

W & F Building Maintenance Co. and William A. McQueen and Michael B. Enis and Gary King.
Cases 20-CA-16255, 20-CA-16289, and 20-CA-16471

10 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 5 October 1982 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting statement, and the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ In adopting the judge's conclusion that Supervisor Colbert's remarks to employees Enis and King in March 1981 were not violative of Sec. 8(a)(1) of the Act, we find that Colbert's comments, i.e., that it was a waste of money to join the Union and that their job security was not with the Union but in doing good work, were merely expressions of opinion privileged under Sec. 8(c).

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: This proceeding, in which a hearing was held on March 3 and 8, 1982, is based on unfair labor practice charges filed against W & F Building Maintenance Co., herein Respondent, on May 19, 1981, in Case 20-CA-16255 by William A. McQueen; on June 2, 1981, in Case 20-CA-16289 by Michael B. Enis; and on July 28, 1981, in Case 20-CA-16471 by Gary King. The Regional Director of the National Labor Relations Board, on behalf of the Board's General Counsel, issued complaints in these cases on July 31, 1981, and on August 25, 1981, which were consolidated for hearing by order of the Regional Director. The complaint in Case 20-CA-16255 alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act, by changing McQueen's job classification and reducing his wages on or about March 1, 1981, and by discharging him on May 15, 1981, because of his union and/or protected concerted activities. The complaints issued in Cases 20-CA-16289 and 20-CA-16471 allege that Respondent violated Section 8(a)(1) and (3) of the Act by

assigning Enis and King to "more arduous job assignments" in March 1981 and discharging them on March 30, 1981, because of their union and/or protected concerted activities. The complaint in Case 20-CA-16289 also alleges that Respondent violated Section 8(a)(1) of the Act when its supervisor, Julius Colbert, on or about March 2, 1981, "threatened to discharge employees because they went to the Union" and pointed out the futility of employees supporting the Union by telling them Respondent would discharge them if it wanted to and there was nothing the Union could do to stop it. This complaint also alleges that Respondent violated Section 8(a)(1) of the Act when its operations manager, Robert Rice, or about February 20, 1981, interrogated employees about their union sympathies and activities and in March 1981 promised to improve employees' terms and conditions of employment if they did not file a grievance. Respondent filed answers denying the commission of the aforesaid unfair labor practices.¹

On the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs submitted by the parties,² I make the following

FINDINGS OF FACT

THE ALLEGED UNFAIR LABOR PRACTICES

A. Case 20-CA-16255

1. The evidence

Respondent operates a janitorial service. In 1980 Respondent entered into a contract with GTE Sylvania, herein GTE, to perform janitorial services at GTE's Mountain View, California facility commencing on October 1, 1981. This janitorial work had been previously performed by Commercial Building Maintenance Company which was signatory to a collective-bargaining agreement with Service Employees' Union Local No. 77, herein Local 77, effective from June 1, 1978, until May 31, 1981. This agreement covered the janitors employed by Commercial Building Maintenance at GTE's Mountain View facility. When Respondent commenced doing the janitorial work at GTE's Mountain View facility it recognized Local 77 as the exclusive bargaining representative for the employees it employed there and assumed the collective-bargaining agreement Commercial Building Maintenance Company had with Local 77. Respondent's employees employed at GTE's Mountain View facility were supervised by Leo August, Respond-

¹ In its answers Respondent admits that it meets the National Labor Relations Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Also, Respondent admits that the Unions herein, Service Employees International Union, Locals 77 and 87, AFL-CIO each is a labor organization within the meaning of Sec. 2(5) of the Act.

² The General Counsel's "Motion to Strike Portions of Respondent's Brief to the Administrative Law Judge" is denied because it is in the nature of an answering brief. The Board's Rules and Regulations do not provide for such a brief. Of course, the parties can be assured that I have read the record and insofar as the parties' briefs inadvertently mistake the record I have not relied upon the mistatements.

ent's area manager, who was admittedly a statutory supervisor.

The alleged discriminatee herein, William McQueen, was employed by Commercial Building Maintenance Company at GTE's Mountain View facility. He was retained by Respondent when, in October 1980, it replaced Commercial Building Maintenance Company at that facility. McQueen was employed by Respondent as a "utilityman" and was paid \$6.01 an hour, the rate of pay called for by Local 77's collective-bargaining agreement. McQueen worked from 6 p.m. to 2:30 a.m., Monday through Friday.

Late in December 1980 Area Manager August asked McQueen to do the janitorial work at a Wells Fargo Bank located near GTE's Mountain View facility. August offered McQueen \$400 a month to do this work, but advised him that since he was already employed by Respondent at GTE's Mountain View facility that his paycheck for the Wells Fargo Bank work would have to be paid to someone else. McQueen agreed to work for Respondent at the Wells Fargo Bank and instructed August that his paycheck for doing that work should be made out to a friend of his named Denise Frazier. During January and February 1981, after finishing his daily work at GTE's facility, McQueen then did the janitorial work at the Wells Fargo Bank. McQueen was not paid the \$400 August promised him. He only received \$200 a month. In January 1981 McQueen complained to August about this and was told by August that Respondent had "underbid" the Wells Fargo Bank job thus it was unable to pay him more than \$200 a month for that job. The Wells Fargo Bank job was not covered by a Local 77 collective-bargaining agreement or by a contract between Respondent and any other labor organization.

On Friday, February 27, 1981, McQueen did not go to work because he was ill. He unsuccessfully tried to telephone August on February 27 to advise him of his absence. Likewise, on Monday, March 2, McQueen did not go to work because he was ill and unsuccessfully tried to phone August to advise him of his absence. On Tuesday, March 3, McQueen visited GTE's Mountain View facility and told August he was sick and had to visit the doctor to be X-rayed. August remarked that McQueen had not cleaned the Wells Fargo Bank for several days and told him he was suspended from work until March 8 and to bring him a slip from the doctor when he returned to work.

On Monday, March 8 McQueen reported for work with a doctor's certificate which stated he had been under the doctor's care since March 5, 1981, and was able to return to work March 8. August refused to accept this certificate. He stated McQueen was still suspended and told him to return with a union business representative. The record is not absolutely clear, but it appears that on March 11 August reinstated McQueen.

On March 9, 1981, McQueen spoke to Union Representative Andy Hermosillo and asked that the Union file a grievance on his behalf concerning his suspension and the Company's refusal to pay him for sick leave during the period he was absent from work because of his illness. McQueen also told Hermosillo that the Company improperly subcontracted the Wells Fargo Bank janitori-

al work to him and had not paid him the agreed-upon monthly salary for doing this job. Hermosillo agreed to process McQueen's suspension and sick leave pay grievances, but told McQueen there was nothing improper about Respondent asking him to work at the Wells Fargo Bank. He stated that when he (Hermosillo) had worked as a janitor he had done something similar.

