

**M.B.K., Inc. d/b/a Scotch & Sirloin Restaurant and Culinary Alliance & Bartenders Local No. 498, Hotel and Restaurant Employees and Bartenders International Alliance, AFL-CIO. Cases 31-CA-11628, 31-CA-11796, and 31-RC-5225**

28 March 1984

**DECISION, ORDER, AND DIRECTION  
OF SECOND ELECTION**

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

On 30 November 1982 Administrative Law Judge Richard D. Taplitz issued the attached decision. 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>1</sup> recommendations, and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER<sup>3</sup>**

The National Labor Relations Board adopts the recommended Order of the administrative law

<sup>1</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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Flaitz. In so doing, we additionally rely on the uncontroverted testimony that in prior incidences in which the Respondent was apprised that its employees had called in sick when in fact they were not ill, the Respondent did not discharge them but merely altered their schedules.

Further, in adopting the judge's conclusion that the Respondent constructively discharged employee Sargent, we additionally rely on the judge's finding that, on Sargent's return to work on 13 November 1981 with an ankle injury, the Respondent's owner and manager, Font, assigned her to a work station that necessitated her climbing stairs, even though she was visibly limping. Finally, we note, in connection with the judge's application of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Supreme Court, subsequent to the judge's decision, affirmed the test set forth there by the Board. See *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

<sup>3</sup> In setting aside the election in Case 31-RC-5225 and in directing a second election, we adopt the judge's recommendation in fn. 33 of his decision that our Order shall not be construed as precluding the Regional Director from reconsidering the challenged ballots in light of our finding that employee Flaitz, who cast one of the challenged ballots, was discharged unlawfully. Because Flaitz' challenged ballot, together with the remaining challenged ballots, now may be determinative of the election results, the election will not be set aside and the Union will be certified if the Regional Director's reconsideration should result in a finding that a majority of the employees voted for the Union.

judge and orders that the Respondent, M.B.K., Inc. d/b/a Scotch & Sirloin Restaurant, Ventura, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

IT IS FURTHER ORDERED that the election conducted on 15 December 1981 in Case 31-RC-5225 be, and it hereby is, set aside and this case is hereby severed and remanded to the Regional Director for Region 31 for the purpose of scheduling and conducting a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

[Direction of Second Election omitted from publication.]

**APPENDIX**

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

WE WILL NOT discharge, constructively discharge, or otherwise discriminate against any employee for engaging in activity on behalf of Culinary Alliance & Bartenders Local No. 498, Hotel and Restaurant Employees and Bartenders International Alliance, AFL-CIO, or any other union.

WE WILL NOT coercively interrogate employees concerning their own or other employees' union activities; promise increased hours or other benefits to employees to discourage union activities; threaten to discharge or take other reprisals against employees because of their union activities; threaten to blackball employees because of their union activities; threaten to take action that would make union organization futile; threaten to make life miserable for union employees so as to make them want to quit; create the impression that we engage in surveillance of our employees' union activities; change the schedules of employees because a union engages in organizational activity; increase the hours of employees because we believe that they are antiunion; decrease the hours of employees because we believe that they are prounion; deny time off to employees because of their union activities; change our policy and deny employees a free after-shift drink and the use of the salad bar because employees engage in union activities; or prevent employees from voting or threaten to call the police if prospective voters remain on our premises to vote in a Board election.

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

WE WILL offer D. Wesley Replogle, Larry Allen Flaitz, and Sandra Lee Sargent immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of Replogle and Flaitz and the constructive discharge of Sargent, and notify them in writing that that has been done and that evidence of those unlawful discharges will not be used as a basis for future personnel action against them.

M.B.K., INC. D/B/A SCOTCH & SIRLOIN RESTAURANT

## DECISION

### STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. These consolidated cases were heard at Ventura, California, on September 21 and 22, 1982. The charge in Case 31-CA-11628 was filed on October 22, 1981, by the Culinary Alliance & Bartenders Local No. 498, Hotel and Restaurant Employees and Bartenders International Alliance, AFL-CIO, herein called the Union. The original complaint issued on December 30, 1981, alleging that M.B.K., Inc. d/b/a Scotch & Sirloin Restaurant, herein called the Respondent, the Employer, or Scotch & Sirloin, violated Section 8(a)(1) and (3) of the National Labor Relations Act. The charge, first amended charge, and second amended charge in Case 31-CA-11796 were filed by the Union on January 4, January 28, and February 24, 1982, respectively. An order consolidating Cases 31-CA-11628 and 31-CA-11796, together with an amended complaint, issued on February 26, 1982. The complaint was further amended at the opening of the hearing.

