went to Jack Harootunian's office with Darrell Brown and Jack Harootunian. They were in there about 15 or 20 minutes, and then he called me back in. The only two that were in there then were Jack Harootunian and Darrell Brown.

They said, you go ahead and go home and we will call you. We will talk this over and we will let you know, we will call you. This was at about 11:00 o'clock.

So I went home and I waited and by 3:00 o'clock they had not called so I called him and said I was wondering because I have to come after my husband or find a babysitter one way or the other. And he said, "Well, I will call you back."

He called me back about five after 3:00 and told me to come in. I said, "Does this mean I am fired?" And he said, "We want you to come in here." So I got ready and—

Q. (Interrupting) Excuse me, Ms. Ashley, who was the telephone conversation with?

A. Oh, Jack Harootunian. I got ready and met my husband—he caught a ride—half-way to Culbertson, and I picked him up so he could watch the baby. And I came back and sat out in the waiting room until he could get Rosalie Madsen and Darrell Brown.

When I walked in his office Rosalie patted me on the shoulder and she said, "I am sorry, Shirley."

"And he said, "We have found that you resigned." And I said, "I did not resign. "And he said, "Well, you have to take this paper." And I said, "I won't take it." And he said, "You have to because you left the plant without permission."

And I said, "Well, I will take it, but I did not resign." And I said, "You know, I am fired. I can live with this but can you." So I came home and that was the end of it.

Brown, Fringer, Harootunian, Madsen, and Sitzman all testified consistent with the notion that Ashley left the plant without asking permission to leave.²⁰ Thus, in one form or another Brown, Madsen, and Sitzman all testified that Ashley abruptly announced she was departing by saying words to the effect, "You can punch me out, I can't take this anymore." As noted above, there is no indication that any of the three supervisors present at the conference room meeting said a word or did a thing. In addition, evidence was offered by Respondent to demonstrate that Fringer's presence on the floor was solely for the purpose of showing applicants about the plant and that she was not serving as a substitute supervisor on the day shift as she occasionally did. However, even assuming that was the case, Fringer did not advise Ashley that she lacked normal supervisory authority.

Following the conference room meeting on January 30, Arendell was issued a reprimand for "participating in a disruptive confrontation on the floor." Madsen was of the view that Ashley too deserved a warning for the same reason but, as Ashley had left, no warning could be issued to her. Eventually Arendell protested this reprimand to Plant Manager Bauer as a "last resort." According to Arendell, she apprised Bauer of her version of the events and her impression that none of Respondent's supervisors believed her. Arendell told Bauer she was saddened by this fact. According to Arendell, Bauer asked her, "Are you telling me the truth?" and when Arendell responded that she was, Bauer told her that that was good enough for him. Nevertheless, according to Arendell, nothing was ever done with the reprimand she received.

The assertion that Shirley Ashley left work without permission is simply so absurd and incredible as to merit the unlawful inference the General Counsel would have me draw. In *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), the court observed at 470:

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naïf than is a judge.¹⁵ If he finds that the stated motive for a discharge is false, he certain-

²⁰ Under rule 7 in Respondent's handbook, walking off the job or leaving the plant without permission during work hours is treated as an automatic resignation.

ly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference. . . .

¹⁵ "Judges are apt to be naïf, simple-minded men, and they needed something of Mephistopheles." (Holmes, Law and Court, in *Speeches*, 102 (1913); "Credulity is not esteemed a paramount virtue of the judicial mind." (Huston, J., in *Rankin v. Jauman*, 1895, 4 Idaho 394, 401, 39 p. 1111, 1113.)