Respondent's collective-bargaining contract with Local 77 which covered the janitorial work being performed by Respondent's employees at GTE's Mountain View facility included a grievance-arbitration procedure which provides for a board of adjustment comprised of two company and two union representatives and also provides that if the board of adjustment cannot resolve a grievance either party, upon the agreement of the other party, may submit the grievance to an impartial arbitrator.

During mid-March 1981 a board of adjustment meeting was held to discuss McQueen's sick leave and suspension grievances. Respondent was representative by its vice president, Sivils, and Area Manager August. McQueen, who was present, was represented by Local 77's president, Percell, and its business representative, Hermosillo. The board of adjustment deadlocked over the grievances. Sivils at this time informed McQueen that McQueen was lucky that he had not been discharged rather than just suspended for his unexcused absences and warned that if McQueen incurred anymore unexcused absences Respondent would discharge him.

Late in March 1981 August reclassified McQueen from utilityman to janitor, which meant that as of that day McQueen was paid the contractual hourly rate of \$5.81 for a janitor rather than the hourly rate of \$6.01 paid to a utilityman. When August reclassified McQueen, according to McQueen's undenied testimony, August told him that his reason for reclassifying McQueen was that McQueen was refusing to work overtime and because of this could not be employed on the utility crew.³

McQueen grieved to the Union about his changed classification and the resultant reduction in his pay. The board of adjustment met late in April 1981 to consider this grievance. This hearing was attended by the same persons who were present at the previous board of adjustment hearing. The union representatives objected to the fact that McQueen was downgraded from utilityman to janitor. Respondent's representatives took the position that Respondent had to replace McQueen as a utilityman with a person who was dependable because McQueen could not be depended upon to act as a utilityman due to his unexcused absences. The board of adjustment deadlocked over this grievance and there is no evidence the Union pursued this grievance any further.

On April 23, 1981, the board of adjustment met to discuss McQueen's sick leave and suspension grievances and his further grievance about Respondent's failure to pay

³ McQueen testified that he advised August that his refusal to work overtime was due to the fact he was working at the Wells Fargo Bank for Respondent as well as at GTE's Mountain View facility, thus it was impossible for him to work overtime at GTE. I reject this portion of McQueen's testimony inasmuch as it is inherently implausible because late February 1981 was the last time McQueen worked at the Wells Fargo Bank.

him overtime when he worked at the Wells Fargo Bank. With respect to McQueen's overtime claim for his work at the Wells Fargo Bank the board of adjustment deadlocked and there is no evidence that the Union pursued the grievance any further. With respect to McQueen's sick leave and suspension grievances, Respondent agreed to reimburse McQueen for March 8 through 10 which were the 3 days of work he lost when on March 8 August refused to accept his medical certificate. Respondent also agreed that if the Union or McQueen submitted proof that McQueen had been treated on February 27, 1981, at the VA Hospital, as he claimed, that Respondent would also pay him for sick leave from February 27 through March 5.

On the first payday following the April 23 board of adjustment hearing McQueen discovered that the pay for the 3 days which Respondent had agreed to pay him were not in this paycheck. McQueen complained to Union Representative Hermosillo who phoned Respondent's vice president, Sivils, and asked why Respondent had not paid McQueen for the 3 days. Sivils told Hermosillo that he had been waiting for Hermosillo to contact him and give him the results of the Union's investigation as to whether McQueen was at the VA Hospital on February 27. Hermosillo replied that himself and McQueen had gone to the VA Hospital and could find no record that McQueen had been there. Hermosillo told Sivils that in view of this Sivils could pay McQueen the 3 days' pay as they had agreed. Sivils stated he would make arrangements that the 3 days' pay would be included in McQueen's next paycheck.

On May 15, 1981, McQueen visited Respondent's office and spoke to Vice President Sivils. McQueen stated he had come to pick up his check for the 3 days Respondent had agreed to pay him. Sivils told him that the moneys for those 3 days would be included in his next paycheck. McQueen stated it was his legal right to get the money immediately. Sivils disputed this and reiterated that these moneys would be in McQueen's next paycheck. Sivils explained that he had been waiting to see if, as per their agreement, he was obligated to also pay McQueen for the other 5 days, that the Union had recently informed him that he was not obligated to pay McQueen for those additional days and that he had told the Union the check for the 3 days which Respondent was obliged to pay would be in McQueen's next paycheck. McQueen insisted that he be given this money immediately. Sivils repeated it would be in his next paycheck. Then McQueen stated he had gotten sick while working at the Wells Fargo Bank and wanted Respondent to give him a check for his medical expenses. Sivils told him that he should just go to the doctor and submit his doctor bills pursuant to the medical insurance coverage provided by in Respondent's contract with Local 77 covering GTE's Mountain View facility. McQueen stated since his illness was caused by his work at the Wells Fargo Bank this insurance did not cover him. Sivils explained that it did not matter where he got sick in order to be covered by the medical insurance provided for under the Union's collective-bargaining agreement. McQueen told Sivils he was wrong. They talked about this matter for several more minutes. McQueen

then stated he intended to file a workmen's compensation claim against Respondent because he had breathed bad air while working at the Wells Fargo Bank and wanted Respondent to pay him for this. Sivils told him he should file a workmen's compensation claim and it would be investigated. Sivils discussed this matter with McQueen for several more minutes. Finally, after approximately 45 minutes Sivils told McQueen that he did not feel McQueen was listening to what Sivils was saying, that he was very busy, and asked McQueen to leave his office. McQueen stated he would not leave until he got his money for the 3 days Respondent owed him. Sivils told him he did not have the time to discuss the matter any further as he had a lot of business to attend to and again asked him to leave the office. McQueen again refused to leave until he was given the money for the 3 days Respondent owed him. He asked to speak to Respondent's president. Sivils denied this request and asked McQueen to step outside into the reception area where a receptionist and a bookkeeper were present. Sivils asked McQueen to leave the premises. McQueen stated he would not leave until he received the money for the 3 days Respondent owed him and spoke to Respondent's president. Sivils at this point told McQueen, "You are forcing me to terminate you" and again asked him to leave the premises. McQueen refused and was told by Sivils that if he did not leave Sivils would call the police to escort him out. McQueen stated he was not leaving, so Sivils phoned the police and asked them to send someone to remove McQueen from the premises. Then Sivils told McQueen he was going to phone the Union "to tell them that you are forcing me to terminate you" and in fact phoned the Union's office and spoke to Union Representative Hermosillo and told him he was "being forced to terminate McQueen" and described McQueen's conduct. Shortly after this the police came and escorted McQueen from the premises.⁴

On May 15, shortly after the police escorted McQueen from Respondent's premises, Sivils received a phone call from Steve Buker, an employee of GTE responsible for monitoring GTE's contract with Respondent. Buker told Sivils that GTE was exercising its right under section 7.1 of its contract with Respondent⁵ to terminate Respondent's employees Del Rio and McQueen and, in response to Sivils' inquiries, stated that Del Rio had violated GTE's security and McQueen had gotten a loan from a loan company by impersonating an engineer named McQueen who was employed by GTE.