On October 8, 1981, the Union filed a petition for an election in Case 31-RC-5225. Pursuant to a Decision and Direction of Election which issued on November 20, 1981, an election by secret ballot was conducted on December 15, 1981, among the employees of the Respondent in an appropriate bargaining unit.<sup>1</sup> After the election, each party was furnished with a tally of ballots which showed that of approximately 31 eligible voters, 21 cast ballots, of which 7 were cast for the Union, 10 were cast against the Union, and 4 were challenged. On December 21, 1981, the Union filed timely objections to conduct affecting the results of the election. On March 3, 1982, the

<sup>1</sup> The bargaining unit was:

Included: All full-time and regular part-time waiters, waitresses, hosts, hostesses, dishwashers, busboys, bartenders, cooks, food preparation employees, cocktail waitresses, cashiers/door personnel.

Excluded: Charter cruise captain, charter cruise deckhands, charter cruise concessionaire, assistant charter cruise concessionaire, managerial employees, guards and supervisors as defined in the Act.

Regional Director for Region 31 of the Board issued a supplemental decision, order consolidating cases, order directing hearing and notice of hearing. As to the challenges he sustained one of the challenges and concluded that it was unnecessary to consider the remaining challenges as they could not affect the results of the election.<sup>2</sup> With regard to the objections to the election, the Regional Director found that the objections raised legal and factual issues that were closely related to the issues involved in Cases 31-CA-11628 and 31-CA-11796. As the conduct alleged in the objections was substantially similar to the conduct alleged to constitute unfair practices in the unfair labor practice cases, the Regional Director ordered that the objections be consolidated with the unfair labor practice cases for the purpose of hearing, ruling, and decision by the administrative law judge and that after such a hearing the representation case be transferred to and continued before the Board in Washington, D.C.

### Issues

The primary issues are:

1. Whether the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees, by making various threats and promises to employees to discourage union activity, by soliciting grievances from employees, by creating the impression of surveillance of union activities, and by preventing employees from voting in a Board election.

2. Whether the Respondent violated Section 8(a)(3) and (1) of the Act by changing the hours and work schedules of employees to discourage union activity and by discontinuing the practice of giving employees complimentary aftershift drinks and food for the same reason.

3. Whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging D. Wesley Replogle, by discharging or constructively discharging Sandra Lee Sargent, and by denying a day off to and then discharging Larry Flaitz because those employees engaged in union activities.

4. Whether the election should be set aside.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

<sup>2</sup> The sustained challenge was to the vote of Larry Flaitz. The decision indicated that Flaitz was not an employee on the date of the election, that no meritorious unfair labor practice charge had been filed alleging that Flaitz had been unlawfully discharged, and that it was therefore presumed the discharge had been for cause. As a result of that finding the challenges were resolved by the Regional Director and were not referred to an administrative law judge. At the opening of the hearing the General Counsel successfully moved to amend the complaint to allege Flaitz' discharge as a violation of the Act. The challenged ballots could therefore be determinative. However, the question of the challenged ballots was not referred to me, it is not before me for decision, and I have no jurisdiction in that regard.

On the entire record<sup>3</sup> of the case, and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The Respondent, a California corporation with an office and principal place of business in Ventura, California, is engaged in the operation of a restaurant, bar, and charter cruise boat. The Respondent annually derives gross revenues in excess of \$500,000 from the operation of its business. In a stipulation executed in Case 31-RC-5225 the Respondent admitted that during the past fiscal or calendar year it purchased goods valued in excess of \$3000 from enterprises located within California, which enterprises received such goods in substantially the same form directly from outside California. In that stipulation the Respondent also admitted that it was engaged in commerce within the meaning of the National Labor Relations Act and was subject to the jurisdiction of the National Labor Relations Board. At the trial of the instant case the Respondent admitted that it received more than \$3000 worth of goods indirectly from interstate. I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>4</sup>

#### II. THE LABOR ORGANIZATION INVOLVED

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

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Allegedly Unlawful Remarks That Font Made to Employees*

##### 1. Background

The Respondent, Scotch & Sirloin, is a restaurant and bar which employs approximately 31 employees. Toward the end of September 1981 the Union began an organizing drive among those employees. The Union filed the petition for an election on October 8, 1981.

James Font is the president, manager, and owner of the Scotch & Sirloin. He learned of the Union's organizing drive no later than October 10, 1981. On that date his bartender Bill Fay quit. Fay told Font that Fay was a union business agent and that he had done all that he could to organize the store. The complaint alleges, in substance, that Font responded to that union organizing drive with a wide variety of unlawful threats, promises, discharges, and other conduct designed to defeat the Union.

<sup>3</sup> The General Counsel's unopposed motion to correct the transcript of the record is hereby granted by the substitution of "contending" for "pretending" at p. 63, l. 1.

<sup>4</sup> *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958); *Bickford's, Inc.*, 110 NLRB 1904 (1954).