The General Counsel offered substantial credible employee testimony which demonstrates that the manner in which Ashley departed from the plant on January conformed to the typical approach used by employees to secure permission to leave. The circumstances likewise demonstrates beyond all doubt that Ashley was not abandoning her job. Even Fringer agrees that Ashley took care of the paperwork at her machine. Ashley's assertion—supported by Allen and Corey—that she was given permission to leave is far more consistent with Fringer's choice of the words "checked out" in her note to Madsen than is the scenario depicted by Respondent. Harootunian's obdurate insistence that Ashley quit her job is completely unsupported by the circumstances surrounding Ashley's January 30 departure from the plant. That Ashley could be upset is entirely understandable—the evidence strongly suggests that she was subjected to a vile attack attempting to follow the usual work procedure and her supervisor's instruction and ended up being accused by Sitzman of provoking the verbal assault. Finally, when Harootunian's draconian reading of the rules in Ashley's case (a long-term employee) is compared with the absolution granted by Bauer in Arendell's case, it becomes perfectly obvious that Respondent, as its election campaign strongly suggests, deals with the union sympathizers as harshly as possible. In my judgment, Respondent's zealously antiunion attitude caused it to over react to the circumstances surrounding Ashley's leaving the plant on January 30 in order to avail itself of what was perceived as an opportunity to get rid of an active union advocate. In defense of its actions, Respondent has falsely asserted that Ashley did not have permission to leave. When that is coupled with the unconvincing assertions by Respondent's supervisors that they were not aware of Ashley's union sympathies, I am convinced that Ashley's discharge resulted solely from her union sympathies. Therefore, I find that Shirley Ashley's discharge on February 2, 1981, violated Section 8(a)(1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unlawful activities of Respondent described in section III, above, occurring in connection with the operation of 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 of commerce.

V. THE REMEDY

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

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Marc Prochazka and Shirley Ashley immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges they previously enjoyed. It is also recommended that Respondent be ordered to make Marc Prochazka and Shirley Ashley whole for the losses which they suffered as a result of their discharges found herein to be unlawful in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympia Medical Corp.*, 250 NLRB 146 (1980), and *Florida Steel Corp.*, 231 NLRB 651 (1977). And see, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). It is further recommended that Respondent expunge from its records any reference to Prochazka and Ashley's unlawful terminations. It is further recommended that Respondent expunge from its employee handbook the following language: "If you feel you are being pressured into making a commitment to the union, notify your supervisor and we will see that such pressuring is stopped." Finally, it is recommended that Respondent be ordered to post the attached notice marked "Appendix" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and Respondent's obligation to remedy its unfair labor practice.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce or an industry affecting commerce within the meaning of Section 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. By interrogating its employees and by maintaining a policy encouraging employees to report solicitations concerning labor organizations to management, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging Marc Prochazka and Shirley Ashley, Respondent has violated Section 8(a)(1) and (3) of the Act.

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

6. The General Counsel did not meet the burden of proving by a preponderance of the evidence that Respondent violated the Act in any respect other than specified in 3 and 4, above.

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

ORDER²¹

The Respondent, Electric Hose & Rubber Company, McCook, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employee in order to discourage activities on behalf of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC.

(b) Coercively interrogating employees about their activities on behalf of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC, or encouraging employees to report union activity to their supervisors.

(c) In any like or related manner interfering with, restraining, or coercing employees because they choose to engage in activities on behalf of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC, or discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in that labor organization except to the extent permitted by an agreement described in Section 8(a)(3) of the Act.

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

(a) Offer immediate and full reinstatement to Marc Prochazka and Shirley Ashley and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the section above entitled "The Remedy."

(b) Expunge from its records any reference to the unlawful discharge of Marc Prochazka and Shirley Ashley.

(c) Expunge from its handbook that material specified in the above section entitled "The Remedy."

(d) 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 or useful to a determination of the amount of backpay due under the terms of this Order, the propriety of any offer of reinstatement made to Marc Prochazka and Shirley Ashley and Respondent's compliance with subparagraph (b) above.

(e) Post at its McCook, Nebraska, facility copies of the attached notice marked "Appendix."²² Copies of said notice to be furnished by the Regional Director for Region 17 of the Board shall be duly signed by Respondent and posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to

²¹ 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. The General Counsel's unopposed motion to correct the transcript is granted.

²² 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."

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.

(f) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that those allegations of the complaint which the General Counsel failed to prove be, and the same hereby are, dismissed.