On May 15, 1981, Respondent in fact terminated McQueen's employment.

⁴ This description of what was stated during the May 15 meeting between Sivils and McQueen is based on Sivils' testimony. In certain respects McQueen's testimony about this meeting does not jibe with Sivils' testimony. I have credited Sivils' testimony because while testifying he impressed me demeanorwise as a more credible and reliable witness than McQueen.

⁵ Sec. 7.1 of GTE's contract with Respondent provides, in substance, that GTE has the sole right at any time and for any reasons, disclosed or undisclosed, to require Respondent to terminate an employee or employees employed by Respondent at GTE's Mountain View facility.

2. Analysis and ultimate findings

a. *McQueen's reclassification and the resulting reduction in his pay*

The complaint alleges Respondent reclassified McQueen from utilityman to janitor with a resulting reduction in his wages because of his union or protected concerted activities. The General Counsel argues that the record establishes that McQueen's job classification was changed and his pay reduced because he filed grievances with Local 77 pursuant to Local 77's contract with Respondent. I disagree.

Although the record establishes that Area Manager August, the person who decided to change McQueen's job classification and reduce his salary,⁶ was antagonistic toward McQueen because his absences from work at GTE and his failure to do the work at the Wells Fargo Bank and suspended him because of this, there is no evidence that August was hostile toward McQueen because he filed grievances with the Union.

August's explanation to McQueen for his reclassification, that McQueen was too undependable to be employed as a utilityman because of his refusal to work overtime, indicates that August reclassified McQueen for a legitimate business reason.⁷ I realize that Vice President Sivils, during the processing of McQueen's reclassification grievance, informed the union representatives that it was McQueen's undependability caused by his unexcused absenteeism which resulted in his reclassification.⁸ And I recognize that in some situations where respondents offer different reasons to justify their conduct toward employees it may warrant an inference of improper motivation. I am not persuaded that this is such a situation. The reasons for McQueen's reclassification and reduction in pay given to McQueen by Area Manager August and to the Union by Vice President Sivils are not inconsistent but, quite the contrary, are consistent inasmuch as each reason is based on the fact that Respondent felt McQueen was too undependable to continue working on the utility crew.

Lastly, the timing of McQueen's demotion, coming shortly after Respondent learned about the suspension and sick leave grievances McQueen filed with the Union does not warrant an inference of improper motivation inasmuch as McQueen's demotion also took place soon after Area Manager August, by suspending McQueen, in-

⁶ The record establishes that August's superiors in management did not know about McQueen's changed classification and reduction in pay and did not participate in August's decision to change McQueen's job classification and reduce his pay, but learned about August's conduct only after McQueen grieved to the Union.

⁷ As I have found, *supra*, when August late in March told McQueen he was being reclassified because of his refusal to work overtime which made him too undependable to be employed on the utility crew, McQueen did not question August's assertion that his refusal to work overtime made him too undependable to be a utilityman. Rather, McQueen testified he took the position that he could not work overtime because he was working for Respondent at the Wells Fargo Bank when his regular shift at GTE ended. As I have found *supra*, McQueen's excuse for not working overtime is inherently implausible.

⁸ In addition to being absent without an excuse on March 17, 1981, shortly before his reclassification, McQueen, as far as Respondent believed, had also been absent without an excuse on February 27 and March 2.

dicated he was hostile toward him for his absenteeism and his failure to clean the Wells Fargo Bank. In other words it is just as reasonable to conclude from its timing that McQueen's demotion was motivated by the same reasons which had caused August to initially suspend him as by any hostility toward McQueen because of the grievances he had filed with the Union, particularly whereas here there is no extrinsic evidence that August was hostile toward McQueen for filing the grievances.

Based on the foregoing, I am of the opinion that the General Counsel has not established by a preponderance of the evidence that in reclassifying McQueen from a utilityman to a janitor and in reducing his pay that Respondent did so because of McQueen's union or protected concerted activities. I therefore shall recommend that this allegation be dismissed.

b. *McQueen's discharge*

The General Counsel contends that the record establishes that Respondent discharged McQueen on May 15, 1981, because of the grievances he had filed with the Union. I disagree.

I have serious doubts that the General Counsel has proven a *prima facie* case in the matter of McQueen's discharge, but even assuming that the General Counsel has established a *prima facie* case, the record overwhelmingly established that McQueen would have been terminated on May 15, 1981, even absent any union or protected concerted activities. The record, as described in detail *supra*, establishes that on May 15 McQueen visited Respondent's vice president, Sivils, for the purpose of collecting sick leave moneys which Respondent had agreed to pay him pursuant to the settlement of McQueen's sick leave grievance and to attempt to get Respondent to reimburse him for doctor bills incurred due to illness which allegedly occurred while McQueen was working for Respondent at the Wells Fargo Bank and to have Respondent also pay a workmen's compensation claim. McQueen met with Sivils for approximately 45 minutes and they discussed McQueen's grievances. Then, when Sivils attempted to end the discussion so he could get back to work, McQueen, dissatisfied with the position Sivils had taken on the matters which were discussed, refused to leave Sivils' office and he refused to leave Respondent's premises. Only after McQueen refused Sivils' repeated requests to leave, some of which were made in the presence of two employees, did Sivils indicate to McQueen that McQueen's conduct of refusing to leave the premises was forcing Sivils to terminate him. Plainly, Sivils' decision to terminate McQueen was completely unrelated to any union or protected concerted activity engaged in by McQueen, rather it was related solely to McQueen's above-described insubordinate conduct of refusing to leave the premises which took place in the presence of two other employees. There is no evidence that in discharging McQueen for engaging in this insubordination that Sivils treated McQueen differently than other employees. Moreover, the record shows that regardless of his insubordinate conduct on May 15 McQueen would have been discharged later that same day. Thus, on May 15, after McQueen left the premises,

a representative of GTE phoned Sivils and demanded that Respondent remove McQueen from the job pursuant to paragraph 7.1 of GTE's contract with Respondent which gives GTE the right to require Respondent to terminate an employee for any reason. There is no evidence that Respondent does not ordinarily comply with such requests. Lastly, Sivils credibly testified that McQueen was not eligible to be transferred from the GTE job to another of Respondent's jobs in that area because of his earlier insubordinate conduct, his excessive absenteeism, and because the only job vacancy in the geographical area where McQueen lived was one which required a government clearance and Sivils testified he feared that due to what happened at GTE he might not be able to get that clearance.