#### 2. Font's conversations with Sonya Nicely

##### a. *Facts*

A number of employees testified that they had conversations with Font in which the Union was mentioned. With one exception (the conversation with Sandra Sargent which is discussed below) Font, in his testimony, did not specifically address himself to any of those purported conversations. He averred that, when he first realized there was a labor union involved, he asked for and received advice from his lawyer that he was told in substance that he should make sure he did not discuss anything concerning his approval or disapproval of the Union with the employees, and that he followed those instructions to the letter. I believe that Font was less than candid in that testimony. His demeanor, his "general denial" as opposed to the specific detailed testimony of a number of different employees, and the generally corroboratory nature of the substance of that employee testimony convince me that those employees rather than Font should be credited.

Cocktail waitress Sonya Nicely was one the first employees that Font spoke to after he learned from Fay on October 10, 1981, that the Union was organizing. That conversation occurred about 6 p.m. on October 10. Prior to that time Font had often complained to Nicely that she was too slow and that he was planning to reduce her hours or fire her. She had asked for more working time and he had told her that he could not increase her hours because of her low sales. On October 10 Font spoke to her in the restaurant and asked her whether she would like to work more hours. When she said that she would, he told her that he was planning to let some of the waitresses go. When she asked the reason he said, "Don't you know what is going under?" She replied that she did not and he told her to get back to work and not tell anybody what he had said. If there were any ambiguity as to what Font meant when he asked Nicely whether she knew "what was going under" he made it clear when he spoke to her the following day. On October 11, 1981, Nicely was at the Scotch & Sirloin as a customer. Font asked her if she joined the Union and she replied, "What Union?" Font then said he was going to increase her hours and that she should be prepared to work hard.

Two days later, on October 13, 1981, Font spoke to Nicely while she was working. He again asked her whether she had joined the Union and she once again said, "What Union?" About an hour later he asked her whether she was planning to join the Union. She replied that she did not know and that she was sick and tired of being cornered by him every chance he had. They discussed the pros and cons of the Union and Font said that, if she joined, it would cost her a lot of money to join, she would have to pay dues, and she would have to pay for medical insurance.

About 2:15 a.m. on October 14 Font spoke to Nicely in his office. He told her that he was going to increase her hours, that everyone had joined the Union except her, and that she was the only one who was loyal. She asked him who had signed and how he knew. He replied that E. Victor Moraga and Larry Flaitz had admitted

joining the Union because of the medical insurance, and that Regina Tully must have joined because she brought in Bill Fay to work there. Nicely asked about Sandra Sargent and Font said that she had signed. Nicely said that she was Sargent's friend and Sargent never discussed it with her to which Font replied, "Believe me, I know she signed."

On November 6, 1981, Nicely overheard a conversation between Font and cocktail waitresses Roxanne Negrin and Nancy in Font's office. Font told them that the restaurant would never be a union house, that he was going to make life miserable for all the employees who signed for the Union, and that that way employees would want to quit on their own.

On November 8 Font spoke to Nicely while she was working. He told her that if she signed with the Union she would not be able to stand there with a drink of coffee and a cigarette. He also told her that she would have to go to a bathroom and take her break and smoke her cigarette there and that, by the time she got out and came back to her station, he would have someone to take over her station. He also told her that his legal fees would be coming out of employees' wages and tips.<sup>5</sup>

#### b. Conclusions

In summary, between October 10 and November 8, 1981, Font repeatedly interrogated Nicely about her union activities. In the context of that interrogation and also in the context of his statement to her that she was the only one who would not sign for the Union, he promised her increased hours. Font's statement to Nicely on October 10 to the effect that he was planning to let some of the waitresses go was made in the context of his interrogation of her union activity and his instruction to her not to tell anyone what he had said. Font's remark amounted to a threat to discharge employees because of their union activity. Font's remark to cocktail waitresses on November 6 to the effect that he would make life miserable for the union employees so that they would quit on their own was a further threat of reprisal against employees because of union activity. His remark to the effect that he would make sure that it was never a union house, when considered in the context of his further remarks about making life miserable for union employees, indicated that Font would take actions against employees to make their organizing efforts futile. Font's remark to Nicely on October 14 of "Believe me, I know that she signed" with regard to Sandra Sargent gave Nicely reasonable grounds for assuming that Font had placed the union activity of employees under surveillance. Font's remark to Nicely created the impression that he was engaging in surveillance of his employees' union activities.

I find that the Respondent through Font violated Section 8(a)(1) of the Act by coercively interrogating an employee concerning union activities, by promising benefits to an employee to discourage union activity, by threaten-

<sup>5</sup> The above findings are based on the testimony of Nicely. In evaluating the possibility that bias against the Respondent affected her testimony, I have considered the fact that Nicely appeared to be hostile toward Font, that she is no longer employed by the Respondent, and that she is pursuing a workmen's compensation claim against the Respondent. After weighing the possibility I still believe that she was a credible witness.

ing to discharge employees because of their union activity, by threatening to take action that would make union organization futile, by threatening to make life miserable for union employees so as to make them want to quit, and by creating the impression that he was engaging in surveillance of its employees' union activities.<sup>6</sup>

### 2. Font's conversations with Ann Galligos

#### a. Facts

On or about October 12, 1981, Font approached cocktail waitress Ann Galligos and asked her if she knew what was happening. She said that she did not. He told her that Bill Fay was trying to organize a union. She told Font that she had not heard about it. Later that evening she asked Font for an after dinner drink and he replied by asking whether she was part of the Union. She said she was not and he said she could have the drink. Font asked her if she knew of anybody else who was involved with the Union. She told him that she was not involved and she did not know of anyone else.

