

**IDAB, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO.**  
Case 12-CA-9147

28 March 1984

**SUPPLEMENTAL DECISION AND ORDER**

**By CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 11 August 1980 the National Labor Relations Board issued its Decision and Order in this proceeding,<sup>1</sup> in which the Board granted the General Counsel's Motion for Summary Judgment finding that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union previously certified by the Board as the exclusive bargaining representative of a unit of the Respondent's employees.<sup>2</sup> Upon a petition for review and cross-application for enforcement of the Board's Order, the court of appeals remanded the case to the Board for further consideration consistent with its opinion.<sup>3</sup> The court concluded that the Respondent had made a sufficient prima facie showing in support of its objections to entitle it to a hearing on those objections. Specifically, the court found, inter alia, that affidavits submitted by the Respondent raised substantial and material issues of fact as to whether an atmosphere of fear and violence at the time of the election and/or alleged electioneering at the polls destroyed the atmosphere necessary for the exercise of a free choice by the voters. On 27 May 1982 the Board issued its order remanding proceeding to the Regional Director and directed a hearing for the purposes set forth in the court's opinion. A hearing was then held before Administrative Law Judge Howard I. Grossman 14, 15, and 16 June and 7 and 8 September 1982, and 8 February 1983 the judge issued the attached supplemental decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

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,<sup>4</sup> and conclusions and to adopt the recommended Order.

<sup>4</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the judge's decision, the Respondent's exceptions, and the record and note the following.

The Respondent contends that the judge erred in considering evidence that the Respondent attempted to influence the testimony of witnesses in the hearing. However, the judge's finding of a "proclivity" on the part of the Respondent to attempt to influence the testimony of the witnesses in this proceeding, though possibly relevant in some respects, is not an essential element of his credibility findings and we do not rely on it in that regard. An exception in this respect concerns employee Ugarte, since the evidence regarding his attempted manipulation of witnesses prior to the hearing logically and properly was considered by the judge in evaluating his testimony.

The Respondent further argues that the judge failed to mention certain testimony of employee Gonzalez to the effect that Gonzalez had heard a rumor prior to the election that employee Rodriguez threatened employee Contreras with a gun. Since the judge found that the incident with the gun never occurred, and that rumors regarding threats did not circulate until after the election, we conclude that Gonzalez' testimony on this point was contrary to weight of the evidence and therefore is discredited. In this regard, we find it unnecessary to pass on the judge's conclusion that the rumors were not widespread, since we agree with this finding that they were circulated after the election. We also note that the judge erroneously referred to witness Mures as a female, and that, contrary to the finding of the judge, Mures was not still employed by the Respondent at the time of the hearing. In our view this undermines the judge's crediting of Mures and therefore we disregard the testimony of Mures in its entirety. The judge relied on Mures' testimony primarily as corroboration of the testimony of Union organizer Klinakas as to other matters due to the detailed and plausible nature of his testimony, his testimony regarding his instructions was equally credible in the absence of Mures' corroboration. With regard to Jorge's conduct while the polls were open, we find no reason to disturb the judge's crediting of Jorge's and Gonzalez' testimony, even without the corroboration of Mures, since the contrary testimony of the Respondent's witnesses is inconsistent and conflicting, and fails to establish objectionable conduct even when considered standing alone.

Finally, we note that the Respondent is correct in asserting that there is uncontradicted testimony that employees Cincentes' and Wilk's tires were tampered with before the election. Since no evidence was adduced which connected these matters with the election, we find it unnecessary to pass on the veracity of such testimony. We also find it unnecessary to rely on the judge's comments at sec. II,B,6 of his decision that, "considering Wilk's physical attributes, I consider it unlikely that the union sympathizers would have done anything to his property even if they were of a mind to do so."

Thus, in view of our examination of the record and of the foregoing, with the exception of Mures as set forth above, we find that the judge's credibility resolutions are fully supported by the weight of the evidence and the reasonable probabilities of the situation. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The judge found no factual support for the Respondent's objections with the exception of observer Gonzalez' wearing a union button during the polling period. With respect to Gonzalez, a member of the in-plant organizing committee, we note, as did the judge, that the reviewing court, citing one of its own decisions, stated that such conduct, "considered in isolation will not ordinarily be sufficient to invalidate an election." *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 971 fn. 6 (5th Cir. 1982). We therefore find it unnecessary to consider whether members of the in-plant organizing committee acted as agents of the Union, and do not rely on fn. 34 of the judge's decision.

<sup>1</sup> 251 NLRB 19.

<sup>2</sup> On 26 March 1980 the Board adopted the Regional Director for Region 12's recommendation that the Respondent's objections to an election held 1 November 1979 be overruled in their entirety and that the Union be certified as the exclusive bargaining representative of the appropriate unit.

<sup>3</sup> *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 971 (5th Cir. 1982).

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, IDAB, Inc., Hialeah Gardens, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The International Association of Machinists and Aerospace Workers, AFL-CIO (the Union or Petitioner), filed a petition in Case 12-RC-5725 on August 20, 1979, and amended it on August 27, seeking to represent certain employees of IDAB, Inc.<sup>1</sup> (the Respondent or the Employer).<sup>2</sup> Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on November 1, 1979. The tally of ballots indicated that of approximately 86 eligible voters, 44 cast ballots for, and 37 against, the Union-Petitioner. There were two challenged ballots, which were insufficient in number to affect the results of the election. On November 8, 1979, the Employer filed objections to conduct affecting the results of the election.<sup>3</sup>

On December 18, 1979, the Regional Director for Region 12 issued his Report on Objections to the election in which he recommended that the Board overrule the Employer's Objections in their entirety, that the Employer's request for a hearing be denied, and that the Union be certified as the exclusive representative of all employees in the bargaining unit set forth in the election agreement. On January 7, 1980, the Respondent-Employer filed exceptions to the Regional Director's report, arguing that the election should be set aside, or that a hearing should be held on the objections. Thereafter, on March 26, 1980, the National Labor Relations Board (the Board) adopted the Regional Director's recommenda-

<sup>1</sup> At the time of earlier proceedings herein, the Respondent-Employer's name was "EDS-IDAB, Inc.," according to the Board's prior reported decision at 251 NLRB 19 (1980). During the instant hearing, the Respondent-Employer's counsel represented that the corporation had changed its name to that indicated above, and his motion to amend the name in this proceeding was granted without opposition upon counsel's assurance that no Board order which might issue as a result of these proceedings would be opposed on the ground of lack of notice. Although the Respondent-Employer's brief shows the abbreviation after "IDAB" as "INC.," the record and the Board's prior decision state it in lower case; accordingly, I have used that form herein.

<sup>2</sup> *Ibid.*

<sup>3</sup> The Respondent's brief sets forth the text of the objections. In essence they contend that (1) Petitioner's observer at the election, Al Gonzalez, wore a campaign button saying "VOTE YES - FOR IAM" and that the Board agent did not ask him to remove it; (2) Petitioner's agents, members, employees, and supporters coerced employees with threats or actions of violence to their persons or property; (3) Petitioner's agents, members, employees, and supporters loitered in the balloting area during the election and threatened or coerced employees when they were casting their ballots; (4) said conduct was so aggravated as to create a general atmosphere of fear and reprisal making a free choice by the voters impossible; and (5) that there was additional objectionable conduct which affected the results of the election.

tions, and issued a Decision and Certification of Representative.

Upon a charge filed on April 25, 1980, by the Union, the General Counsel, by the Regional Director for Region 12, issued a complaint on May 6, 1980, alleging that the Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Upon the General Counsel's filing a Motion for Summary Judgment, the Board, on August 11, 1980, concluded that since about April 8, 1980, and thereafter, the Respondent had refused to bargain collectively with the Union in violation of the Act. Accordingly, the Board issued a bargaining order. *EDS-IDAB, Inc.*, 251 NLRB 19 (1980). Thereafter, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Fifth Circuit, and the General Counsel filed a cross-application for enforcement of the Order. On February 4, 1982, the court denied enforcement, and remanded the case to the Board for a hearing. *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 971 (5th Cir. 1982), reversing 251 NLRB 19 (1980).<sup>4</sup>

The court concluded that the Employer had made a sufficient showing of an atmosphere of fear and violence during the election to entitle it to a hearing, despite the hearing the hearsay nature of the evidence. Briefly stated, that evidence included affidavits from three witnesses<sup>5</sup> to the effect that employee Contreras told them a prounion employee had lifted his shirt and had shown Contreras a gun prior to the election, with an accompanying threat in the event that the Petitioner lost the election. Another witness<sup>6</sup> submitted an affidavit that prounion employee Jorge had punched Contreras in the eye, giving him a black eye. The court's decision noted Contreras' unwillingness to affirm or deny these allegations during the Regional Director's investigation. In addition, the Employer's evidence included allegations that Jorge had threatened physical harm to other employees or their property.

The affidavit of one of the witnesses, Vigil, affirmed that there were rumors of threats to employees Freyre and Alemany. Virgil was assigned to investigate and Freyre told him that he was upset with employees harassing others to vote for the Union. As stated by the court: "Freyre also told Vigil, 'Off the record—I will never tell anyone about the threats to me or others because I have to come back and work with these guys every day.'" Alemany made similar statements, according to Virgil's affidavit.

The court also stated the necessity of evaluating evidence of improper electioneering by Jorge, who allegedly sat next to the union observer for 10 to 15 minutes during the voting and spoke to him. In addition, Jorge allegedly spoke to employees standing in line to vote, and was wearing a prounion patch on his overalls. The

<sup>4</sup> As indicated, the Respondent-Employer's name is stated differently in the court's decision.

<sup>5</sup> Hall, Vigil, and Carmanate. The latter's name appears as "Carminatti" in the record of this proceeding. I have used the spelling given in the court's decision.

<sup>6</sup> Medina.

court observed that this evidence must be considered cumulatively, together with the evidence of threats attributed to Jorge, in order to determine whether the atmosphere necessary for the exercise of a free choice by the voters had been destroyed. Finally, the court indicated the necessity of determining whether any such conduct by Jorge had been condoned by the Petitioner.

On May 27, 1982, the Board issued its Order Remanding Proceeding to the Regional Director, directing a hearing for the limited purposes stated in the court's opinion, and, on June 9, 1982, the Regional Director for Region 12 issued a notice of hearing.

Pursuant to the foregoing authority, a hearing was held before me in Miami, Florida, on June 14, 15, and 16, and September 7 and 8, 1982. On the entire record, including a brief filed by the Respondent-Employer, and on my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. SUMMARY OF THE EVIDENCE PERTAINING TO SUBSTANTIVE ISSUES

###### A. *The Union Campaign—the Inplant Organizing Committee*

The organizational campaign began with a union meeting in July or August 1979, which was attended by 10 to 15 employees, according to union organizer Anthony Klinakis. Thereafter, a general meeting attended by 40 to 45 persons was held on October 11, 1979, and another on October 29, with about the same attendance. Union authorization cards were solicited at these meetings.

Klinakis had more frequent meetings, at least once a week with smaller groups of employees, for the purpose of coordinating campaign activities within the plant. Although various employees were utilized for this purpose, the principal ones were Ildefonso (Al) Gonzalez, Luis Jorge,<sup>7</sup> Francisco (Pancho) Rodriguez, Victor Ugarte, and one other. No one was "elected" to this group, according to Ugarte—they simply volunteered. Klinakis testified that he utilized these employees as an organizing committee within the plant. He instructed them to try to persuade their fellow employees to accept the Union-Petitioner, but to do so with an "open mind." The union organizer contended that he told this small group that the Union was "not coming in there [to] . . . try to portray an image of a bunch of bad guys . . . [or] to bend anybody's arm to vote for the Union." Former employee Gonzalez testified that Klinakis instructed his listeners to campaign for the Union during nonworking hours, but admonished them not to threaten employees. Employee Rodriguez, who is fluent in Spanish but understands little English, affirmed that Klinakis had an interpreter at these meetings (Rick Haro) who translated the organizer's remarks into Spanish, testimony which was corroborated by Klinakis. Rodriguez asserted that, according to the interpreter, Klinakis said that the Union was seeking better wages and benefits for the workers, but that

prounion employees could not threaten other employees in connection with the campaign. Employee Idalberto Mures corroborated this testimony. The group of four employees decided to talk to other employees about the Union "in a nice way," according to Rodriguez.