Based on the foregoing I find that the General Counsel has failed to establish by a preponderance of the evidence that McQueen was discharged because of his union or protected concerted activities, and shall recommend that this allegation be dismissed.⁹

B. Cases 20-CA-16289 and 20-CA-16474

1. The evidence

Respondent is in the business of supplying janitorial services to business enterprises. It has facilities in the State of California located in the cities of San Francisco, San Jose, and Sacramento. Only the San Francisco facility is involved in these cases.

John Foggy, herein Foggy, is Respondent's president. Dory Sivils, herein Sivils, is Respondent's vice president. Robert Rice, herein Rice, is Respondent's manager of operations for the San Francisco facility. Julius Colbert is the supervisor of the utility crews employed in San Francisco.

Respondent's San Francisco employees are represented by Local 87 which during the time material herein was a party to a collective-bargaining contract with Respondent containing a union-security clause requiring membership in Local 87 after 30 days of employment. The contract, with respect to employees' wages, provides for employees classified as janitorial employees to be paid \$8.22 an hour effective June 1, 1980.

In May 1980 Enis was hired by Respondent as a janitor to work at the San Francisco airport which is located just outside of San Francisco and paid \$5.25 an hour. The commute to the airport proved to be too difficult for Enis, who resides in San Francisco. Accordingly, Enis stopped working at the airport and asked his immediate supervisor, Julius Colbert, to assign him janitorial work in San Francisco when a vacancy occurred there. Enis worked as a janitor irregularly for Colbert in the city of San Francisco from June through August 1980

⁹ I have considered the fact that in his prehearing affidavit given to the National Labor Relations Board and in Respondent's answer to the complaint in this case, Sivils, in justifying McQueen's discharge, stated that he was terminated when GTE invoked par. 7.1 of its contract with Respondent. Sivils failed to state that McQueen's refusal to leave the premises would have resulted in his termination even absent GTE's request. Nonetheless, in the circumstances of this case, including my impression that Sivils, when he testified about his reasons for discharging McQueen, was a sincere and reliable witness, I do not believe this omission impugns Sivils' credibility.

and was paid \$5.25 an hour. Colbert told Enis that when he started to work full time in San Francisco he would be paid \$6.25 an hour. In September 1980 Colbert hired Enis to work full time as a member of a two-man utility crew. Shortly thereafter Enis' pay was increased to \$6.25 an hour. The other member of the utility crew on which Enis worked was King, who was hired by Colbert late in September 1980. When Colbert hired King he promised him he would be paid \$5.25 an hour initially and \$6 an hour after 3 weeks. Colbert never fulfilled the later promise. Enis and King worked from 5 p.m. to 1 a.m., with a half hour off for lunch, Monday through Friday. They usually worked together as a team, but occasionally were assigned to work at different locations. Each day Supervisor Colbert assigned them to do janitorial work at different business enterprises. They did the usual janitorial work such as emptying waste baskets, dusting, sweeping, cleaning bathrooms, and waxing floors. Prior to their employment with Respondent neither Enis nor King had janitorial experience.¹⁰

Enis continually asked Supervisor Colbert to pay him more money from the time he (Enis) started working in San Francisco as a full-time worker in September 1980 until his termination on March 30, 1981. Likewise, King continually asked Colbert for more money from the time he started working in late September 1980 until his termination on March 30, 1981. Enis and King, on some of these occasions, worded their requests for more money in terms of a request to be paid "union scale."¹¹ In addition, it is undisputed that Colbert failed to pay Enis and King for the overtime hours they worked as a team, particularly during October 1980, and that Enis and King complained about this to Colbert and asked to be paid for their overtime hours. In speaking to Colbert about the above-described money matters, at times Enis and King spoke to him separately and at other times spoke to him together. Colbert responded to Enis' and King's request for more money and overtime pay by telling them they would receive more money when the quality of their work improved and that the reason they had not been paid for their overtime was that they should have completed their assigned work during the normal workshift, and that once they were trained and became proficient in their work they would be able to finish their assignments during normal working hours.

On a few occasions early in 1980 Enis spoke to Operations Manager Rice and told him that he was unhappy

¹⁰ Enis testified that before working for Respondent he "had janitor experience." Enis did not elaborate about this. In the employment application that he submitted to Respondent Enis indicated that he had no prior janitorial experience. This circumstance plus Enis' poor demeanor has lead me to reject his testimony that prior to going to work for Respondent he "had janitor experience."

¹¹ Colbert specifically denied this and testified that Enis and King simply asked for "more money." I have rejected Colbert's testimony because demeanorwise he did not impress me as a sincere witness when he gave this testimony. However, I reject Enis' testimony that in November 1980 when he and King asked Colbert for "union wages" that Colbert threatened them with discharge. King, who also testified about this conversation, failed to corroborate Enis' testimony that Colbert threatened them. I am of the opinion that if Colbert made this threat King would have remembered it. Moreover, demeanorwise Enis did not impress me as a credible witness when he attributed the threat to Colbert.

working for Respondent because he was not being paid sufficient wages and that he had worked overtime for which he had not been paid. Enis asked Rice for a raise in his pay to \$7 an hour and to pay him for the overtime.¹²

In February 1981 Enis and King visited the office of Local 87 and joined that union, Enis on February 9 and King on February 19. On February 19 when Enis and King visited Local 87's office the office clerical, who did the paperwork connected with King's union membership, phoned Respondent's place of business, identified herself to whomever answered for Respondent. The next day, February 20, King and employee Pratt were assigned to work at St. John's Church. Supervisor Colbert and Operations Manager Rice visited this jobsite at which time Rice asked King whether King and Enis had joined Local 87. King was noncommittal.¹³

Early in March 1981, Operations Manager Rice called Enis and King into his office and spoke to them in the presence of Supervisor Colbert. Rice asked whether Enis and King had joined the Union. Enis and King answered in the affirmative. Rice stated he had been planning on getting everyone into the Union and asked how they got along with Union Business Representative Welch. They told him they got along alright with Welch. Rice then asked if they still wanted their backpay and when they answered yes informed them that he would see what he could do to get it for them. The conversation ended with Rice stating he was trying to get everyone into the Union and that Enis and King would start earning union wages of \$8.22 an hour in their next paycheck.¹⁴ The record reveals King was paid \$8.22 an hour during his last payroll period in Respondent's employ, the last 2 weeks of March 1981. There is no evidence whether Enis was likewise paid \$8.22 an hour. However, under the circumstances, since King's pay as Rice promised, was raised to this level, it is a fair inference that Enis was also given the same pay raise inasmuch as he was promised this pay raise by Rice at the same time as King.