On October 14 Font spoke to Galligos in his office. He told her that she would be working more hours since she was not union.

Sometime later in October Galligos suggested to Font that her friend Brian O'Hagen be hired as a waiter. Font replied that in a little while they would be needing a lot of waiters.<sup>7</sup>

#### b. Conclusions

Font's interrogation of Galligos on October 12 concerning her own and other employees' union activities was coercive and violative of Section 8(a)(1) of the Act. His statement to her on October 14 that she would be working more hours since she was not union was a promise of benefit to discourage union activity. That also violated Section 8(a)(1) of the Act. In the context of those other violations, Font's remark to Galligos sometime in October to the effect that in a little while they would be needing a lot of waiters constituted a threat to discharge employees because of their union activity. It also violated Section 8(a)(1) of the Act.

### 3. Font's conversations with Larry Flaitz and E. Victor Moraga

#### a. Facts

Larry Flaitz was a waiter who worked for the Respondent. When he reported for work on October 10, 1981 (the day Fay told Font that the Union was organizing), the hostess, Terry Fryman, asked him why he was not wearing a tie. Font was standing there at the time and Flaitz asked him whether they had to wear ties. Font replied, "No, but since you have all become union, you can all dress the same and be servants and I will call you by number."

The following day, October 11, Font called Flaitz and another waiter, E. Victor Moraga, into his office. Font

<sup>6</sup> *Marines' Memorial Club*, 261 NLRB 1357 (1982).

<sup>7</sup> The above findings are based on the credible testimony of Galligos.

asked them why they had signed for the Union. Flaitz and Moraga both acknowledged that they had joined and they both spoke about such things as medical benefits. Font then said, "If you guys weren't happy with the situation or your working conditions, why didn't you come to me first instead of going to the Union?" Flaitz replied that they would have but they probably would have been fired. Font said that he had dealt with unions before and that Scotch & Sirloin would not be a union house. Font said that it did not help the air traffic controllers and it would not help his employees, that the Union was for weak people and they were not weak, that employees were going to have to pay for their own medical benefits and all the Union wanted was their money. Font also said, "I am going to have to cut your hours if the house goes union." And as they were leaving, he added, "If you come back to work."<sup>8</sup>

Prior to the union organizing drive employees of the Scotch & Sirloin were not required to report their tips on their timecards. During the week of October 11 Font told Flaitz that if he went union he would have to declare his tips every day. Flaitz said that that was the way it should be.

On November 7, 1981, Moraga spoke to Font about a certain wine list. Font said that they would have a new wine list but not until the people who were prounion were out of the restaurant. Font also said that there would be a lot of changes for the better for the employees after the people who were prounion were gone.

#### b. Conclusions

Font's interrogation of Flaitz and Moraga on October 11, 1981, was coercive and therefore violated Section 8(a)(1) of the Act. His question concerning why those employees had not come to him rather than the Union about working conditions was a further unlawful coercive interrogation.<sup>9</sup> Font's remark that he had dealt with

<sup>8</sup> These findings are based on the credited testimony of Flaitz. Moraga, in his testimony, corroborated much of the substance of Flaitz' testimony. However, Moraga did not appear to have a clear memory of the incident and much of his testimony came forth only after leading questions and the refreshing of his memory by his affidavit. I believe that Moraga's testimony was based on his general impression of what was said rather than the details of the conversation, while Flaitz' testimony was based on his ability to recall exactly what was said. I therefore have relied on Flaitz' testimony where it did not fully correspond with the testimony of Moraga. As discussed above Font did not specifically address his testimony to this particular conversation.