Santiago Leon, a witness called by the Employer, was asked whether he was aware of an "in-plant organizing committee . . . organizing for the Union." The witness did not understand the question. He was then asked whether he was "aware of certain employees in the Company that were working to have the other employees . . . vote for the Union." Leon answered affirmatively, and identified three members of the committee. Klinakis testified that the Union did not pay this group of employees for their campaign activities, and that he did not authorize them to act on behalf of the Union—testimony which is corroborated by other evidence in the record.

Victor Ugarte, a witness called by the Employer, stated that this group was confident at the beginning of the campaign that the Union was going to win. As the campaign progressed, they made a decision to "speak each time more insistently with those who were undecided." Later, when it appeared that the election was going to be close, the group "decided to pressure more intensely four or five of the company employees." However, Ugarte added, the four employees did this on their own, and neither Klinakis nor any other union official told them to do so. The four employees also distributed union literature to other employees.

Ugarte's statements are partially contradicted by witnesses called by the Petitioner. Thus, Gonzalez testified that the group prepared lists of employees in accordance with what was believed to be their sympathies, either for or against the Union, or undecided. With respect to pro-company employees, the group tried to win them over by stressing the benefits of union representation. Gonzalez denied that there was any discussion of "stronger measures" against these employees, and asserted that the group was confident of victory in the forthcoming election.

Rodriguez described the activity of the four employees as voluntary work which was not requested by Klinakis. Rodriguez called it a "survey" of employee sentiment about the Union, based on statements made by the employees at general union meetings. The witness denied that the results of the survey were based on specific interrogation of individual employees, and acknowledged that guesswork was involved. Nonetheless, the group believed on the day of the election that they would get 60 to 70 percent of the votes. Jorge testified that the strategy of the group with respect to pro-company employees was to convince them that the Union would provide "work protection" and benefits such as seniority.

###### B. *Juan Contreras*

###### 1. The alleged gun incident and other alleged threats

###### a. *The alleged threat*

Employee Juan Contreras testified that, between 9 and 11 a.m., about a week before the election, Rodriguez

<sup>7</sup> Jorge's first name also appears as "Louis" at places in the record. I conclude that the correct spelling is "Luis."

lifted his shirt and showed Contreras a gun tucked in his belt, saying that Contreras knew what to expect if he did not vote for the Union. This took place in the assembly area, and Rodriguez, a welder, was working at the time. Gonzalez, Ugarte, and another employee, apparently deceased, were present according to Contreras. The latter walked away from Rodriguez and did not say anything.

Ugarte testified that he saw Rodriguez approach Contreras during the lunch hour, about 12:30 or 12:40 p.m.<sup>8</sup> According to Ugarte, Rodriguez raised his shirt and showed Contreras a gun. Ugarte did not hear Rodriguez say anything to Contreras, and did not remember the date. However, according to Ugarte, he heard Rodriguez threaten Contreras on other occasions. "Practically the last two months before the election," Rodriguez would tell Contreras that he knew the latter was procompany and that it "would be best for him not to come to work on the day of the election." Contreras, on the other hand, denied that Rodriguez threatened him on any occasion other than the one involving the alleged gun incident.

Rodriguez acknowledged that he owns a gun, but denied that he ever took it to work. He denied that he showed Contreras a gun or threatened him. The witness stated that he did talk to Contreras about the election, but denied that he told the latter to vote for the Union. "As a matter of fact," Rodriguez testified, "even Juan Contreras complained about being discriminated against." Gonzalez, who was present during the alleged incident according to Contreras, denied seeing any employee "take out a gun on any other employee."

Victor Ugarte testified that he heard Luis Jorge tell Contreras that he knew Contreras took information to the Company, and that Jorge would "go out looking" for Contreras if the Union lost the election and Jorge lost his job. Contreras, however, denied that anybody other than Rodriguez threatened him.

*b. The alleged reporting of the Rodriguez threat*

As described above, the alleged incident took place between 9 and 11 a.m., according to Contreras. During the lunch hour, he tried to find Company President Lou Kipp in order to report the incident, but Kipp was not on the premises. It was not until several hours later that Contreras had an interview with Kipp and other company officials. He explained the delay by saying that he only discussed matters with a "person of the highest rank." Asked whether he felt that his life had been threatened by Rodriguez, Contreras replied that he did not like the way Rodriguez "proceeded," but did not feel the matter was sufficiently important to bring to the attention of another company official in Kipp's absence. It was during the afternoon of the same day that Contreras allegedly reported the matter to Kipp, in the presence of Personnel Director Arlene Hall and Purchasing Manager Manuel Vigil.<sup>9</sup> Contreras asserted that he asked Vigil to loan him the latter's gun but that Vigil declined.

<sup>8</sup> Gonzalez testified that the lunch period was from 12 to 12:45 p.m.

<sup>9</sup> Vigil's name appears as "Vahill" in the record of this proceeding. Although his affidavit with presumably the correct spelling of his name was forwarded to the court with the record on appeal, the affidavit was not

Company counsel did not call Vigil during the Employer's case-in-chief, but was allowed to do so during rebuttal over the objections of Petitioner and counsel for the Regional Director. Virgil initially testified that only he and Contreras were present during a conversation which took place a few days before the election, but later corrected this to assert that Kipp was also present. Vigil testified that Contreras claimed Rodriguez had threatened him with a gun. The purchasing manager asserted that Contreras "acted afraid," and asked Vigil for a gun—a request which Vigil denied. The latter could not remember whether this meeting took place in the morning or the afternoon.

According to Vigil's initial testimony, Rodriguez worked in the welding area, which is distinct from the machine shop and the assembly area. As Contreras reported the matter, according to Vigil, Rodriguez came over to Contreras in the assembly area where Contreras works and the incident took place there. On cross-examination, Virgil acknowledged that, in an affidavit given to company counsel in December 1979, he stated that Contreras reported the incident as having taken place in the machine shop, to which Contreras had been called by Rodriguez. Vigil then asserted that the etire area was referred to as the "machine shop." Hall testified in a similar manner. Rodriguez, on the other hand, testified that the welding and assembly departments are separate.

Personnel Director Hall affirmed that in the late afternoon of October 26 Contreras came to the office "very red in the face" and "visibly upset." He said that he wanted to speak to Kipp, and a meeting took place with Kipp, Hall, and Vigil as interpreter. Contreras said that Rodriguez lifted his shirt and showed him a gun. This took place in "the building across the street," which Hall termed "the machine shop," or "the production facility."

Hall was asked when it was that Rodriguez had done this, according to Contreras. "Just in the way he was acting, it was that day," the witness answered. She then asserted inability to understand Contreras' "broken English" on this point, although Vigil was present as an interpreter. However, Hall "believed" that Contreras was relating a threat that had occurred the same day. In an affidavit given to company counsel in November 1979, Hall stated that she could not recall whether the threat was made or 2 days prior to the meeting with Kipp. (U. Exh. 8.)

At the hearing, Hall testified that Contreras said he was "concerned about his family." In her 1979 affidavit, Hall affirmed that Contreras said "he had received no phone calls at home and that he was only concerned about his safety in the shop and after the election."

Hall further testified that having a gun on company property was grounds for "immediate dismissal," and that it occurred to management that the police should be called. Kipp instituted an investigation according to Hall, but "there were no supervisors around that saw the incident." Further, management was "confused" as to the

offered in evidence in this proceeding. There is no indication in this record that Vigil ever spelled his name for the reporter. I conclude that "Vigil" and "Vahill" refer to the same person, and that the former is the correct spelling.

proper action to take just before the election, and called company counsel<sup>10</sup> immediately after the Contreras report. The advice received was to take no action at the time because of the imminence of the election. Further according to Hall, there was an element of "confidentiality" to the report from Contreras, who did not wish other employees to know about his meeting with Kipp.

Contreras testified initially that he could not remember whether he reported the Rodriguez threat to anybody other than Kipp. On redirect examination and in response to a leading question, he testified that he also discussed it during the evening of the same day with Jose Carmanate. Contreras said that he could not remember Carmanate was his supervisor at the time.

The Employer called Carmanate as a witness for the first time during rebuttal, and, as in the case of Vigil, he was allowed to testify over the objections of Petitioner and counsel for the Regional Director. The witness stated that his title was supervisor of the assembly department at the time of the events in question, that Contreras was in that department, and that he, Carmanate, was Contreras' supervisor. Some time prior to the election, between 6 and 8 p.m., while he was at the shop, Contreras called him and said that Rodriguez had "shown him a revolver in his back." According to Carmanate, Contreras asserted that the incident took place in the assembly department. Contreras said that he was afraid, and Carmanate told him to be calm, saying that he would speak with his superiors about it the next day. Carmanate advised Contreras to notify him "immediately" if it happened again, so that "the Company would have [sic] some action." Carmanate was asked on cross-examination why Contreras had waited the entire day before notifying his own supervisor. Carmanate's answer was that Contreras had "supposedly" called him in the afternoon.

#### *c. Company action against Rodriguez*

Rodriguez testified that he was called into the office after the election by his supervisor, Julio Blanco. Rafael Castillo, Robin Baker, and Kipp were present, as well as Blanco. Rodriguez was handed a memorandum dated November 2, 1979. The memorandum is in English, in which language Rodriguez is not proficient. It reads as follows:

It has come to our attention that you made personal threats against fellow employees on several occasions during the past few weeks. This is an unacceptable behavior and violates not only company policy but the law. Consider this letter as notice that effective this date you are being placed on 30 day's probation with the company. If any misconduct occurs within the next 30 days, you will immediately be dismissed. Any future incidents of personal threats will be subject to immediate dismissal. [E. Exh. 9.]

<sup>10</sup> Hall identified the individual called as an attorney other than the Respondent's counsel in this proceeding.

Castillo told Rodriguez that the latter had "threatened" people, and that he was on probation for 30 days. Kipp made similar statements, and Rodriguez denied them, saying that it was "a lie." Kipp did not specify the nature of the threats and did not accuse Rodriguez of having a gun in the plant, according to Rodriguez. The latter testified that he did not take the reprimand seriously, since he had "always maintained good conduct at work." According to Rodriguez, "If I had threatened somebody a week before the election, why didn't the Company fire me?"

Neither Kipp, Blanco, Castillo, nor Baker testified during the proceeding. Accordingly, Rodriguez' testimony on this issue is uncontradicted.

#### 2. Jorge's alleged punching of Contreras

Pedro Medina was a regional sales manager for the Respondent when he testified, and was an assistant to the supervisor of drafting at the time of the election. He testified that an employee told him that Jorge had punched Contreras and had given him a black eye. Medina "went over across the street just out of curiosity," and observed that Contreras did have a black eye. The witness asserted that he asked Contreras whether Jorge had hit him in the eye. Contreras "put his head down and just didn't want to talk," according to Medina. At lunch the same day, Medina asked Jorge about the matter, and the latter replied that it was an accident. Medina asked Jorge how anybody could be punched accidentally. Jorge reaffirmed that it was an accident, but was laughing at the time according to Medina.

Jorge denied punching Contreras, but admitted that he was involved in an accident with the latter. According to his testimony, he was sitting in a reclining chair in Blanco's office when somebody came in the door. Jorge got up and turned around. As he did so, his elbow hit Contreras. Jorge apologized, and Contreras said that there was no problem, that it was an accident. Jorge said that this took place after the election, although he could not remember the date of a conversation with Medina which he had about the subject. Contreras corroborated Jorge's testimony that Contreras' black eye was the result of an accidental blow, although he gave a somewhat different version of it. Contreras said that this took place before the election.

#### *C. Other Alleged Threats and Rumors of Violence, and Property Damage*

##### 1. Alleged threats and rumors of threats to Arsenio Freyre

As set forth in the court's opinion outlined above, Vigil's affidavit recites Freyre's alleged statement to Vigil about harassment by other employees, threats made to Freyre, and the latter's fear of other employees. Although Vigil was called as a witness by the Employer in this proceeding, he was not asked any questions about Freyre.