After meeting with Rice and Colbert, as described above, Enis and King went to the company garage to get ready for work at which time Colbert gave them

their work assignments. Colbert then asked Enis and King why they had gone to the Union. King told him they had joined the Union because they wanted to be paid union wages. Enis stated that they deserved to be paid union scale because they were qualified. Enis asked why Colbert had not told them about the Union. Colbert stated that he did not think the Union was any good, that he felt it was a waste of money to join the Union, that King's and Enis' security was not with the Union but in doing good work, and that even with the Union he could fire them if their work was unsatisfactory.¹⁵

During mid-March 1981 Enis spoke to Rice and told him he was not happy working for Respondent and intended to quit. Rice suggested they have lunch and talk about the matter. Enis agreed and during their luncheon meeting Enis repeated that he intended to quit his employment with Respondent. Enis also asked Rice if there was any way he could be paid for the overtime hours he had worked and had not been paid for. Rice indicated he would investigate the question of Enis' overtime pay and told Enis he should not quit his job with Respondent because Respondent had gone to a lot of trouble training him to be a good worker and that this training was just starting to pay off. Rice asked Enis to remain in Respondent's employ. Enis agreed not to quit.¹⁶

On Monday, March 30, 1981, shortly after reporting for work, Enis and King were summoned to Rice's office and in the presence of Colbert were handed their termination slips and told they were being discharge. The termination slips, dated March 30, were identical and signed by Rice. They stated Enis and King were terminated for "falsification of time records and unauthorized use of company vehicle, including unreported damage to vehicle and customer premises." Rice told Enis and King that they had falsely credited themselves with having worked a full shift, 7-1/2 hours, on Friday, March 27, when in fact they had not worked that many hours. Rice stated he had gone looking for them that night at the Turner Construction Company, where they were supposed to have been working, and had been unable to find them. Rice asked where they were. Enis and King replied they were doing their work at the Turner Construction Company, but admitted they had not worked 7-1/2 hours but had given themselves credit for this amount of time because the Company owed them

¹² Based on Rice's testimony. Enis testified he spoke to Rice about getting "union scale." Rice denied this. Rice impressed me demeanorwise as a more credible witness. Accordingly, I have rejected Enis' testimony.

¹³ The description of Rice's conversation with King is based on King's testimony. I have credited King's undenied testimony that on February 20, at St. John's Church, Rice asked whether King and Enis had joined the Union but have rejected his further testimony, which was specifically denied by Rice, that Rice at this time told King "he hated to see a good man go." I have rejected this part of King's testimony because demeanorwise Rice impressed me as a more credible witness than King on this particular aspect of the conversation.

¹⁴ The description of this conversation is based on King's testimony. Enis, who also gave testimony about what was stated during this meeting, indicated that his memory of what was stated at the meeting was poor. Demeanorwise Enis did not impress me as a reliable witness when he testified about the meeting. Rice testified that all that was stated at this meeting was that Enis remarked that he felt Respondent owed him moneys for the overtime hours he had worked and asked if Rice would help him collect said moneys. Rice further testified that there was no mention of a union. Colbert, who testified for Respondent, was not called on by Respondent to corroborate Rice's testimony. I have credited King's version of this meeting and not Rice's because demeanorwise King impressed me as a sincere and reliable witness when he testified about what was stated during this meeting whereas Rice did not.

¹⁵ This description of Colbert's meeting with Enis and King is based on King's testimony. Enis also testified about this meeting but demeanorwise did not appear to be reliable or sincere when he gave this testimony. Colbert was not questioned by Respondent about this particular meeting. He generally denied ever asking Enis or King about why he joined the Union or of having told them it was a mistake to have joined the Union. I have credited King's version of this meeting because demeanorwise he impressed me as a sincere and reliable witness when he testified about the meeting and Colbert failed to present his version of what was stated at the meeting nor did he specifically deny the remarks attributed to him.

¹⁶ The description of this luncheon meeting is based on Rice's testimony. Enis testified that he told Rice he was thinking of quitting and wanted his "backpay." Enis further testified that Rice suggested Enis not ask for his backpay and that in return Rice would pay him union wages and have Supervisor Colbert stop harassing him. When Enis rejected this offer, Enis testified Rice stated, "You're not going to be too happy to see me coming around because I'm going to choose my people." I have credited Rice's version of this meeting and rejected Enis because demeanorwise Rice impressed me as a more credible witness.

moneys for overtime they had worked. Regarding the reference in the termination slips to the "unreported damage to vehicle," Rice told them he discovered they had damaged a company vehicle and not reported it to management. Rice also stated that they had ruined a rug at the Children's Hospital which had not been reported to management. Enis stated that this incident had occurred more than a month previously and that he had reported it to the janitor employed by Respondent at the Hospital. King pointed out that he was not responsible for this damage because on the night in question he was not working with Enis having been assigned by Rice and Colbert to another location. Lastly, Rice stated Enis and King had spilled nail polish on the carpet at the Golden Arch Beauty Salon. Enis acknowledged his responsibility for this and stated that he had forgotten to inform management.¹⁷

a. The falsification of timecards and unauthorized use of a company vehicle

On Friday, March 27, 1981, Rice assigned work to the night-shift workers because Colbert, who normally had this responsibility, was absent from work that week on a leave of absence. On March 27 at 5 p.m., the start of the workshift, Rice dispatched King and Enis to Turner Construction Company, a job which they had done in the past, which usually took approximately 2 hours. This was their only job assignment. Rice advised them he would speak to them later at Turner Construction to tell them where they would be working for the remainder of the evening. Shortly after Enis and King left for Turner Construction Rice was informed about another job for a utility crew. So at approximately 6 p.m. he drove to Turner Construction to give this assignment to Enis and King. The company vehicle used by Enis and King was not parked in Turner Construction's yard so Rice returned to Respondent's office to determine whether they had phoned and left a message. They had not. Rice returned to Turner Construction at approximately 8:30 p.m. and again discovered that the company vehicle used by Enis and King was not parked in that company's yard and observed that all of the lights were out in the buildings which they had the responsibility to clean.¹⁸

¹⁷ Rice, Colbert, King, and Enis testified about the March 30 termination interview. The testimony of no two of these witnesses seems to be corroborative with respect to a large number of the matters of significance mentioned during the meeting. The above description is based on Rice's testimony and those parts of King's, Enis', and Colbert's testimony which are not inconsistent with Rice's testimony. I have relied on Rice's testimony, where there is a conflict, because of all of the witnesses who testified about this meeting Rice impressed me demeanorwise as a more credible and reliable witness than the others.