<sup>9</sup> The General Counsel also contends that that remark constituted an unlawful soliciting of grievances and an implied promise to correct those grievances. I do not believe that theory to be tenable. It is true that the solicitation of grievances during an organizational drive carries with it an inference that the employer is implicitly promising to remedy those grievances and where that inference is not rebutted by the employer, a violation of Sec. 8(a)(1) exists. *Marines' Memorial Club*, supra; *Cutting, Inc.*, 255 NLRB 534 (1981). However, in the instant case Font was not asking employees to come to him with their problems. He was asking them why they had not come to him in the past. It could be argued that there was an implication that Font was asking employees to come to him in the future and that there was a further implication that he would satisfy their requests if they did come to him. However, I believe that that calls for one implication too many. The remark is found to be an unlawful interrogation but not an unlawful solicitation of grievances.

unions before and that the Scotch & Sirloin would not be a union house constituted a threat that he would take action to make organization futile and therefore violated Section 8(a)(1) of the Act. His remark that he was going to have to cut hours if the house went union constituted a clear threat of reprisal for union activity and his further remark, "if you come back to work," constituted a threat to discharge employees because of union activity. Both of those threats violated Section 8(a)(1) of the Act. Font's remark to Flaitz on October 11, 1981, to the effect that tips would have to be declared every day if Flaitz went union also constituted a threat of reprisal because of union activity in violation of Section 8(a)(1) of the Act.<sup>10</sup> Font's remark to Moraga on November 7 to the effect that there would be a new wine list when the prounion people were out of the restaurant and that there would be a lot of changes for the better for the employees after the people who were prounion were gone constituted both an unlawful promise of benefits for employees who remained nonunion and a threat to discharge employees who were prounion. Both the promise and the threat violated Section 8(a)(1) of the Act.<sup>11</sup>

### B. The Changes in Employees' Hours and Benefits

#### 1. Background

Even before the Union began organizing, Font had from time to time changed the employees' schedules. He had moved employees from one station to another, shifted the days worked, and changed the number of hours worked depending on the needs of the business. Shortly after the union organizing campaign began there were a number of changes. Some of those changes were shown in a posted schedule change. Prior the Union's organizing, schedules had not been posted. Font had simply told employees of the changes. Font acknowledged, in substance, that he made changes because of the union activity. He averred however that he was simply equalizing the number of hours worked among the employees because of the union activity. When asked whether there were changes in schedules because of union activity he responded, "Yes, I think I may have made some change to make sure that everyone was getting equal or approximately equal hours based on the number of days that they had. I may have moved people around in a particular period. And that should reflect on the pay periods that follow. The purpose was to make sure that I was not giving more hours to some employees that may have or may not have had any union activities."<sup>12</sup> Those changes were made in violation of Section 8(a)(1) of the Act. As the Board held in adopting the administrative

<sup>10</sup> There may well have been a duty to report tips every day but Font could not lawfully condition his actions in that regard on whether or not the employees engaged in union activity.

<sup>11</sup> The General Counsel contends that several other statements by Font constituted violations of Sec. 8(a)(1) of the Act. Some of those matters are so interrelated with an evaluation of the allegations that employees were unlawfully discharged that they are discussed below in that context.

<sup>12</sup> Nicely credibly testified that Font told her that with the "Union thing" he had to give everybody equal laws and had to rotate stations.

law judge's decision in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1242 (1966).<sup>13</sup>

An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union were not in the picture. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benefits because of the union or withholds them because of the union.

Font admitted that changes in hours were motivated by the Union's presence. Moreover, there was considerable testimony that changes were used as a carrot to induce antiunion conduct and as a stick to punish prounion conduct.

## 2. The changes that related to Sonya Nicely

Prior to the union activity Font considered Sonya Nicely to be a slow employee and he had denied her requests for increased hours. As is set forth in detail above, on October 11 and 14, 1981, he promised to increase her hours because of his belief that she had refrained from joining the Union. In several conversations he made it clear to her that that was the reason he was going to increase her hours.

Prior to mid-October 1981 Nicely had worked some Tuesday but that was not her regular day. In mid-October Font called her and told her to work that Tuesday. That was Sandy Sargent's normal day and Nicely asked whether Sargent was working. Font replied by asking whether she wanted to work or not. He told her that he was giving her the extra day because she had been loyal to him. She decided to accept the Tuesdays.

Nicely testified that prior to the union activity she worked an average of about 25 hours a week and that, after the campaign began, her hours were raised to about 34 to 36 hours a week. The Respondent's employees are paid on a semimonthly basis. The Respondent's records show that for the period October 1 through 15, 1981, Nicely worked 42 hours with only 15 of those hours during the first week. They also show that for the period October 16 through 31 she worked 76 hours.<sup>14</sup> The Respondent's records show a dramatic increase in pay by Nicely on and after October 16, 1981. As waiters and cocktail waitresses were paid minimum wage, the amount of gross pay (which does not include tips) indicated the number of hours actually worked.<sup>15</sup>

<sup>13</sup> See also *Marines' Memorial Assn.*, supra; *St. Elizabeth Community Hospital*, 240 NLRB 937, 941 (1979); *Cutter Laboratories*, 221 NLRB 161, 168 (1975).

<sup>14</sup> Those were the only payroll records introduced into evidence which set forth the number of hours worked. More detailed records were placed in evidence with regard to pay.