Victor Ugarte testified that he had a "violent argument" with Freyre about a week before the election, and told him that "it was best for him not to come to work

on the date of the election." Ugarte also asserted that he heard Rodriguez make similar statements to Freyre.

Freyre, a witness for the Employer, gave testimony different from either Vigil's affidavit or Ugarte's assertions. He was asked by company counsel whether he had ever been threatened prior to the election. The witness replied that other employees attempted to "convince" him that he should support the Union, and that he finally got into an argument with Ugarte over his refusal to do so. However, all that Ugarte said was that it was "unbelievable" that Freyre would not support the Union. "There were no threats to my person," Freyre testified, "but just personal reproaches like, 'You shouldn't have done that; it's unbelievable that you have done that.'" Freyre denied that anybody, including Rodriguez, Jorge, or Gonzalez ever threatened him "physically," or "seriously," nor did he hear that the latter employees had threatened any other employee. Freyre said that he and Rodriguez were "close" and joked a lot, that a lot of joking takes place in the plant. "Sometimes you don't take them seriously but a little bit stays," Freyre stated. Freyre contended that he heard rumors of threats prior to the election. Thus, he said that he heard he might be attacked, and rumors that Pancho (Rodriguez) had made threats, but nothing about a gun. Freyre further asserted that he heard threats attributed to Jorge that "cars might break down." He also contended that one of his tires was deflated with a bolt stuck in the valve, but acknowledged that this took place after the election.

As set forth above, the court's opinion recites a part of Vigil's affidavit attributing a statement about threats to Freyre. After direct and cross-examination of Freyre, I asked him, through an interpreter, whether he ever told Vigil, "Off the record, I will never tell anyone about the threats to me or others because I have to come back and work with these guys every day."<sup>11</sup>

The witness initially answered, "Yes, I told him." Petitioner's counsel, who is bilingual, then protested that there had been "something missing from the interpretation." I repeated the question, and the witness replied that he did not remember "exactly that type of conversation," but that he did make statements "with some persons" that he did not wish to make any "declarations" because of fear of suffering a "mishap." Freyre seemed to testify that he only made statements to an "attorney from the Labor Department." Asked again whether he made the statements attributed to him in Vigil's affidavit prior to the election, Freyre answered, "Basically afterwards if I did because it's not really in my mind because a lot of time has elapsed." On redirect examination, Freyre said that he was afraid to make "declarations" because he had heard "rumors" that he "might be beaten up, persons from even outside the workshop." On re-cross-examination he said that his mind was "not too clear" on statement to Vigil.

## 2. Alleged threats and rumors of threats to Guillermo Alemany

As also described in the court's opinion, Vigil's affidavit alleges statements from Alemany to Vigil similar to

those attributed by Vigil to Freyre. Vigil was not asked any questions about Alemany during his testimony. Counsel for the General Counsel represented that he and the Respondent counsel had made efforts to locate Alemany, but were not successful. The General Counsel submitted an affidavit of Alemany given to a Board agent, and it was received.<sup>12</sup>

The affidavit is dated November 26, 1979, and reads in relevant part as follows:

I was eligible to vote in the election in November. Prior to the election, there were no threats of physical harm or of property damage made to me by any employee or union official because of the union situation. I did not hear any threats made to any other employees. [Bd. Exh. 3]

## 3. Alleged threats to Santiago Leon

Employee Santiago Leon, a witness for the Employer, testified that Jorge threatened to break up Leon's car if the latter did not vote for the Union. Jorge did this twice, the first time at a union meeting at the Holiday Inn, and the second time in the plant, according to Leon. The witness said that he took these statements seriously. Leon further asserted that one of his tires was slashed a few days before the election. Ugarte corroborated Leon's testimony.

In an affidavit given to a Board agent on November 26, 1979, Leon stated that Jorge twice told him that he would destroy Leon's car if the latter did not vote for the Union. Other persons heard this, and Leon "thought it was a joke." He further affirmed in his affidavit that "nothing ever happened to [his] car." The affiant also averred that he was not aware of any threats to other employees. (U. Exh. 3.) Jorge denied having arguments with or threatening Leon.

## 4. Alleged property damage sustained by Anthony Wilk and Gavin Cincentes

Wilk was eligible to vote in the election in 1979, but was a supervisor in the electrical assembly department at the time of his testimony. He testified that he favored the Employer during the union campaign, and that this fact was known to other employees. Wilk stated that he found a cement spike in the tire of his car, above the white sidewall, a few days before the election. He did not know the source of the spike. Jorge denied that he put the spike in Wilk's tire. Wilk also stated that he was not personally threatened, and did not observe any other employees being threatened about their union sentiments. Wilk is a man of imposing physique, similar to that of a professional football player, and was much larger than any of the other witnesses in the proceeding.

Ugarte testified that Jorge told him that Jorge had let the air out of the tires of employee Gavin Cincentes, be-

<sup>12</sup> The affidavit was received pursuant to Rule 804(b)(5) of the Fed. R. Evid., the requirements of the Rule having been satisfied. The official transcript does not reflect that the exhibit was received, although my comments clearly reflect an intention to do so. P. 679 of the official transcript is hereby corrected so as to indicate that Bd. Exh. 3 was received.

<sup>11</sup> Certain errors in the transcript are hereby noted and corrected.

cause of Jorge's belief that Cincentes was procompany. Jorge denied that he did so.

5. Other evidence pertaining to rumors of threats or violence

Regional Sales Manager Medina testified that prior to the election, he heard rumors that "Pancho" had a gun and was going to kill or hurt some one with it, and that cars or tires would be damaged. Medina identified the source of these rumors as supervisor Carmanate, "Fruma," "George," and "Jorge." Medina "presumed" that "George" was an eligible voter, but did not know his last name.

In response to a leading question as to whether she ever heard rumors of threats or violence "during the pre-election period," Personnel Director Hall answered "Absolutely," and said that there was employee talk that cars were going to be damaged, and that one employee resigned because his tire valves had been cut off. However, in another context, Hall was asked when the first time she learned from Ugarte about preelection threats, and said that she heard this in August or September 1981. Asked whether she learned about it from some other source prior to that time, Hall asserted that Gonzalez and Jorge had made similar disclosures to Kipp, but that her "personal knowledge" of it dated back to 1981.

In response to a leading question, Santiago Leon claimed that he heard rumors "prior to the election" that employees had their tires slashed. However, as already noted, in an affidavit dated in November 1979, Leon said that he was "not aware of any other threats being made by employees or by union officials either to me or to anyone else." (U. Exh. 3.)

In response to a leading question, Anthony Wilk testified that he heard rumors "prior to the election" that employees not favoring the Union "might get beat up," and that such threats were attributed to "Pancho," "Little Al," and Luis Jorge.

Jorge and Gonzalez acknowledged hearing rumors about an incident with a gun, and that some one had been threatened. Although Gonzalez on cross-examination said that he heard this before the election, he was unable to give the date. Jorge also said that he heard the rumor, but was uncertain whether he heard it before or after the election, and denied its truth. Rodriguez, the supposed culprit, not only denied that he threatened Contreras with a gun, but also denied ever hearing that he had done so. As described above, he testified without contradiction that Kipp did not make this accusation against him in the postelection meeting concerning Rodriguez' 30-day probation. Freyre's testimony about rumors is summarized above.

The Petitioner presented witnesses who, in general, testified to the contrary of the Employer's witnesses. Salvatore Chung, a company employee at the time of his testimony and one of the voters in the 1979 election, denied that (1) he had observed Jorge, Rodriguez, Gonzalez, or Ugarte threaten any employee about procompany sentiments; or (2) he had heard rumors that Rodriguez had shown a gun to Contreras about a week before the election or that Jorge had punched Contreras in the eye; or (3) that he had heard rumors of threats from

Ugarte or Jorge to other employees or their property. Renaldo Quirello, also a current employee who voted in the 1979 election, gave similar testimony, including a denial of rumors that Jorge threatened damage to Santiago Leon's car. Similar denials were voiced by employees Rolando Arce, Idalberto Mures, Richard Otrara, and Hugo Almeida, with one exception—Almeida heard rumors that Rodriguez had shown Contreras a gun. However, Almeida testified that he did not hear this until after the election.

6. Company action against Jorge

On November 2, the day after the election, the Employer gave Jorge a written reprimand identical in language to the one given the same day to Rodriguez, supra, and also placed him on a 30-day probation. (E. Exh. 13.)

D. *The Election on November 1*

1. The election area and the parties' observers

The Respondent has two buildings in which it conducts its operations. Building no. 1 contains the administrative staffs and other functions, while building no. 2 has the production facilities. The buildings are separated by a parking lot. The election was conducted in building no. 1.

The record contains several diagrams of a portion of building no. 1 immediately surrounding the election area, together with testimony which is unintelligible because of the inadequacy of the diagram to which the testimony relates or because the testimony is unrelated to any diagram. I conclude that the most accurate portrayal of the election area is given in Employer's Exhibits 14 and 15, the latter being a duplicate of Exhibit 14 without certain notations. These exhibits were submitted on the last day of the hearing, after several witnesses had already testified about events taking place within the election area.

The exhibits and other evidence show that most of the voters came from building no. 2 across the parking lot, and entered building no. 1 by means of a ramp leading to a large door. The line of voters proceeded in a straight line upon entering the door. Idalberto Mures, an order dispatcher, testified that there were about 10-15 voters in line when she voted during the first session. Jorge estimated 8 to 10.

To the right of the line of voters was a storeroom surrounded by a fence which was parallel to the line of voters. To the left of the voters and at right angles to the line which they formed were large storage racks about 10 feet in height. There were aisles between the racks, and the election officials and ballot box were located just inside the second aisle between these racks. Further into the building was a walkway which ran parallel to the storage racks, with working areas, an employee cafeteria, and restrooms beyond the walkway.

The voting was conducted in two sessions, the first at 2:45 to 3:45 p.m., and the second from 5:30 until 6 p.m. The Employer's observer was China Alvarez Hung, while the Petitioner's observer was Gonzalez.

The parties stipulated that Gonzalez wore A union button during the entire election saying "Vote Yes for IAM."<sup>13</sup> Union organizer Klinakis testified that he did not instruct Gonzalez to do so, while the latter stated that nothing was said to him about the button by the Board agent. Gonzalez had worn the button for some time prior to the election. Company observer Hung signed a certificate that the balloting was fairly conducted during the first voting session, but refrained from doing so after the second session upon advice of a company attorney, who had learned from Hung about Gonzalez' button. (U. Exh. 6.)

Regional Sales Manager Medina testified that he went over to the election area out of curiosity, and saw Jorge waiting in line to vote. Jorge was "hollering and talking" to voters. Medina asserted that he saw Jorge walk to the election table, vote, and then seat himself on a box a longside the storage rack which was behind the election table. Medina submitted a sketch together with his pretrial affidavit which shows several boxes adjacent to the storage rack nearest the election table. (U. Exh. 2.) Medina said that he went to the cafeteria, and returned 10 to 15 minutes later. Jorge was still sitting on one of the boxes, talking to union representative Gonzalez and to voters waiting to vote. Medina affirmed that Jorge was about 7 feet from the voting table, and 7 to 10 feet from the line of voters, although in his pretrial statement Medina averred that Jorge was sitting about 2 feet from the election table. According to Medina's testimony and the diagram attached to his affidavit, the outermost storage rack was filled with merchandise, and he, therefore, had to position himself toward the aisle where the election table was located in order to observe these events.

Jorge gave a different version. He was in the voting line during the first session. Although there was some talk among the voters waiting in line, Jorge did not recall saying anything. He testified that he was tired, and sat down on some boxes for 2 to 3 minutes to lace up his shoes. According to Jorge, the boxes were next to the fence surrounding the storeroom. This was to the right of the line of voters, a different location from the area to the left of the voters adjacent to the storage rack where, according to Medina, the boxes were located. Shown the diagram prepared by Medina, Jorge denied that they were any boxes near the election table. Jorge testified that he was simply following the flow of the line of voters. He gave his name to Gonzalez and Hung as the election observers, and then went to the voting booth and deposited his ballot. Jorge denied that he went back, sat down, or talked to Gonzalez. Instead, he left the building and remained on the ramp outside the entrance for 5 to 10 minutes, waiting for a friend. He was visible to the line of voters entering the building, but not to persons at the election table. Jorge did not recall saying anything to the voters entering the building. When his friend had finished voting, the two of them went back to work.