¹⁸ The description of what took place on March 27 is based on Rice's testimony. I have rejected King's and Enis' description where it conflicts with Rice's because demeanorwise Rice impressed me as a more credible witness. In crediting that part of Rice's testimony describing his two trips to Turner Construction Company to speak with Enis and King, I have considered the testimony of the security guard, Kinley Brown, who was on duty that evening at the Turner Construction Company. In view of my favorable impression of Rice's demeanor when he gave his testimony, I am of the opinion that when Rice first visited the jobsite at approximately 6 p.m. the gate to the jobsite, which was open until at least 6 p.m., had not been locked yet and that when Rice later visited the site that one of the many persons with keys to the gate had apparently inadvertently left the gate open. I am of the opinion there is nothing inherent-

Friday, March 27, 1981, was the end of a payroll period. The employees who work on the night shift turned in their timecards on the Monday after the Friday which ends the payroll period.¹⁹ On Monday, March 30, when Enis and King arrived for work at approximately 5 p.m. they gave their timecards to Rice who observed that they had given themselves credit for a full shift of work, 7-1/2 hours. Rice asked where they had been on March 27 and indicated that he had been unable to locate them that night. Enis stated that they were working at Turner Construction Company. Based on the fact that no one from Turner Construction Company had complained that its facility had not been cleaned Friday, Rice concluded that Enis and King had completed their assigned janitorial work at Turner Construction sometime during Friday evenings. Since the vehicle used by Enis and King was not at Turner Construction on the two occasions that Rice was there Friday night and since Enis and King had credited themselves on their timecards for 7-1/2 hours of work for a job which should have taken only approximately 2 hours, Rice also concluded that Enis and King had used the company vehicle for an unauthorized purpose and had falsified their timecards.

b. The damage to a company vehicle

On Saturday, March 21, 1981, when Respondent's president, Foggy, entered the Company's garage he observed that the right front fender of the Company's small pickup van, the Dodge Ram, was dented. Foggy left a note for Vice President Sivils asking him to determine who was responsible for the dent. On Monday, March 23, Sivils asked Day-Shift Foreman Lowe if he knew anything about the dent. Lowe answered in the negative. Supervisor Colbert, who was usually in charge of the night-shift employees, was absent from work on funeral leave so, since Enis had been driving the Dodge Ram for the 2 or 3 days immediately before March 21, Sivils questioned Enis about the dent.²⁰ Enis informed him that the van was already dented before he had started driving it and that, as a matter of fact, Supervisor Colbert had shown him the dent when he first drove the van. Colbert

ly implausible in Rice's testimony. Also, I have rejected Brown's testimony to the effect that on March 27 Enis and King arrived for work at Turner Construction Company between 7 and 7:30 p.m. and left between 10 and 10:30 p.m. I have not credited this testimony because I am persuaded that Brown, who testified almost 1 year after the events of March 27, 1981, had no reason to remember March 27, 1981, as distinct from any other date let alone to remember whether King and Enis worked that particular day or the specific hours they worked. In other words, I believe that Brown was not a credible witness on this point. Lastly, I note that Enis' testimony that the company vehicle used by himself and King on March 27 was parked outside Turner Company from the time they arrived until they left is inconsistent with King's testimony that the vehicle was not parked there during the entire period that they were there because at some point in time Enis used the vehicle to leave in order to get lunch.

¹⁹ Based on the testimony of Rice, Colbert, and employee Yin Law Chow. I have rejected Enis' and King's contrary testimony because Rice and Colbert, whose testimony was corroborated by Chow, impressed me demeanorwise as more credible witnesses.

²⁰ The fact that Enis had been driving the Dodge Ram on the night shift during this period is based on the credible and uncontradicted testimony of Rice and Sivils.

was not scheduled to return from his leave of absence until Monday, March 30, so Sivils informed President Foggy he would speak to Colbert about the dent at that time. When Colbert returned to work on Monday, March 30, Rice asked him about the dent and Colbert told him he knew nothing about it and that he had not, as Enis told Sivils, brought the dent to Enis' attention. Rice had observed that the "operator's vehicle maintenance inspection" reports which Enis had filled out each day that he drove the Dodge Ram failed to indicate that the fender was dented. Under the circumstances Rice concluded that Enis was responsible for denting the truck and, in addition, had tried to conceal his responsibility from management.²¹

c. The damage to the rug at Children's Hospital

On or about February 23, 1981, while working by himself at Children's Hospital, Enis accidentally spilled some wax on a rug which left a stain between 1 and 3 feet in diameter. Respondent employed a full-time janitor there. Enis notified the janitor about the stain, but did not notify his supervisors. Respondent first learned about the stain when the Hospital's building supervisor phoned President Foggy to complain about the damage to the rug. Foggy was concerned about the matter and had Vice President Sivils investigate. Sivils spoke to the janitor who told him that Enis was responsible for the stain. Thereafter, in Rice's presence, Sivils questioned Enis. Enis described how he had accidentally spilled some wax on the rug and explained he had not felt it was necessary to tell his supervisors because he had told the janitor. Sivils advised Enis that whenever anything happened on the job which might upset the customer that Enis should promptly notify his supervisors so that Respondent could speak to the customer about the matter and in that way it would not appear as if Respondent were trying to hide something.²²

d. The damage to the carpet at the Golden Arch Beauty Salon

During the time material herein Respondent provided janitorial services to several facilities operated by the Golden Arch Beauty Salon. Each night during the week Respondent provided a janitor who did the usual janitorial work at the Golden Arch Stores and approximately

²¹ Enis testified that when he first drove the Dodge Ram it was already dented and that Supervisor Colbert showed him the dent at the time Colbert assigned him to drive the van. Upon Colbert's return from his leave of absence, as I have found supra, Colbert told Operating Manager Rice that Enis was not telling the truth when he stated that Colbert had known about the dent and had shown it to Enis at the time he assigned him to drive the van. However, when he testified Colbert failed to specifically deny Enis' testimony that at the time he was assigned to drive the van that Colbert showed him the dent. Nonetheless, I have rejected Enis' testimony in this respect because demeanorwise he did not impress me as a credible witness. In any event, assuming that on March 30 Colbert lied to Rice when Rice questioned him about the dented fender, I am of the opinion that in taking at face value what Colbert told him that Rice acted in good faith.