<sup>15</sup> Nicely's pay rounded off to the nearest dollar was: July 1-15, \$183; July 16-31, \$181; August 1-15, \$188; August 16-31, \$107; September 1-15, \$151; September 16-30, \$159; October 1-15, \$141; October 16-31,

Font promised to increase Nicely's hours because he believed Nicely had not joined the Union and he almost immediately carried out that promise. In the light of the above circumstances Font's claim that he was merely trying to equalize hours because of the Union and that schedules were often changed in the past simply does not constitute an adequate defense. I find that Font increased Nicely's hours in order to discourage membership in the Union and thereby violated Section 8(a)(1) and (3) of the Act.

## 3. Changes for Galligos

On October 12, 1981, Font coercively interrogated cocktail waitress Ann Galligos concerning her and other employees' union activities. She told him that she was not involved with the Union. Two days later, on October 14, Font told Galligos that she would be working more hours because she was not union.

From October 1 through 15, 1981, she worked 41-1/2 hours and was paid \$139. From October 16 through 31 she worked 71-1/2 hours and was paid \$240. Except for the August 16 through 31 period in which she earned \$253, the \$240 she earned between October 16 and 31 was the most that she was paid since July 1, 1981.<sup>16</sup> Galligos left the Respondent's employment in early November 1981 and therefore no continuing pattern could be shown. However, the sharp jump in the number of hours worked by Galligos from the first half of October to the second half, taken together with Font's statement to her on October 14 that she would be working more hours since she was not union, establishes that Font did carry out his promise to increase her hours for that reason. I find that Font increased Galligos' hours in order to discourage membership in the Union and thereby violated Section 8(a)(1) and (3) of the Act.

## 4. Changes for Larry Flaitz and E. Victor Moraga

As found above Font coercively interrogated Flaitz and Moraga concerning their union activity. At that time both Flaitz and Moraga acknowledged to Font that they had joined the Union. Font told them that he was going to have to cut their hours if the house went union. On the same day, October 11, Font posted a new schedule. That was the first time that changes had actually been posted. Flaitz had regularly worked on Wednesdays. Under the new schedule he no longer worked on Wednesdays. He was not given any additional hours to make up that loss. Within a few weeks of October 11 Moraga's hours were cut. Before the union activity he had regularly worked on Tuesdays and that day was taken from him.

The Respondent's records show that Flaitz worked 39 hours from October 1 through October 15 and 36 hours from October 16 through October 31. He was paid \$131 in the October 1 through 15 period and \$121 from October 16 through 31. However, his pay was somewhat irregular even before that time. It was as high as \$181

\$258; November 1-15, \$268; November 16-30, \$236; December 1-15, \$214; and December 16-30, \$214.

<sup>16</sup> The records in evidence do not go back before July 1.

from July 1 through 15 and as low as \$139 from September 1 through September 15. Flaitz called in sick on November 1 and he did not work for the Respondent thereafter. He is one of the alleged dischargees. The Respondent refused to schedule Flaitz for work for periods after November 2 but that matter is resolved in the discussion of the discharge which is set forth below. In view of the short period between Font's threat to reduce hours and the discharge of Flaitz, and the inconclusive nature of the records concerning Flaitz' work patterns, I am unprepared to find that Flaitz' hours were reduced because of his union activities.

Moraga worked 32 hours and was paid \$107 for the period October 1 through 15. He worked 44 hours and was paid \$145 for the period October 16 through 31. His pay was \$178 for November 1 through 15 and \$111 for November 16 through 30. There are no records in evidence indicating either hours or pay after November 30. Though Moraga testified that his hours were reduced within a couple of weeks of October 11, 1981, no records were put in evidence that would indicate a pattern of hours or pay after November 30. In view of the vagueness of the evidence with regard to Moraga's schedule, I am unprepared to find that his hours were reduced because of union activities.

#### 5. Changes for D. Wesley Replogle

Replogle signed a union authorization card on September 26, 1981. He attended from four to six union meetings in late September and October. In addition he spoke to a number of employees in the restaurant in favor of the Union in the period between mid- to late September and his termination on November 11. He passed out a number of authorization cards at the restaurant. On October 24, 1981, in the context of the discussion about charging for ice, Font accused him of starting something that he could not finish. At the time of his discharge Font told him that Font signed his paycheck and the Union did not. In view of Replogle's overt union activity, the small number of employees in the bargaining unit, the efforts of Font to find out who was active for the Union by his coercive interrogation of employees, and that the subsequent admissions by Font to Replogle that Font knew that Replogle was active for the Union, it can reasonably be inferred that Font knew at an early date that Replogle was a union activist.