<sup>13</sup> The Employer's objection lists the text of the button in capital letters. This does not appear in the official transcript, and I have adhered to the form given in the latter.

Idalberto Mures worked in the storeroom adjacent to the election area. She testified that at 1 p.m. on the election day she and other employees were ordered to clean the area between the storage racks where the election area was to be located. Shown the diagram prepared by Medina, Mures denied that there were any boxes between the storage racks. All the boxes had been placed "inside" (the storeroom). "And those we had no room for in front we had to place in the back." Mures testified that Jorge was in front of her in the election line. He sat down on some boxes "next to the fence," then voted, and left.<sup>14</sup>

Mures denied that Jorge spoke to Gonzalez after placing his ballot in the box, "because the inspector . . . prohibited us from speaking to anyone else." Mures, who continued working in the storeroom after voting, testified that she did not see Jorge come back into the election area. Instead, she asserted that she saw union observer Gonzalez talk to "the inspector," who then spoke to several persons in the area. These individuals then left, one of them being "Pete Medina," according to Mures.

Gonzalez gave testimony similar to Mures'. Jorge did not converse with the union observer, and left after voting. On the contrary, Gonzalez saw Company President Kipp, Medina, John Green, and others, "just hanging around the door where the people come in to vote." Green testified during the proceeding, and identified himself as a former vice president of the Respondent, and currently president of a company wholly owned by the same parent company which owns the Respondent. Gonzalez testified that he complained about the presence of these individuals to the Board agent, who then caused them to leave the election area. Further, Gonzalez testified the Employer's observer did not make a similar request to the Board agent.

Other evidence on this issue is either contradictory or tends to corroborate Jorge, Mures, and Gonzales. Thus, company observer Hung asserted that she saw Jorge "standing around" after he voted. However, her testimony was vague as to where Jorge was standing, while her pretrial affidavit contradicts her testimony and corroborates Gonzalez' claim of his own complaint to the Board agent about management personnel in the voting area. (U. Exh. 7.)<sup>15</sup> Personnel Director Hall testified twice about the matter, but the essence of her testimony is that she saw Jorge sitting on some boxes "next to the fence" near the line of voters. Contradicting Medina, Hall asserted that the storage racks were not full, and that she could see through them. Carmante testified vaguely that saw Jorge sitting for "a long time" on some boxes "near to the place of the elections," while Santiago Leon gave similarly vague evidence. On the other hand, the testimonies of Wilk and Chung tend to corroborate Jorge.

The parties stipulated that Jorge wore coveralls on the day of the election with the union emblem on the front

<sup>14</sup> The sense of Mures' testimony is partially distorted by a misplaced "A" (answer) on p. 595 at l. 9 of the transcript. The record is hereby corrected so as to delete said "A" and to place it at the beginning of l. 11. Further, the period after the word "persons" in l. 10 is stricken and a question mark is substituted in lieu thereof.

<sup>15</sup> Hung's name appears as "Iliana M. Alvarez" in the affidavit.

and rear. The emblem is circular, and about 4 inches in diameter. Inside are representations of a caliper and a try square, with the letters "A of M" about three-eighths of an inch high. Extending in a circle around the emblem near the border is Petitioner's name in letters about one-quarter inch high. (U. Exh. 9.) Credible evidence establishes that Jorge purchased the coveralls himself, and had worn them for some time prior to the election.

### 3. Anthony Klinakis

John Green, the president of a company related to the Respondent, asserted that he was "in back of production area" of building no. 1, where the election was held, since he has occasion to be "in the plant a dozen times any time during the day." He said that he was in the election area three times during the election process. Green averred that through the rear door of building no. 1 he saw union organizer Klinakis "perhaps two" times in the company parking lot between the two buildings. Employees were voting at this time, according to Green. However, he could not specify the time of day. Green stated that Klinakis was about 15 to 20 feet from the line of voters, and that there was no conversation between them and Klinakis.<sup>16</sup>

Klinakis testified that he and Rick Haro arrived at the plant before the first voting session approximately 15 minutes prior to the scheduled time of a preelection conference. They parked on a street which runs in front of the Respondent's building no. 1 and entered that building. After the conference, Klinakis, Haro, the Employer's attorney,<sup>17</sup> and three company representatives including Kipp and Green went to the voting area, where the Board agent gave instructions to the observers and made other arrangements. According to Klinakis, the union representatives then left through the front of the building, entered their car, and returned to the union office. The distance from the Respondent's plant is about 8 to 10 miles, most of it traveled on an expressway, according to Klinakis. The trip took 12 to 15 minutes.

The union representatives spent less than 30 minutes in their office, and then started back to the Respondent's plant, arriving about 10 minutes prior to the scheduled close of the first voting session, 3:45 p.m. They again parked in front of building no. 1, and waited in the reception area until the polls were officially closed. Together with the company attorney, Klinakis and Haro then went to the balloting area to observe the sealing of the ballot box. Numerous company officials, including Green, were "standing around" according to Klinakis.

Klinakis further testified that after the sealing of the ballot box the union representatives again left from the building, entered their car, and turned left into a side street headed west. The side street passes both buildings so that the Company parking area between them can be observed from the street. Klinakis saw employees who had just been released from the day shift congregating in

<sup>16</sup> The parties stipulated that Green did not submit any evidence to the Regional Director during the investigation of the objections to the election.

<sup>17</sup> Company counsel during the election was an attorney other than counsel of record during the hearing.

the parking lot between the Respondent's two buildings. Klinakis stopped the car on the side street, got out, and talked with the employees for about 20 minutes until shortly after 4 p.m. Klinakis and Haro then proceeded to a corner grocery store about half a mile away, where they had a soft drink and visited with a few employees who had just left work.

As the second voting session was scheduled to begin at 5:30 p.m., the union representatives arrived back at the plant at 5:20 p.m., and again parked in front of the building according to Klinakis. After observing the beginning formalities of the second voting session, they returned to the corner grocery store, then returned to the plant prior to the closing of the session at 6 p.m., and waited in the reception room until the official closing hour.

## II. FACTUAL AND LEGAL ANALYSIS

### A. *The Collateral Issues*

#### 1. The new unfair labor practice charge

On July 13, 1982, the day before the first day of hearing in this matter, the Union filed a charge against the Respondent alleging that it discharged Gonzalez on July 9, 1982, because of his union activities, in violation of Section 8(a)(3) of the Act, and that it interrogated and attempted to influence employees concerning their prospective testimony in the instant proceeding, in violation of Section 8(a)(1) (Case 12-CA-10269, E. Exh. 10). During the first 3 days of hearing, the Respondent protested that the Union was attempting to prove the 8(a)(1) violation before the charge had even been investigated, while the Union responded that it was merely seeking to show that the Respondent's witnesses were untrustworthy. I sustained the Respondent's objection to further questions arguably pertaining to the recently filed charge.

On August 31, during a recess between the third and fourth days of hearing, the Regional Director approved a withdrawal of the charge. (E. Exh. 11.) Nonetheless the parties litigated numerous issues the resolution of which have some bearing on various credibility determinations.

#### 2. The meeting with Kipp in 1980

Ugarte testified as follows: "In February of 1980 we had a meeting with . . . [company president] Lou Kipp . . . and asked him for money to leave the Union." Ugarte later testified that this meeting took place in March, and said that "Kipp did not make a deal with us." Ugarte asserted that Kipp told the employees they could keep their jobs as long as they did not "start up any problems" for the Company.

Gonzalez recalled a meeting with Kipp in 1980, and said it was when the employees were talking about a strike. He denied offering to drop support of the Union in return for money, and denied telling Kipp that he would forget about the Union if Kipp gave him enough money to go back to Puerto Rico and start his own business. Rodriguez corroborated Gonzalez' testimony, denying that there was any discussion of the employees' drop-

ping their support of the Union, or of Gonzalez' demanding "thousands of dollars from Mr. Kipp." He also denied that there was any talk of Gonzalez' returning to Puerto Rico. However, Rodriguez acknowledged there was some discussion of "Victor (Ugarte) running to Chile at that meeting."

The subject of the 1980 meeting with Kipp comes up again in connection with a 1982 meeting, and is evaluated together with other evidence.

### 3. Ugarte's history and relationship with the Respondent

According to Ugarte, he came to the United States from Chile in 1978, and worked for the Respondent. He further asserted that he returned to Chile in April 1980, and came back to the United States in February 1981. However, his signature appears on one of the Employer's exhibits dated May 12, 1980, when he was supposedly in Chile. (E. Exh. 8.) Further according to Ugarte, he started working in California in February 1981 for a company related to the Respondent, and later started working for the Respondent again in Florida.

In August or September 1981, according to Ugarte, the Respondent loaned him \$3000 in connection with immigration problems. In late 1981 or early 1982, he told Company President Lou Kipp and a company attorney about the alleged preelection threats and violence. Personnel Director Hall corroborated this latter assertion, but Ugarte contradicts himself in other testimony, where he contends that he did not relate the events of the election to the Respondent until a later date.

In February or March 1982, Ugarte had to return to Chile because his visa expired. He received a subpoena from the Respondent in connection with the current proceeding, and his air fare and living expenses while in the United States were paid by Company President Kipp.

Ugarte testified that he still owes \$2200 on his loan, and that the Respondent is not pressing him for repayment. He was asked, "So, it's paid back if you can?" and he replied, "Evidently." Personnel Director Hall testified that Ugarte had been paying on his loan, but stopped when he returned to Chile in 1982. Hall said that the company loans money to employees on an interest-free basis, upon a showing of need. Most of these are in the \$200-\$300 range, for tools or medical expenses, although the Company did loan \$4000 on one occasion, and, in connection with a real estate transaction, made a 30-day "bridge loan" of \$20,000 to an employee, according to Hall. There is other evidence of company loans to employees.

Taking Ugarte's and Hall's statements at face value, I conclude that the Respondent has a policy of loaning money to employees on an interest-free basis. It loaned \$3000 to Ugarte in the latter half of 1981, on which a balance of about \$2200 is still due. The Respondent is not pressing Ugarte to pay the balance.

### 4. The warning to Gonzalez

Ugarte testified that in January 1980, i.e., about 2 months after the election, Gonzalez asked him to accompany the latter to the office of Company Official Robin

Baker. Baker told Gonzalez that he was giving him a warning slip. Ugarte agreed that he asked Baker whether this was because of Gonzalez' union activities. He contended that Baker answered in the negative, saying that Gonzalez was "working slowly." Ugarte also testified that he attended another meeting in January 1980, with Gonzalez, Company President Kipp, and numerous other individuals. Ugarte stated that Gonzalez received notice of a suspension. The witness agreed that he asked Kipp whether the company action had anything to do with Gonzalez' union activities. According to Ugarte, Kipp said "No," adding that the plant supervisor considered Gonzalez to be working under his usual capacity. Asked whether Kipp really replied "Maybe, yes" to Ugarte's question, the latter answered, "No, Mr. Kipp was an intelligent person."

Ugarte was then shown a document written in Spanish which he acknowledged was in his handwriting, and was prepared in January 1980. (U. Exh. 1.)

As translated by the official interpreter at the hearing, portions of the document reads as follows:

Victor Ugarte, this employee asked Mr. Robin Baker if this was being done to Operator Gonzalez because of his activities with the Union, and Mr. Baker answered, yes, that it would be stupid to try to deny it. No more questions were asked.

The employee, Victor Ugarte, asked Mr. L. Kipp if this was being done by the company because of the pro-union activities of the employee Gonzalez, at which Mr. Kipp answered, that maybe, yes. Finally the company retired its accusations against me and did not suspend me.<sup>18</sup>

At this point, the cross-examination of Ugarte reads in part as follows:

BY MR. CARILLO:

Q. Is he telling us now that he wrote this, referring to himself, and that what it states there that he did is a lie? [sic]

A. Yes.

Q. And you wrote that knowing that what you were writing was a lie?

A. Yes.

Q. Let me ask you concerning the second meeting [repetition of second paragraph from document quoted above]. So now, it is your testimony that what's written there is not what was said and done?