²² In finding that Sivils spoke to Enis, as described above, I have rejected Enis' testimony that no one ever spoke to him about what happened to the rug at Children's Hospital and have credited Sivils' testimony because demeanorwise Sivils impressed me as a credible witness on this point whereas Enis did not.

once each month sent a utility crew to do the more extensive janitorial work such as waxing the floors. During the week of March 16, 1981, the owner of the Golden Arch Beauty Salon phoned Vice President Sivils and complained that one of the Respondent's employees had spilled nail polish on a carpet and had been attempted to hide the damage by placing a throw rug over the stain. Enis and King had worked at the particular store the night before, so, Sivils asked Enis if he knew whether anything had been spilt on the carpet. Enis answered in the affirmative and explained that when he was mopping the floor the mop handle hit a bottle of nail polish which fell and broke. Sivils asked why Enis did not report this to his supervisor. Enis stated that "he had taken care of it."²³ The Golden Arch Beauty Salon shortly thereafter stopped doing business with Respondent because of this incident.

2. Discussion and conclusionary findings

a. The alleged assignment of more arduous work to Enis and King in March 1981 because of their union and/or protected concerted activities

The complaints in these cases allege that Respondent violated Section 8(a)(1) and (3) of the Act by giving Enis and King "more arduous job assignments" in March 1981 because of their union or protected concerted activities. The admissions of Enis and King have persuaded me that this allegation is without merit.

Enis admitted that insofar as job assignments were concerned, March 1981 was no different than other periods of his employment because, as he testified, Supervisor Colbert had been harassing him and King from the very beginning of their employment as a utility crew in September 1980 until their termination on March 30, 1981. Enis testified that from the start of their employment Colbert always assigned Enis and King the work of stripping and waxing floors which took longer to do than other types of janitorial work and that they never knew what to expect from Colbert. And, King's testimony establishes that as a matter of fact Enis' and King's assignments in March 1981 were no more arduous than in the past. King testified that although he and Enis were assigned to strip and wax floors in March 1981 that this was a normal part of their work and that King did not feel Supervisor Colbert was treating them unfairly by assigning them this kind of work. Not only did King testify he did not feel Colbert in March 1981 was harassing Enis and himself by assigning them the task of stripping and waxing floors, but referring to his work assignments in March 1981 King testified his work was "nice" and that he "loved it."

²³ The General Counsel urges that because Respondent failed to produce dispatch orders showing that Enis and King had worked at the Golden Arch Beauty Salon during the time in question, when the nail polish was spilled, that I should infer that it was another utility crew or the regular janitor assigned to service that customer who split the nail polish. I disagree. Sivils, who in terms of his demeanor impressed me as a sincere and reliable witness, testified, as I have found supra, that Enis admitted responsibility for the spilt nail polish. Moreover, Enis did not deny Rice's testimony.

Based on the foregoing I find that the record fails to establish, as alleged in the complaints herein, that in March 1981 Respondent gave Enis and King "more arduous job assignments." It is for this reason that I shall recommend this allegation be dismissed.

b. Enis and King are discharged on March 30, 1981, allegedly because of their union and/or protected concerted activities

During the time material herein the janitors employed by Respondent who worked in San Francisco were represented by Local 87 and covered by Respondent's collective-bargaining agreement with that Union. Despite its contract with Local 87 Respondent did not comply with the contractual wage provisions in the case of all of its janitors. Respondent paid its inexperienced janitors substantially less an hour than called for by the union contract. Respondent paid its inexperienced janitors the contract rate of pay only after they acquired sufficient on-the-job experience to become proficient in their work.²⁴ Pursuant to this practice Enis and King, who were inexperienced janitors, were paid substantially less than the contract rate. During the same period of time Respondent employed at least six other inexperienced janitors who likewise were not paid the contractual rate of pay.

Enis and King, who commenced to work full time for Respondent in late September 1980, worked together as a utility team. From almost the very beginning of their employment they were unhappy about their rate of pay and in 1980 and 1981 constantly asked their supervisor, Julius Colbert, for more money and, in particular, asked that they be paid "union wages." Also, beginning in late October 1980 and continuing thereafter they complained to Colbert about the fact that they had not been paid for certain overtime hours they had worked. In February 1981 they joined Local 87, apparently in order to assist themselves in collecting their "union wages" and overtime pay.

Counsel for the General Counsel takes the position that Enis' and King's efforts to have Respondent pay them union wages and overtime pay constituted "concerted activities" as that term is used in Section 7 of the Act and that the record also establishes that Enis' and King's concerted activity was a motivating factor in Respondent's decision on March 30, 1981, to discharge them, thereby establishing a prima facie case of a violation which Respondent failed to rebut by establishing it would have discharged them even if they had not engaged in protected concerted activity. I disagree. Even assuming that Enis and King, in pressing Respondent for union wages and overtime pay, were engaged in protected concerted activities, I find that the General Counsel has not made a prima facie showing that their concerted activity was a motivating factor in their discharges.

There is a lack of evidence that Respondent was hostile toward Enis and King because of their demands for union wages and/or overtime pay. Supervisor Colbert, in response to their continuous request for union wages and

overtime pay, advised them that their wages would be raised when they acquired more experience and became more proficient at their work and that the reason he had not paid them for their overtime was that they should have finished the work in question during their normal working hours, but had not done this due to their lack of experience. And, in March 1981, after Respondent learned Enis and King had joined the Union, Operations Manager Rice did not express any animosity toward them for joining the Union but instead informed them he had been planning on getting them into the Union and stated their pay would be raised to \$8.22 an hour, the contractual rate of pay, in their next paychecks. As a matter of fact Enis' and King's wages were increased to \$8.22 an hour during the next payroll period. I recognized that when Supervisor Colbert learned that Enis and King had joined the Union he told them that he felt they were wasting their money because he did not think the Union was any good and pointed out that it was their job performance rather than union membership which provided job security because if their job performance was not satisfactory he still could fire them despite their union membership. I am of the opinion that Colbert's comments are insufficient to warrant a finding that Respondent was antagonistic toward Enis and King for pressing their claim for union wages and/or overtime pay. Further, Colbert's comments simply indicate that Colbert personally thought that union representation was a waste of the employees' money.