On September 16, 1981, which was before there was any indication that Font had knowledge of the union activity, he granted Replogle's request to take off from work on October 16 and 18. Replogle had not been scheduled to work on October 17. Font learned of the union activity on October 10 and almost immediately began interrogating employees about union activities. On October 12 Replogle received a message from Font that Font was training a new bartender and that he was not to report for work that night. He was told that he would not be scheduled to work until after he returned from his weekend off. On October 19 he reported for work early and the restaurant was closed. He tried to telephone the restaurant but did not get an answer. The next day, October 20, he called the restaurant and spoke to Font. He asked Font what the schedule was and Font said that he

would call him back. Later Font did call back and said he still had not worked out the schedule. Late that night he went to the restaurant where Font told him that the schedule was not completed and that he would call him in the morning. Font did not call in the morning. On October 22 Replogle once again called Font and asked about the schedule. He told Font that he had asked for 2 days off and not 2 weeks. At that point Font told Replogle that Font had hired two new bartenders to replace Fay and Replogle and that he thought Replogle had asked for a week off. Font said that he would talk to the other two bartenders to see if they would go down to 2 or 3 nights a week so that Replogle could have 2 or 3 nights a week. That evening Font called Replogle and told him that he was scheduled to work at 9 p.m. on Saturday, October 24. He worked 5 hours that night and 5 hours each on October 27, 28, and 31. Before the union activity Replogle generally worked 5 nights a week from Thursday through Monday. Beginning October 24 he only worked 3 days a week and he worked less hours on each of those days. He was discharged on November 11, 1981, and he is one of the alleged discriminatees. The Respondent's records show that from October 1 through 15 Replogle worked 46 hours and from October 16 through 31 he worked 20 hours. His pay for September 1 through 15 was \$344; for September 16 through 30, \$280; from October 1 through 15, \$184; from October 16 through 31, \$80; and the records do not list him thereafter.

The evidence set forth above, considered together with the evidence relating to Replogle's discharge set forth in section C, below, establishes that between October 12 and November 11 (the date of his discharge) Font reduced Replogle's hours of work because of Replogle's union activities. The Respondent thereby violated Section 8(a)(1) and (3) of the Act.

#### 6. The changes for Sandra Lee Sargent

Sargent is one of the alleged discriminatees. She testified in substance that on October 13 she was rescheduled so that she lost her regularly scheduled Tuesday work, that she worked less hours, that she worked at stations where she received less tips, and that she was assigned to stations where it would be difficult for her to function because she had a foot injury. Those matters are discussed in detail with regard to her discharge. However, the Company's records indicate that she worked 61 hours from October 1 through 15 and 66 hours from October 16 through 31. They also show that her pay varied somewhat during the time she worked. There was a sharp decline in hours during the pay period of November 1 through 15, but that was when she started working for another employer.<sup>17</sup> On the basis of those records I am unprepared to find that Sargent's hours were reduced because of her union activity.

<sup>17</sup> Her pay was: July 1-15, 1981, \$214; July 16-31, \$241; August 1-15, \$249; August 16-31, \$266; September 1-15, \$266; September 16-30, \$288; October 1-15, \$204; October 16-31, \$221; and November 1-15, \$80.

### 7. The changes with regard to aftershift food and drink

Prior to the union activity it was customary in the Respondent's establishment for employees to have a free drink and free use of the salad bar after they finished their shift.<sup>18</sup> On October 12, 1981, when Galligos asked for the customary aftershift drink, Font asked her whether she was part of the Union. When she said that she was not he told her to go ahead and have one. Sometime after the union organizing drive began Font told Flaitz that until the union thing was settled no one was getting anything to eat. In mid-October 1981 Galligos asked Font for a drink and Font told her that, until he knew for sure who was for and who was against the Union, no one was going to get anything from him. In mid-October employee Shawna Darby overheard Font telling hostess Terry Fryman that she could not have a potato after she finished hosting.

I find that the Respondent violated Section 8(a)(1) and (3) of the Act by changing its past policy and denying employees a free aftershift drink and the use of the salad bar because the employees engaged in union activities.

#### C. The Discharge of D. Wesley Replogle

##### 1. The sequence of events

Replogle was hired by the Respondent as a bartender on August 30, 1981, and was discharged on November 11, 1981. As is set forth in section B he was very active in organizing on behalf of the Union. He signed a card on September 26, 1981, attended a number of union meetings, attempted to organize employees at the restaurant, and distributed authorization cards at the restaurant. Font was aware of Replogle's union sympathies.

During the short period that Replogle worked for the Respondent he was at best a marginal employee. Sandra Sargent, who testified for the General Counsel, thought he was scatterbrained. Sonya Nicely who also testified for the General Counsel averred that he had a temper and sometimes liked to argue. The witnesses called by the Respondent had an even less favorable estimate of Replogle. Cocktail waitress Negrin described him in great detail as a terrible bartender, as did Linda Miller. Font testified that Replogle was very excitable and broke many glasses. Font also testified, and I believe credibly, that on two occasions prior to the date of discharge he saw Replogle fail to ring up a drink as bartenders were required to do by a standing company policy. On both occasions Font explained the company policy to Replogle.<sup>19</sup> Replogle testified that no one from the Respond-

<sup>18</sup> This finding is based on the testimony of employees Galligos, Flaitz, Darby, and Replogle. Roxanne Negrin testified that there was no change in company policy after the union organizing drive began. She averred that employees would ask Font for a drink and sometimes Font would say yes and sometimes no. I do not credit Negrin in this regard.