A. Yes.

Q. So when you wrote this, you knew that what you were writing was a lie?

A. Yes.

In explanation, Ugarte first said that the document was dictated by Gonzalez. He then stated that the four union

<sup>18</sup> An English translation of the entire document is in evidence as G.C. Exh. 2. There are some minor differences between this version and the portions translated in the transcript - "Robin Baker" appears as "Robin Becker," and Kipp's reply of "Maybe, yes" becomes "Perhaps, yes," but the sense of the two translations is consistent. The document is not signed.

protagonists—Gonzalez, Jorge, Rodriguez, and himself—“[took] down notes . . . discussed the matter, and decided and I kept writing and I wrote it down.”

Gonzalez contradicted this version. He said that he had some “little pieces of paper” concerning “discrimination.” He and Ugarte met at Rodriguez’ house, and Gonzalez gave Ugarte his notes. However, the latter was a witness to many of the events, and wrote the document himself. There was insufficient time at the first meeting to complete it, and Ugarte finished writing it in his own apartment. Later, according to Gonzalez, he conferred with Ugarte and the two of them agreed that the information related in the document was correct. With some minor differences, Rodriguez corroborated Gonzalez’ account of the preparation of the document. Ugarte wanted it in order to prove that the Respondent was discriminating against Gonzalez.

Gonzalez also gave a detailed account of the two meetings described in the document. The first meeting took place in the fourth week of November 1979, rather than in January 1980 as related by Ugarte.<sup>19</sup> In response to the management charge of being slow at work, Gonzalez replied that he was being given the wrong materials and the wrong information. When Ugarte asked Baker whether the company action against Gonzalez was caused by his union activities, Baker said “Yes,” and that it would be “very stupid of him to deny it.”

The second meeting took place in January 1980, and Gonzalez was about to be suspended. When Ugarte asked Kipp whether this action was caused by Gonzalez’ and union activities, Kipp replied, “Maybe, yes.” Gonzalez testified: “They didn’t suspend me after that . . . They tore up the paper and told me to go back to work.”

Richard Otrara, an employee of the Company at the time of his testimony, stated that he was present at the second meeting. Ugarte was taking notes and defending Gonzalez. According to Otrara’s version, it was Gonzalez who asked Kipp: “Is it because of the Union why I’m getting the thirty days?” Kipp replied, “‘It could be,’ and he was a little mad and it stopped there. He didn’t say no more.” Rodriguez was also present at this meeting. He did not understand it because it was conducted in English. However, he testified that Gonzalez later explained it to him, in a manner which is consistent with Gonzalez’ testimony.

I credit Gonzalez’ version of these events, except that, in agreement with the English version of the document, I conclude that the first meeting took place in the second rather than the fourth week of November 1979. Gonzalez’ testimony is replete with detail and is inherently more probable than Ugarte’s. Otrara was wrong on the identity of the individual who asked Kipp the question about Gonzalez’ union activities—it was Ugarte rather than Gonzalez—but he corroborates Gonzalez and the document on the crucial issue of Kipp’s answer.

Considering all the testimonial and documentary evidence together, Ugarte’s testimony is improbable. Accordingly, I conclude that he did not tell the truth at the

<sup>19</sup> The English version of the document gives the second week of November 1979.

hearing about Baker’s and Kipp’s answers to his questions concerning Gonzalez’ union activities during their meetings with Gonzalez. It follows that Ugarte’s statement, that the answers attributed to Baker and Kipp in the document that he wrote are not the answers which they gave, is itself false testimony.<sup>20</sup>

#### 5. The employees’ decision not to strike

Gonzalez testified that the Union held meetings with the employees after the election, and after the Employer had refused to bargain with the Union. Union organizer Klinakis told the employees that the Employer was being unfair, and urged them to strike. Gonzalez favored a strike, and attempted to persuade fellow workers to do so. However, Victor Ugarte circulated a notice to the Company, stating that the employees who signed it did not wish to strike. There was no strike. Ugarte testified that he “passed the paper” around to the employees, and that “each one of them in their totality [sic] signed that they did not want to go on strike.”<sup>21</sup>

#### 6. The prehearing meetings of the witnesses—the meetings with Kipp

##### a. Summary of the evidence

Gonzalez, Jorge, Rodriguez, and Ugarte had several meetings about a week before the first day of hearing in this proceeding, July 14, 1982. According to Gonzalez, two meetings took place on July 8, the first one during the middle of the day in Burdine’s, a department store in Hialeah. Ugarte, who had just returned from Chile, said

<sup>20</sup> The Respondent argues in its brief that the fact that the charge involving Gonzalez was withdrawn shows that it was without merit, and that the document Ugarte wrote is incorrect. However, the charge may have been withdrawn because, in response to the Respondent’s objection, I refused to allow the Union to interrogate witnesses on matters which arguably may have pertained to a charge still under investigation by the Regional Director. The investigation may well have been incomplete at the time the hearing resumed on September 7, 1982. In any event, the fact that a charge is withdrawn does not establish that it is without merit.

<sup>21</sup> E. Exh. 8 purports to be a copy of at least a part of the notice, and is dated May 12, 1980. It consists of two pages, the first page containing the notice in English and eight signatures. The second page contains the notice in Spanish, 40 complete signatures, and 2 partial signatures. There are two columns of signatures, that last in each column being no. 21 and 42, respectively. These are the incomplete signatures, the copying machine having failed to reproduce the lower portion of each signature. The exhibit was received conditionally, upon the representation of the Respondent that the original would be produced. The original is not in the record, although the Respondent contends that the original is in other Board records.

The signatures include those of Ugarte, Rodriguez, and Gonzalez. The latter was asked by the Respondent why he signed the petition, if he in fact favored a strike. Gonzalez replied that he had no choice, since he would be the only one favoring a strike. Employer’s counsel on cross-examination then pointed out employees who had not signed. Asked whether he would have been the only one favoring a strike under these circumstances, Gonzalez answered, “Probably not. That, I do not know.” The Employer argues that this shows that Gonzalez was an untrustworthy witness. I do not agree, since Gonzalez was obviously speculating when he gave his reason for signing, and may well have believed that Ugarte would be successful in getting all employees to sign. In fact, Ugarte’s testimony suggests that he did so, while the document itself is inconclusive on this issue for the reasons given. In any event, Gonzalez did not misrepresent a material fact. Rodriguez testified that he signed the notice because Ugarte told him that it would be better to “wait for the court” than to go on strike.

that he had received a subpoena to testify in the instant hearing, that he really did not want to attend, but that his attorney had advised him he was obligated to do so. Gonzalez testified that he had just returned from vacation, and knew nothing about the hearing. Ugarte said that his attorney had told him that the Union had nothing to gain and the Company had everything to win. According to Gonzalez, he asked Ugarte how the Union could lose if the witnesses told the truth, "because the Company had a bunch of lies."

Ugarte wanted to see whether the four witnesses could agree on what they were going to say, "so everything looks all right." According to Gonzalez' testimony, he replied that the only thing they were going to say was the truth. Ugarte asked Rodriguez to admit that he had a gun, and Ugarte was then going to say that he saw a gun, but did not know whether it was plastic or real. The first meeting broke up at this point, since Gonzalez, Rodriguez, and Jorge were on their lunchbreak, which was about to run out. As the employees dispersed, Ugarte told them that he had been "deported" to Chile. Because various individuals in the Union made charges against him with the immigration authorities, according to Gonzalez.

Gonzalez testified that the next meeting took place on the evening of the same day, at Rodriguez' residence. Ugarte again said that they should "get together . . . so everything looks all right." He said that he was working for the Company in the matter, and that the best thing the employees could do was to "collaborate" with the Company, which might guarantee their jobs in return. Ugarte said that he could arrange a meeting with Company President Kipp, and Gonzalez replied that he had nothing to discuss with Kipp. Gonzalez gave the same answer when Ugarte suggested a meeting with the Company's attorney. There was some discussion of possible discrimination against other employees, and Ugarte again suggested a meeting with Kipp. Gonzalez said that he would think about it.

While at work the next day, according to Gonzalez, he received a telephone call from Ugarte. The latter said that he had called Kipp, who wanted to meet with the employees. Gonzalez replied that he had to consult with his two fellow workers, and later called back to tell Ugarte that Rodriguez was busy "at twelve o'clock," and could not make the meeting. A few minutes later, Kipp approached Gonzalez at his work station, spoke about a meeting, and told Gonzalez not to worry about "punching out." "I will fix your timecards," Kipp said. He suggested a Holiday Inn as the meeting place, but Gonzalez protested that this was inappropriate because he was in dirty work clothes. Kipp then suggested a company apartment in Miami Lakes. Jorge and Rodriguez agreed, and the employees drove to the address which Kipp had given to Gonzalez.

According to Gonzalez, during the meeting in the Miami Lakes apartment, Kipp said that a hearing was scheduled on July 14 between the Union and the Company, and that Ugarte was "working with" the Company in the matter. Gonzalez replied, "You don't have to say that," and added that he would not be testifying against any of his coworkers since he would only be telling the

truth. There was some talk of possible discrimination against other employees, and then Gonzalez asked Ugarte the nature of his role in the conversation, since he was no longer a company employee. According to Gonzalez, Ugarte replied that he wanted a clean record, wanted to stay in the country and bring his family to the country, and that the Company had promised to help him with "jobs and other matters." Gonzalez testified that he also asked Kipp about Ugarte and received a similar answer about assistance to the latter.

Ugarte suggested that the employees ask Kipp "for some type of paper guaranteeing [their] jobs" if they helped the Company, according to Gonzalez' testimony. Kipp said that he could give the employees something like that, but that he had to talk to his attorney "because he didn't want to leave himself open."

No agreement was reached, but the employees were supposed to meet again at one of their houses. Gonzalez did not attend any additional meetings because he said he was "fed up" Gonzalez was fired a short time later, and the charge in Case 12-CA-10269 was filed thereafter, on July 13, the day before the first day of hearing in this matter.

Gonzalez testified on September 7, subsequent to the withdrawal of the charge on August 31. Luis Jorge testified on July 16, prior to withdrawal of the charge. Union counsel asked him whether he had had any contacts with Ugarte within the preceding 2 weeks, and Jorge replied that they met at a shopping center. As noted above, the Respondent objected to any further questions concerning the recently filed charge, and I sustained this objection.

Francisco Rodriguez, like Gonzalez, testified after the withdrawal of the charge. He was not asked any questions on direct examination about the various meetings just prior to the instant hearing. However, on cross-examination by the Respondent, he was asked about the meeting he had "with Mr. Kipp at the Miami Lakes apartment, just prior to this hearing." Rodriguez acknowledged that he protested discrimination against other employees including his daughter at this meeting, and there is a confusing colloquy between Rodriguez and the Respondent's counsel as to whether he was "upset," "unhappy," or "mad" at the Company about these events. Rodriguez attempted to testify further about the Miami Lakes meeting, but was prevented from doing so by the Respondent's counsel.

On further cross-examination, Rodriguez was asked whether he and Jorge had a meeting with Kipp and other officials at the Company subsequent to the Miami Lakes apartment meeting. Rodriguez then described another meeting, with Kipp, Hall, and Vigil. Rodriguez protested the recent discharge of Gonzalez. He testified that Kipp replied that "he wasn't doing that for the Union," but that Gonzalez "had made trouble for the Company." Rodriguez acknowledged that Kipp did not tell him what to say at the instant hearing.

Victor Ugarte on cross-examination testified that he called Rodriguez after his return from Chile, and said that he wanted a meeting with him, Gonzalez, and Jorge. Ugarte said that the first meeting took place at Rodriguez' house. He acknowledged that he first met with the

employees at Burdine's, but said that "it was not a meeting." In explanation, Ugarte testified that he called Rodriguez at work to ask for the meeting, "and they wanted to know what I wanted a meeting with them for [sic]. Then we got together at Burdine's from where I was calling them, and I told them I wanted to meet all of them in one of their homes and there I would explain to them what I wanted to speak to them about, and they agreed."