Nor does the timing of the discharges warrant an inference of improper motivation. The demands made by Enis and King for union wages and overtime pay were tolerated by Respondent for several months prior to their discharge and when they joined the Union in a further effort to implement these demands Respondent, instead of reacting in a hostile manner, acknowledged, through Operations Manager Rice, that Enis' and King's conduct of joining the Union was perfectly permissible and that Respondent now intended to pay them the union wages they were seeking. It was only on Monday, March 30, when Rice discovered that Enis and King had falsified their timecards by crediting themselves for 7-1/2 hours of work the previous Friday when they had only worked approximately 2 hours, that Respondent decided to discharge them.

Lastly, but perhaps most significantly, is the fact that in mid-March 1981 Operations Manager Rice persuaded Enis not to quit his employment. Rice's conduct provides a strong inference that Respondent was not hostile toward Enis and King for pressing their wage and overtime pay demands, nor was it looking for an excuse to discharge them for engaging in this conduct. Surely, if Respondent was hostile toward Enis and King for pressing their wage and overtime demands or was looking for a pretext to fire them for this reason, Rice would not have persuaded Enis to remain in Respondent's employ when Enis informed him he intended to quit. As I have described in detail supra, when Enis, who was substantially more vocal in expressing the wage and overtime pay demands than King, told Rice in mid-March 1981 that he intended to quit, Rice informed him that Re-

²⁴ Respondent was unable to provide close on-the-job supervision of its workers, thus, the amount of time it took for inexperienced workers to become proficient varied and sometimes took quite a while.

spondent had spent a lot of time training him and that it would be stupid for him to quit at that time just when all of the training was starting to pay off—an obvious reference to Rice's earlier promise to Enis and King that they would start receiving the \$8.22 an hour called for by the union contract—and persuaded him to remain in Respondent's employ.

To be sure Respondent's treatment of King is suspect. Respondent based its decision to discharge King, in part, on the damage to the Children's Hospital rug, the damage to the Golden Arch Beauty Salon's carpet, and the dent in the company vehicle, even though Enis was solely responsible for these acts of misconduct and, in the case of the hospital rug and dented vehicle, Respondent knew Enis was solely responsible. However, any inference of improper motivation that arises from Respondent's treatment of King is more than overcome by the other facts set forth above which detract from such an inference. Moreover, King is guilty of the most serious act of misconduct, the falsification of his timecard, which was the misconduct which triggered Respondent's decision to discharge King.

For these reasons I am unable to conclude that an inference of illegal motivation was warranted here. Accordingly, I conclude that the General Counsel has not established by a preponderance of the evidence that Enis' and King's discharge violated Section 8(a)(1) or (3) of the Act, and I shall therefore recommend the dismissal of these allegations in the complaints.

*c. The independent violations of Section 8(a)(1)
attributed to Operations Manager Rice*

As I have found supra, on February 20, 1981, shortly after Enis and King joined the Union, Operations Manager Rice spoke to King while King was working at St. John's Church, and asked whether King and Enis had joined the Union. King's response was noncommittal. The complaint in Case 20-CA-16289, paragraph 6(c), alleges that because of Rice's interrogation Respondent violated Section 8(a)(1) of the Act. I disagree. I am of the opinion that because of the unusual circumstances of this case this allegation should be dismissed. The Union involved is an incumbent union which has a contract with Respondent which contains a union-security clause requiring employees such as Enis and King, after 30 days of employment, to join the Union as a condition of continued employment. During the time material herein, Enis and King were obligated by the union-security proviso to join the Union. There is no evidence that at the time this interrogation took place Respondent had indicated to the employees that it was opposed to them joining the Union as required by the contractual union-security clause. As a matter of fact, subsequent to Rice's February 20 interrogation, in early March 1981, when Enis and King, in response to Rice's questioning,²⁵ told Rice

²⁵ Rice's questioning of Enis and King early in March 1981 about whether they had joined the Union, which is described in detail supra, is not alleged in the complaint as a violation of the Act.

they had joined the Union, Rice indicated to them he was in favor of them having done this because he had intended on having them join the Union. Under the circumstance I am of the opinion that Rice's February 20 questioning of King of whether he and Enis had joined the Union was not coercive and for this reason I shall recommend that this allegation be dismissed.

The complaint in Case 20-CA-16289, paragraph 6(b), alleges that in March 1981 Operations Manager Rice promised to improve employees' terms and conditions of employment if they withdrew their grievance. This allegation is based on Enis' version of what was stated to him by Operations Manager Rice during their mid-March 1981 restaurant meeting. Rice disputed Enis' testimony. As described in detail supra, I have rejected Enis' version of this meeting because Rice impressed me as a more credible witness. Accordingly, for this reason, I shall recommend that this allegation be dismissed.

*d. The independent violations of Section 8(a)(1)
attributed to Supervisor Colbert*

The complaint in Case 20-CA-16289, paragraphs 6(a) and (d), allege that in early March 1981 Supervisor Colbert threatened to discharge employees because they went to the Union and that Colbert pointed out to the employees the futility of supporting the Union by telling them Respondent would discharge them if it wanted to and there was nothing the Union could do about it. With respect to these allegations the record establishes, as described in detail supra, that early in March 1981 Operations Manager Rice called Enis and King into his office and in the presence of Supervisor Colbert asked if they had joined the Union. They answered in the affirmative. Rice indicated to them he favored this because he had intended on having them join the Union and also told them he intended to pay them the rate of pay called for by the union contract, as they had requested. Immediately after this meeting Supervisor Colbert asked Enis and King why they had gone to the Union and told them the reason he had not told them about the Union was that he felt it was a waste of their money to join the Union as he did not think the Union was any good, and stated it was the employees' job performance rather than union membership which provided job security because if their job performance was unsatisfactory they could be fired despite their union membership.

I am of the opinion that these allegations should be dismissed in their entirety because while Colbert's remarks might be viewed as coercive within the meaning of Section 8(a)(1) of the Act if expressed in the context of other unfair labor practices, viewed in isolation they are not violative of the Act. Accordingly, since Colbert's above-described remarks were not expressed in the context of unfair labor practices, I shall recommend that this allegation be dismissed.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER²⁶

The complaints herein be dismissed in their entirety.

²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.