Ugarte denied telling the employees at Burdine's, or later, that he wanted to talk about their testimony so that they would all say the same thing. In fact, he denied saying anything to them at Burdine's about the subject which he wished to discuss. He said that he wanted to meet with them in one of their homes, and it was there that he would explain the subject of the discussion.

The meeting took place that evening at Rodriguez' house. Ugarte asserted that he told the three employees that he had a subpoena to appear and testify, that he was going to tell the truth, and that this might hurt Rodriguez and Jorge. He contended that he told the others that they knew they tried to get money from Kipp in March 1980 to abandon the Union.

Ugarte first denied telling the others that he could arrange a meeting with Kipp. He acknowledged that job guarantees from Kipp were discussed, but denied that he initiated the subject. Rather, he contended it was Rodriguez who asked for them and for a meeting with Kipp. Contrary to his original testimony, Ugarte stated that he replied to Rodriguez that he believed a meeting with Kipp was possible. Ugarte testified that he called Kipp and said that the four of them wanted to meet with the company president, and this was the way the Miami Lakes meeting was arranged. Ugarte denied having a conversation with Kipp prior to the meeting in Rodriguez' house.

According to Ugarte, Rodriguez and Jorge were "repentant" at the Miami Lakes meeting because they had "asked for money to leave the Union." They realized that the Company did not want to have anything to do with the Union, and were willing to tell the truth in return for a written certificate that protected their jobs. Kipp replied that he could not promise anything, since the Company could burn down or go broke, and he only asked them to tell the truth.

Ugarte denied that Kipp said he would try to arrange something about a written job guarantee with his lawyer, but would have to make sure that he did not leave himself "open." The witness admitted that the subject of bringing his family to the United States came up, but contended that it was Gonzalez who raised this subject. Ugarte affirmed that Kipp told him that he would help Ugarte if he could, but never said he was going to get him a job.

#### b. *Factual analysis*

Ugarte's testimony is a mixture of improbabilities, contradictions, and historical fiction. Starting with the meeting at Burdine's, which Ugarte claims was not a meeting, it is improbable that Gonzalez, Jorge, and Rodriguez would have traveled from the Respondent's plant to a shopping mall during their lunch hour to meet with

Ugarte, only to receive from him a statement that he wanted to meet with them later about a subject which he would not reveal at that time. This message could have been conveyed more easily on the phone from Ugarte to one of the other employees while at work. Ugarte in fact admitted that Rodriguez, during the telephone conversation, asked him the subject of the meeting.

I credit Gonzalez' account of the meeting at Burdine's, and find that on July 8, 1982, Ugarte told his former fellow employees that he wanted to see whether they could agree on what to say at the forthcoming hearing in this matter, so that "everything looks all right." He also asked Rodriguez to admit that the latter had a gun, while Ugarte said that he was going to testify that he did not know whether it was plastic.

Ugarte's testimony about the meeting that night at Rodriguez' house is equally contradictory. He first denied saying that he could arrange a meeting with Kipp, and then admittedly arranged such a meeting the following day. His testimony that it was Rodriguez who asked for this meeting is unbelievable. Although Rodriguez did request the *second* meeting with Kipp and other officials, this was to protest the firing of Gonzalez. The discharge had not taken place at the time the employees were meeting on the evening of July 8, and it was Ugarte who initiated *this* meeting. In accordance with Gonzalez' testimony, I find that Ugarte again said that they should "get together so everything looks all right," and that they should "collaborate" with the Company, which might guarantee their jobs in return.

Ugarte's account of the reason he allegedly gave the employees on the evening of July 8, 1982, for "collaborating" with Kipp, is a work of creative imagination. He asserted that the employees tried to get money from Kipp in 1980 (giving both February and March as the date of the meeting), in return for abandonment of the Union, but that Kipp "failed to make a deal." This was apparently what Ugarte meant by the "truth" which would "hurt" the other employees. However, any such prior attempt to obtain money on the part of Gonzalez, Rodriguez, and Jorge is highly improbable. They were then in the full flush of a recent election victory, and were beginning to talk about a strike because of the Respondent's refusal to bargain with the Union. Gonzalez had just won a personal victory against the Company in January. Threatened with suspension because of "slow work," he had compelled the Company to abandon these plans, in part because of damaging admissions by Baker and Kipp that the threatened discipline was related to his union activities. Ugarte, in fact, had been instrumental in getting these admissions—in *January 1980*.

However, a short time later Ugarte changed sides, and was circulating an antistrike notice for signature by employees. The record does not disclose all the reasons for Ugarte's change in sympathies, although they apparently involved trouble with immigration authorities and a return to Chile. In any event, Ugarte was soon in debt to the Respondent because of his personal problems. It is not unlikely, therefore, that in the February or March meeting with Kipp, Ugarte's possible return to Chile was discussed, as Rodriguez testified. However, there is no

evidence to indicate similar reasons for Gonzalez, Rodriguez, or Jorge changing sides.

There is a missing witness to this 1980 meeting—Company President Lou Kipp, who did not testify. The Respondent's failure to call him as a witness casts doubt on the veracity of Ugarte's version of the meeting.<sup>22</sup> I credit the testimonies of Gonzalez and Rodriguez concerning this meeting with Kipp. Therefore, Ugarte's reason for "collaborating" with Kipp, allegedly given to the other employees at Rodriguez' home on the evening of July 8, 1982, is without any factual foundation. I conclude that Ugarte never gave any such reason to them.

Ugarte's description of the Miami Lakes meeting is, if possible, even more incredible. Rodriguez and Jorge were "repentant" at having tried to get money from Kipp in return for abandoning the Union—which in fact they never did—but were now ready to do penance by accepting job guarantees in return for abandoning the Union. According to Ugarte, it was these employees rather than Ugarte who asked Kipp for the guarantees—despite the fact that it was Ugarte, admittedly working on behalf of the Company, who initiated the meetings. Ugarte's testimony that it was Gonzalez who raised the subject of bringing Ugarte's family to the United States—rather than Ugarte himself—is improbable. Once again, the Respondent failed to call Lou Kipp as a witness, an omission which casts doubt on Ugarte's version of the Miami Lakes meeting, as well as the meeting in 1980.<sup>23</sup>

I credit Gonzalez' account of the Miami Lakes meeting with Company president Kipp about July 9, 1982. Kipp said that a hearing had been scheduled for July 14. Gonzalez asked Ugarte and Kipp what Ugarte's role was in the matter, and Kipp replied that Ugarte was working with the Company. Ugarte and Kipp said that the Company had promised to help Ugarte with jobs and other matters, and Ugarte said that he wanted to stay in the country and bring his family to the United States from Chile. Ugarte suggested a written guarantee of jobs for the employees, obviously in return for their giving testimony favorable to the Company in the forthcoming hearing. Kipp replied that he could give the employees something like that, but would have to talk to his attorney to make certain that he did not leave himself "open." No agreement was reached at the Miami Lakes meeting.

Gonzalez did not attend any further meetings, and was soon discharged. Rodriguez and Jorge later had a meeting with Kipp and other company officers, at which time Rodriguez protested the firing of Gonzalez. Kipp appeared to deny that Gonzalez' discharge was related to his union activities, but said that he had "made trouble" for the Company. Kipp did not at this meeting attempt to tell Rodriguez how to testify in the forthcoming hearing.

<sup>22</sup> See authorities cited in *Pur O Sil, Inc.*, 211 NLRB 333, 337 fns. 3 and 4 (1974).

<sup>23</sup> *Ibid.*

## 7. Conclusions concerning the collateral issues

The foregoing determinations warrant an inference that Ugarte was an unreliable witness. Further, Kipp's appearance at the Miami Lakes meeting, his acknowledgment that he would help Ugarte with jobs and other matters, and his suggestion that he might give job guarantees to the employees in return for favorable testimony, provided that he did not leave himself "open," are indications of a proclivity on the part of the Respondent to attempt to influence the testimony of witnesses in this proceeding. This proclivity must be considered in making credibility resolutions on the substantive issues.

### B. *The Substantive Issues*

#### 1. The union campaign

I credit the testimony of Klinakis, corroborated by Mures, that he instructed union sympathizers not to threaten other employees. Although Ugarte testified that the four principal sympathizers decided on their own to "pressure" certain employees when it appeared that the result of the election was going to be close, I reject that testimony, and accept Gonzalez' averments that the four employees were confident of victory. I also accept his testimony, and that of Jorge and Rodriguez, that they agreed to persuade other employees to vote for the Union with reasoned arguments, rather than with threats.

#### 2. Juan Contreras

Contreras and Ugarte contradict each other as to the time that Rodriguez allegedly showed Contreras a gun, Contreras placing it between 9 and 11 a.m., while Ugarte claimed that it took place during the lunch hour about 12:30 or 12:40 p.m. Contreras said that he was looking for Kipp during the lunch hour.

The Respondent in its brief argues that this inconsistency is "clearly explainable" by the lapse of 3 years between the time of the incident and the time of the testimony. This argument begs the question, which is whether the incident ever happened in the first place. As shown above, Ugarte was an unreliable witness, and his corroboration adds little or no probative weight to Contreras' testimony for this reason alone, in addition to its inconsistency. Moreover, Hall's affidavit places the alleged incident at still another time—a day or two before the day Contreras allegedly reported it.

The alleged reporting is equally vague. Vigil could not remember whether it took place in the morning or the afternoon, while, as noted, Hall's pretrial statement suggests that the threat took place 1 or 2 days before Contreras reported it.

The place as well as the time of the alleged threat is uncertain, as Vigil's testimony and pretrial statement contradict each other on this point. The Employer tries to explain this inconsistency by pointing to Vigil's and Hall's testimonies that the terms "production building" or "facilities," and "machine shop," are used interchangeably. This confuses the issue of whether the alleged incident took place in the assembly department or the welding department. Vigil in his initial testimony and Rodriguez testified that these are separate departments.

Contreras was an assembler, and Rodriguez was a welder. Vigil testified that Contreras reported that Rodriguez came over to the assembly department, while his affidavit affirms that it was Contreras who was called over to the "machine shop" by Rodriguez. To add to the confusion, Contreras said that the alleged incident took place in the assembly department, and that Rodriguez was working at the time. How could this be, since Rodriguez worked in the welding department? I conclude that the contradiction in the Employer's evidence as to the place of the alleged gun incident remains unresolved.

The Employer's evidence is also contradictory on the effect of the alleged threat upon Contreras. Asked whether he thought his life had been threatened, Contreras merely replied that he did not like the way Rodriguez had "proceeded," whereas Hall and Vigil said that he was "afraid" or "visibly upset." Hall's testimony and pretrial statement also contradict each other on whether Contreras voiced concern merely for himself, or also for his family.

The Employer argues that Contreras was in fear because he refused to cooperate with the Regional Director's investigation in 1979, and was a reluctant witness at the hearing. "The only answer can be that it was fear, pure and simple," the Employer argues, implying that it was fear of Rodriguez or other prounion employees. This reasoning assumes that what Contreras said about Rodriguez was truthful, and again begs the question. If what Contreras said under oath was untruthful, then he may well have been fearful of committing perjury, and therefore reluctant to testify for this reason. Given the Employer's established propensity to attempt to influence testimony in this proceeding, it is at least equally plausible that Contreras was a hesitant witness because the Employer was attempting to influence him to testify to something that was not so.

Other implausibilities in the Employer's evidence are Contreras' delay in allegedly reporting the event, and the Company's failure to call the police. Supposedly threatened with a gun, Contreras was willing to report the matter only to a "person of the highest rank," instead of to the first supervisor he could find. Hall's explanation that the police were not called because of the imminence of the election and the advice of counsel is equally unlikely. If Contreras had indeed made such a report, the Employer's inaction would have permitted an asserted threat of violence to go unchallenged prior to an election. Carmanate's reason for the fact that Contreras did not call him until the evening—Contreras had tried to reach him in the afternoon—is strangely silent on the Employer's contention that Contreras had reported it in the afternoon, to other supervisors. Carmanate, Contreras' supervisor, was not informed. Although Kipp allegedly conducted an investigation.

The fact that Ugarte asked Rodriguez in July 1982 to admit that he had a gun just before the election in October 1979, while Ugarte was going to testify that he did not know whether it was plastic, strongly suggests that the evidence on this issue has been staged by the Employer. Even more convincing is Kipp's failure to accuse Rodriguez of threatening Contreras with a gun when the

Company disciplined Rodriguez the day after the election, November 2, 1979.

On this issue, the Employer attacks Rodriguez, credibility based on an alleged contradiction in his testimony—he supposedly admitted that Kipp told him the reason he was being reprimanded, but denied that Kipp said anything about a gun. The Employer's first statement is a distortion of Rodriguez' testimony, which was given through an interpreter. Rodriguez' actual testimony is that Kipp accused him of threatening people, but gave no specifics, and that Rodriguez denied it. The Company also accuses Rodriguez of implausibility when he testified that he was not "mad" or "unhappy" about the fact that the Employer fired his daughter. This is another problem in linguistics. In the meetings with Kipp in July 1982, Rodriguez protested the Company's failure to follow seniority in discharging employees who were prounion, including his daughter. Instead of saying that he was "unhappy," he described the Company's conduct as "not well done."

These quibbles are insignificant compared to the fact that the Employer did not produce Kipp as a witness to testify about the November 2, 1979, meeting with Rodriguez or any of the other supervisors who were present at that meeting. I infer from this omission that their testimony would have been adverse to the Employer.<sup>24</sup> Finally, the written reprimand itself does not accuse Rodriguez of threatening Contreras with a gun. These factors establish beyond any reasonable doubt that Kipp did not make this accusation on November 2, 1979, and I so find. Further, the Employer made no specific allegation about a gun incident in its objections filed 6 days later, on November 8, 1979.<sup>25</sup>

It is completely incredible that Kipp would have failed to make this charge if Contreras in fact had reported the alleged incident. Indeed, Personnel Director Hall said that the offense was grounds for "immediate dismissal"—yet Kipp did not mention it to Rodriguez, limited the reprimand to the vague one of "personal threats," and said nothing about a gun incident in his objections to the election.

I find that Contreras did not, in fact, report that Rodriguez had threatened him with a gun, and that no such incident ever took place. The allegation is an afterthought, and all the evidence in support of it is contrived.

The Employer's other evidence concerning Contreras is not even supported by Contreras. Whereas Ugarte asserted that Jorge also threatened Contreras, the latter denied that anybody except Rodriguez did so. The Employer's final absurdity concerning Contreras is its insistence that Jorge punched Contreras and gave him a black eye, based on the dubious testimony and speculations of Medina, whereas both Jorge and Contreras agree that it was an accident. The Employer's brief finally concedes this point, but then argues that there was a rumor that Jorge had deliberately given Contreras a black eye, and

<sup>24</sup> *Supra*, fn. 22.

<sup>25</sup> *Supra*, fn. 3.

that this rumor, with others, was sufficient to make a fair election impossible.

Since Contreras and Jorge differ as to the time of the accidental blackeye, I find that the Employer has not sustained its burden of establishing that it took place prior to the election.

### 3. Alleged threats to Arsenio Freyre

The Employer's evidence again is contradictory. Although Ugarte testified about a "violent argument" with Freyre, and a threat that the latter had "best not come to work on the day of the election," he was contradicted by Freyre himself, who denied any threats, and explicitly described the reasoned nature of Ugarte's attempts to persuade him to support the Union. Although Freyre asserted that one of his tires had been deflated, the admitted fact that it took place after the election means that it could have had no impact upon the voting.

Freyre then strayed into ambiguity, with statements that neither Rodriguez, Jorge, nor Gonzalez threatened him "seriously," that he was "close" with Rodriguez, joked a lot, and that a "little bit stays." This is insufficient evidence to warrant a finding of a threat. Freyre's testimony became increasingly confusing the longer he testified, and I do not credit his assertions about rumors he would be attacked, or that he was fearful he would be "beaten up" after the election if he made any comments. Any such fears after the election, of course, could not have affected his prior vote.

The Employer argues in its brief that Freyre did affirm at the hearing that he made the statement to Vigil which is attributed to him in the latter's affidavit. This argument is a distortion of the record, which shows that Freyre could not remember what he said to Vigil, if anything. Although Vigil was a witness, he was not asked any questions about Freyre. I conclude that Freyre in fact was not threatened.

### 4. Alleged threats to Guillermo Alemany

All of the evidence on this issue is hearsay. Although Vigil's affidavit relates threats to Alemany, and although Vigil appeared and testified, the Employer chose not to ask Vigil any questions about the subject. Alemany himself did not testify, and his affidavit contains a denial of the allegation. I conclude that the Employer has not sustained its burden on this issue.

### 5. Alleged threats to Santiago Leon's car

I cannot credit Leon's testimony that one of his tires was slashed a few days before the election because in his pretrial statement he denies that anything ever happened to his car. Moreover, I do not credit his assertions that Jorge threatened damage to his car and that he took the threat "seriously," because (1) Leon affirms in his pretrial statement that he thought it was a "joke," and (2) Jorge denies the allegation. The Employer argues that Leon's pretrial statement is not contradictory because immediately after saying that he did *not* take Jorge seriously, Leon asserts he did not know whether he should do so. This is flimsy evidence and establishes no more

than a possibility that Jorge may have made a joking reference to Leon's car.

### 6. Alleged property damage sustained by Wilk and Cincentes

All that Wilk reported was a spike in the tire of his car before the election, without any knowledge of the source. I credit Jorge's denial that he did this. Further, considering Wilk's physical attributes, I consider it unlikely that the union sympathizers would have done anything to his property even if they were of a mind to do so. I place no credence in Ugarte's assertions that Jorge admitted letting the air out of Cincentes' tires—denied by Jorge.

### 7. Rumors of threats

The melange of evidence on rumors presents a problem in factual analysis.

The Respondent argues that Petitioner's witnesses should not be credited because they were "pro-union," and thus not the "logical targets of the threats." This argument has no merit. Jorge and Gonzalez were not "the logical targets of threats"—indeed, they were among those who allegedly did the threatening—yet they acknowledged hearing rumors. Wilk denied having been threatened, and because of his size was not a "logical target" of a threat, but asserted that he heard rumors. A rumor has been defined as "a story or statement in general circulation without confirmation or certainty as to the facts," or as "unconfirmed gossip."<sup>26</sup> As such, it is likely to be heard by people who are not themselves the subject of the gossip.

I conclude that there were some rumors of threats, but that they were not widespread, because so many of the witnesses denied hearing them. The real factual issue is the time that they first appeared. In this connection, I consider Almeida's testimony to be significant—he heard a rumor that Rodriguez had shown Contreras a gun, but first heard it after the election. This timing is corroborated, somewhat inadvertently, by Personnel Director Hall's testimony that her earliest personal knowledge of threats dated back to 1981, i.e., after the election. The most important of the alleged rumors was that Rodriguez had threatened Contreras with a gun. This, in fact, did not take place, and Kipp did not mention it on November 2, when he reprimanded Rodriguez. The Employer's objections to the election, filed on November 8, do not allege it. It is therefore unlikely that any such rumor circulated prior to November 1, the date of the election. Also, as noted above, the Employer has failed to establish that Contreras' accidental black eye took place before the election.

Although Freyre alleged a deflated tire, he admitted that it took place after the election. Leon's pretrial statement shows that there was no damage at all to his car. The remainder of the evidence on the date the rumors first appeared is a potpourri, except for Medina and Wilk, who place the beginning of the rumors prior to the

<sup>26</sup> *American College Dictionary*, p. 1062 (Random House, Inc., New York, N.Y., 1969).

election. I do not credit their statements because Medina gave exaggerated testimony in general and admitted that he favored the Company, because Wilk also admitted his sympathies for the Employer, and because their testimonies on this issue are in conflict with the preponderance of the credible evidence.

I note that the Regional Director's investigation of the Employer's objections to the election took place during the period immediately following the election, that employees were being interviewed by a Board agent, and, perhaps, by the Employer. I need not decide this latter point, however. I find that various rumors of threats circulated among employees for the first time after November 1, 1979, the date of the election.

#### 8. The election

##### a. *Luis Jorge and Ildefonso Gonzalez*

Idalberto Mures had the demeanor of a truthful witness. Since her testimony about the election area was contrary to that presented by the Employer's witnesses, Medina in particular, and since she was an employee of the Company, her statements are "apt to be particularly reliable." *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979). I accept her uncontradicted testimony that she and other employees were ordered to clean the election area just before the election, and her denial, corroborated by Jorge, that there were any boxes near the election table. It follows that there were no boxes near the table on which Jorge could have been seated, and I reject Medina's assertions that Jorge sat down on any such boxes. Instead, as Jorge testified, he sat down on some boxes near the storeroom fence, adjacent to the line of voters, and tied his shoes. This testimony is corroborated by Mures and Personnel Director Hall.

Mures and Gonzalez partially corroborate, and I credit, Jorge's testimony that he followed the flow of voters to the election table, did not speak to any of the voters or to Gonzalez except to give his name, cast his ballot in the normal manner, and left the building without returning. I reject Medina's contrary testimony, since he was an unreliable witness, whereas the rest of the testimony is vague and inconclusive.

I also credit Jorge's testimony that he stood on the ramp outside the door to the polling area for 5 to 10 minutes waiting for a friend. The voters passed by him into the building, but he did not speak to them. Jorge at this time was wearing the union emblem, described above, on the front and back of his coveralls. Although the emblem would probably have been recognized by a voter already familiar with it, it would have been difficult for an individual moving in the line of voters to read the "A of M" lettering which was printed horizontally on the emblem, and impossible to read, without close examination, Petitioner's name which appeared in a circle. As stipulated by the parties, Gonzalez wore a union button saying "Vote Yes for I.A.M." The Board agent did not ask him to remove it.

Further, I credit Gonzalez' testimony, corroborated by Mures, that he complained to the Board agent about the presence of representatives of the Employer in the elec-

tion area, that the agent caused them to leave, and that no similar complaint was made by the Employer's observer concerning Petitioner's agents.

##### b. *Anthony Klinakis*

The first voting session was 1 hour in duration, from 2:45 to 3:45 p.m. the Respondent argues that Klinakis' account of what he did during the first session is "incredible." Thus, according to the Respondent's brief, it is "inherently implausible that he made up to a 40-mile round trip in a total time of 50 minutes or less, merely to visit his office for an unspecified reason." The Respondent's arithmetic is faulty—since the one-way distance was 8 to 10 miles according to Klinakis, the round-trip distance was 16 to 20 miles. It is not implausible that a trip of this distance, most of it on an expressway in midafternoon in a metropolitan area, could be made in the approximately 50 minutes which Klinakis gave as the elapsed time. A sufficient reason for the trip may merely have been to be out of the area when the employees were voting.

I, therefore, credit Klinakis' testimony that he returned and parked in front of the building about 10 minutes before the end of the first voting session, waited, and then attended the sealing of the ballot box. After these formalities, the Union agents left the building, started to drive away, and then stopped to talk to employees just leaving the day shift in the parking lot between the Respondent's two buildings. This lasted until shortly after 4 p.m., and Klinakis then went to a corner grocery store. As noted above, the second session was not scheduled to start until an hour or more later, at 5:30 p.m. The union agents again returned about 10 minutes before the voting began, and then went back to the grocery store.

I do not credit Green's assertions that he saw Klinakis in the parking lot at times when employees were voting. Klinakis' testimony was much more detailed than Green's, while the latter was unable to state the time of day that he saw Klinakis. Moreover, the Employer made no complaint about Klinakis to the Board agent during the voting, and did not submit a statement from Green to the Regional Director during the latter's investigation of the objections. Finally, Klinakis impressed me as a more truthful witness than Green.

#### 9. Legal conclusions

As the court has recently stated, the issue in proceedings of this nature is whether the events considered cumulatively tended to interfere with the outcome of the election. Actions attributable to the Union are more significant, while employee actions not so attributable are entitled to less weight and may not be used by themselves to set aside an election. However, they will warrant such action "if [they] disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election." *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364 (5th Cir. 1980), reversing 237 NLRB 1393 (1978). It is well established that the Employer has the burden of going forward with the evidence, and the ultimate burden of proof. *NLRB v. Emerson Electric Co.*, 649 F.2d 589 (8th Cir. 1981), enf. 247 NLRB 1365 (1980).

The evidence in this case does not establish specific acts which would warrant setting the election aside even if they were attributable to the Union, nor does it establish, under the other test mentioned by the reviewing court, a disruption of the voting procedure or a destruction of the atmosphere necessary to a free choice by the voters. The most that may be made out by the evidence of preelection events is that Jorge may have made joking references about damage to Leon's car, that Gonzalez may possibly have joked with Freyre in a manner which the latter considered to be vaguely threatening, and that Wilk may have found a spike in his tire without knowing the source. I have not made specific findings that any of these events happened because of the basic unreliability of the witnesses. However, even if these acts took place, it is well established that isolated, innocuous, and joking remarks, not shown to have caused a change in an employee's vote,<sup>27</sup> are insufficient to warrant setting aside an election.<sup>28</sup> It is also established that property damage not linked to the Union does not affect the results of the election.<sup>29</sup> As the Court of Appeals for the Eighth Circuit has stated:

A showing of misconduct prior to an election, without more, is insufficient to deny enforcement of the Board's order. Interference with the employees' exercise of a free choice must be present in the record to such an extent that an inference can be drawn that the conduct materially affected the election results.<sup>30</sup>

No such inference can be drawn from the record in this case.

Nor does the record warrant a finding of improper electioneering by Jorge, Klinakis, or Gonzalez. Jorge did not "loiter" in the election area, as charged in the Employer's objections. He stood in line to vote, sat down on some nearby boxes to tie his shoes, moved with the line of voters, voted, and left the election area without speaking to anyone except to give his name to the election officials. As was his custom, he wore a union emblem, described above. When outside on the ramp, he waited for 5 to 10 minutes for a friend, but there is no evidence that he spoke to any of the voters moving past him in the line. As Mures credibly testified, the "inspector" had directed voters not to speak to anybody.

The Respondent argues that these facts establish improper electioneering under the standards set forth in the reviewing court's decision in *NLRB v. Readi-Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981), reversing 247 NLRB 890 (1980). The court described the facts in that case as follows:

The undisputed evidence revealed that before the polls opened, two former Carroll employees wear-

ing "Vote Teamsters" signs on their hats and enlarged reproductions of the ballot with an "X" marked in the "Yes" box pinned on their shirts, positioned themselves in the parking lot where the line of waiting voters formed. This line was approximately 25 feet from the polls. At one time there were as many as 45 employees waiting to vote. As the line of voters passed them by, both men urged the employees to vote for the union and repeatedly gestured to the "Yes" box on the ballot pinned to their shirt. These activities continued throughout the polling hours. [636 F.2d at 212.]

The court concluded that this constituted improper electioneering under the Board's rule in *Michem, Inc.*,<sup>31</sup> 170 NLRB 362 (1968). In that case the Board set aside an election where a union official had stood for several minutes near a line of voters, and had engaged them in conversation. The Board noted the "potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party . . . and voters waiting to cast ballots. . . . The final minutes before an employee casts his vote should be his own, as free from interference as possible."

The Board, therefore, announced a "blanket prohibition" against such conversations as a "preventive device to enforce the ban against electioneering in polling places." The Board continued:

We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area [awaiting] to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles." [170 NLRB at 363.]

Jorge's conduct in this case is not similar to that of the two former employees in *Carroll*. He did not speak to the voters, much less urge them to vote for the Union. There was no conversation with voters, and *Michem* is, therefore, inapplicable, as the reviewing court held in another case where there was a brief confrontation between a prounion employee and a company observer. The court noted that "the comments were not 'prolonged,' or even a 'conversation.'" *NLRB v. Klingler Electric Corp.*, 656 F.2d 76 (5th Cir. 1981), enfg. 245 NLRB 1247 (1979). Three other circuit courts of appeals

<sup>27</sup> *NLRB v. S. Prawer & Co.*, 584 F.2d 1099, (1st Cir. 1978), enfg. 232 NLRB 495 (1977); *Fidelity Telephone Co. v. NLRB*, 574 F.2d 409 (8th Cir. 1978), enfg. 232 NLRB 839 (1977).

<sup>28</sup> *NLRB v. USM Corp.*, 517 F.2d 971 (6th Cir. 1975), enfg. 209 NLRB 956 (1974).

<sup>29</sup> *Worley Mills, Inc. v. NLRB*, 685 F.2d 362 (10th Cir. 1982), enfg. 252 NLRB 756 (1980); *The Seville*, 262 NLRB 1282 fn. 2 (1982).

<sup>30</sup> *Worley Mills, Inc. v. NLRB*, *ibid.*, 685 F.2d 362 (10th Cir. 1982).

<sup>31</sup> The spelling appears as "Milchem" in the court's decision. The spelling given above is contained in the caption of the case as reported in Vol. 170 of the Board's Decisions at 362. In subsequent decisions, the Board has misspelled it as "Milchem." See, e.g., *Star Expansion Industries*, 170 NLRB 364 fn. 6 (1968), which issued on the same day as "Michem," and is the next decision printed in Vol. 170. Other cases have repeated the error.

have made similar rulings in cases involving chance, isolated, or innocuous comments.<sup>32</sup>

Unlike the former employees in *Carroll*, Jorge did not wear a reproduction of the ballot on his clothing, with an "X" in the "Yes" box. He merely wore his customary clothing, which had a union emblem on the front and back. A contention that another election should have been set aside because a union observer wore a union logo was labeled "frivolous" by the Court of Appeals for the Ninth Circuit. *NLRB v. San Jose Care Center*, 652 F.2d 195 (9th Cir. 1981), denying enf. on other grounds 248 NLRB 1201 (1980). A similar conclusion is warranted herein with respect to Jorge's emblem.

The reviewing court instructed the Board to consider Jorge's electioneering conduct cumulatively together with the evidence pertaining to threats and violence. I have done so, and conclude that, so considered, the evidence with respect to Jorge's conduct does not warrant setting the election aside.

Gonzalez, the union observer, had a different kind of union badge, saying "Vote Yes—for IAM." The reviewing court, citing one of its own prior decisions, stated that such conduct, "considered in isolation, will not ordinarily be sufficient to invalidate an election."<sup>33</sup> However, it advised the Board that Gonzalez' wearing of the badge should be considered together with "Jorge's electioneering conduct at the hearing." As there was no such conduct, I conclude that the presence of the badge on Gonzalez' clothing is insufficient to warrant voiding the election. The court also concluded that there was an issue as to whether the Union condoned Jorge's "electioneering conduct." This issue also disappears upon the development of the facts.<sup>34</sup>

<sup>32</sup> *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), reversing on other grounds 250 NLRB 1388 (1980); *NLRB v. USM Corp.*, supra fn. 28, *NLRB v. Vista Hill Foundation*, 639 F.2d 479, (9th Cir. 1980), enf. 239 NLRB 667 (1978). See also *NLRB v. Locust Industries*, 542 F.2d 1169 (4th Cir. 1976), enf. 221 NLRB 604 (1975).

<sup>33</sup> *EDS-IDAB, INC. v. NLRB*, supra fn. 6. The Board has reached a similar result in other cases, *Colfor, Inc.*, 243 NLRB 465 (1979), in one instance with judicial approval. *Nestle Co.*, 248 NLRB 732, 742 (1980), enf. 659 F.2d 552 (D.C. Cir. 1981).

<sup>34</sup> I have not found it necessary to determine whether Gonzalez, Jorge, Rodriguez, or Ugarte were agents of the Union because they did not engage in conduct which would require voiding the election under any standard. However, in the event that reviewing authority reaches a contrary conclusion, it seems clear that these employees were not agents of the Union, and that any conduct in which they may have engaged is not attributable to the Union. The record clearly shows that none of the alleged conduct—or the actual conduct, such as Gonzalez' wearing of the badge—was ordered or authorized by Klinakis.

Although Klinakis agreed that he utilized these four employees as an inplant organizing committee, there is no credible evidence that the other employees considered them to be agents of the Union. When Santiago Leon was asked whether he was "aware of an inplant organizing committee organizing for the Union," he did not understand the question, and could only understand it when he was asked whether some employees were trying to get others to vote for the Union. The four employees were simply union sympathizers, and the Union was not responsible for their actions. *Tennessee Plastics, Inc.*, 215 NLRB 315 (1974), enf. 525 F.2d 670 (6th Cir. 1975).

Even viewing the employees as an inplant organizing committee, it is well established that employee members of such committees are not, "simply by virtue of such membership, agents of their union for the purpose of making threats or statements." *Cambridge Wire Cloth Co., Inc.*, 256 NLRB 1135, 1139 (1981), enf. 679 F.2d 885 (4th Cir. 1982). Accord: *Beaird-Poulan Division*, supra. See 247 NLRB at 1380 for the conclusion adopted by the Board, and for the opinion of the Court of Appeals for

At the conclusion of the first voting session at 3:45 p.m., and the sealing of the ballot box, Klinakis and another union agent entered their car in front of the Respondent's building no. 1, where the voting had taken place, drove partially around the block, and saw employees just off the day shift congregating in the parking lot which separated the Respondent's two buildings. The union agent stopped and talked to these employees for about 20 minutes in the parking lot and then left shortly after 4 p.m. Although there had been a line of voters on the ramp leading to building no. 1 when the polls were open, there is no evidence that this line extended any distance into the parking area. The employees with whom Klinakis spoke were, as noted, just off the day shift. It is clear that they were not waiting in line to vote—the polls had just closed. From the fact that the employees were leaving work, I infer that they had already voted during the first voting session. I also conclude that the parking lot itself was not part of the election area, since there is no evidence that the line of voters had extended down the ramp into the parking lot. I, therefore, find that Klinakis' conversations took place with employees who had already voted, were not in line to vote, and in a place which was not the election area. The union agent left at least an hour before the start of the next voting session.

The rule in *Michem* was not formulated to prohibit conduct of this nature, since, as the Board's decision in that case clearly shows, it was intended to protect "the final minutes before an employee casts his vote" [supra, 170 NLRB at 362, emphasis supplied]. The Court of Appeals for the Second Circuit reached this conclusion in similar circumstances. *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035 (2d Cir. 1974), enf. 207 NLRB 822 (1973). In the *Beaird-Poulan Division* case, where the Board's Order was enforced by the Court of Appeals for the Eighth Circuit, the Board agreed that "the *Michem* [sic] rule is irrelevant . . . because the Company failed to present evidence that any union representative engaged in a prolonged conversation with any employee waiting to vote." *Beaird-Poulan Division*, supra, 247 NLRB at 1387. The Board reached the same conclusion in *Nestle Co.*, where its order was enforced by the Court of Appeals for the District of Columbia Circuit (*Nestle Co.*, supra, 248 NLRB 732 at 742 fn.3), and has consistently interpreted *Michem* in the same manner in other cases.<sup>35</sup> I, therefore, conclude that Klinakis' actions in the parking lot do not justify setting aside the election.

In accordance with my findings above and on consideration of the entire record, I make the following

#### CONCLUSION OF LAW

Neither the Petitioner nor any other person engaged in any conduct at any time which would warrant setting aside the election.

the Eighth Circuit. For a similar opinion from the Court of Appeals for the Tenth Circuit, see *Worley Mills, Inc.*, supra, fn. 29.

<sup>35</sup> *Boston Insulated Wire Co.*, 259 NLRB 1118 (1982); *Niagara Wires, Inc.*, 237 NLRB 1347 (1978); *Pastoor Bros. Co.*, 223 NLRB 451 (1976).

On these findings of fact and conclusion of law and on the entire record I make the following recommended<sup>36</sup>

#### ORDER

I hereby order that the Board reaffirm its previous conclusion that the Union was properly certified, overruling the objections to the conduct of the election filed by Respondent-Employer, and that it also reaffirm its prior conclusion that the Respondent, identified by its

new name described above,<sup>37</sup> violated the Act as previously determined, and reaffirm its prior Order.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, it is further ordered that the initial period of certification be construed as beginning on the date that the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.<sup>38</sup>

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<sup>36</sup> 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.

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<sup>37</sup> See caption and fn. 1 supra.

<sup>38</sup> See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnette Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).