<sup>19</sup> Indeed Replogle's own description of the events that occurred on November 11 indicates his attitude toward his work. It also sheds some doubt on Replogle's candor in general. He testified as follows: About midnight, November 11, waitress Regina Tully gave him an order for a Seagram 7 and a Seven-Up. After he poured the drink, Tully returned to him and said that she had made a mistake and she needed a Canadian Club and soda with a splash of coke instead of the 7 and 7. He did not want to waste the drink so he put a splash of coke in the Seagram 7 and

ent questioned him concerning the ringing up of drinks until November 11, the date of discharge. On this matter I credit Font over Replogle. Font took such matters quite seriously. There could be a number of innocuous reasons why a bartender would not immediately ring up a drink after he poured it, but it was still a matter of concern to Font. There was always the possibility that a bartender was stealing money from him or giving away free drinks and the only way that Font had to control the situation was to keep a close tab on the register and to insist that drinks be rung up immediately. The failure of a bartender to immediately ring up a drink could be attributed to the fact that he was too busy with other orders or that he was simply replacing a misordered drink. Font did not consider such a failure to be grounds for immediate discharge. On the two occasions that he spoke to Replogle about such matters before the date of discharge he merely explained the company policy.<sup>20</sup>

As set forth in detail in section B,5, above, beginning on October 12, 1981, which was 2 days after Font learned of the union activity, the Respondent began reducing Replogle's opportunity to work. For a number of days he was not called in at all and thereafter he was given reduced hours. That reduction in hours was motivated by Replogle's union activity and as found above was a violation of Section 8(a)(1) of the Act. On October 24 Font told Replogle that Replogle had started something that he could not finish.

Replogle worked the night of November 11, 1981. About midnight that night waitress Regina Tully gave him an order for a drink which he made up. He immediately rang up the drink on the cash register. Later Tully returned and said that she had made a mistake and she needed a different type of drink. After unsuccessfully trying to doctor up the old drink and pass it off for the correct order, Replogle made a new drink for the customer. He did not ring up the new drink.<sup>21</sup> Font noticed that Replogle had not rung up the new drink on the register and he asked Replogle why he had not collected for that customer's drink. Replogle responded by saying that there was a mistake in the order and he had corrected it. Font then asked Replogle what happened to the old drink and Replogle said he poured it out. Font asked whether Replogle was in the habit of throwing out house liquor.<sup>22</sup>

Seven-Up and sent it back to the customer. The customer immediately returned that drink.

<sup>20</sup> Font was not specific with regard to the dates of those two conversations and it is therefore not possible to determine whether they occurred before or after the beginning of the union activity.

<sup>21</sup> Cocktail waitress Negrin testified that a bartender should ring up a new drink in such circumstances because the cocktail waitress should pay for that drink out of her own pocket. However, there is no indication that Font considered it to be a dischargeable offense for a bartender to make up a replacement drink with no charge.

<sup>22</sup> These findings are based on the testimony of Replogle. Font testified that on November 11 he once again saw Replogle ring up a drink and that he went into his office and got Replogle his check at that point. Font averred that he did not ask Replogle for an explanation before he fired him and that Replogle did not tell him that it was a replacement drink. Bartender Linda Miller, who was a witness for the Respondent, averred that she heard Font ask Replogle why he had given the drink away. I credit Replogle's version of the incident and do not credit Font's where it is inconsistent with Replogle's.

About an hour later Font told Replogle that he was fired and called him a thief. Font told Replogle to get the "hell" out of there. He said that he signed Replogle's paycheck and that the Union did not. He also told Replogle that there was free enterprise and he did not have to have the Union in his restaurant if he did not want it. He told Replogle to get the "hell" off his property. Font followed Replogle to the parking lot and continued yelling at him. He told Replogle that Replogle had gotten into something that he could not finish and that Font would make sure that Replogle did not work in Ventura County. Replogle asked whether he was going to be blackballed and Font said that that was right.<sup>23</sup>

## 2. Analysis and conclusions

The controlling law is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 889 (1st Cir. 1981),<sup>24</sup> cert. denied 455 U.S. 989 (1982), in which the Board applied the "test of causation" that had been articulated by the United States Supreme Court in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977). In reliance on the Supreme Court decision the Board held:

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the

<sup>23</sup> Font did not testify concerning this particular incident, nor did anyone else other than Replogle. I do not believe that Replogle's testimony was inherently unbelievable. My observation of Font as he testified led me to the conclusion that Font was a rather emotional man with strongly held views who was quite capable of blurting out his feelings even if they would be harmful to him. That impression was fortified by the testimony concerning his actions during the course of the election, which is discussed below, as well as by the findings relating to his antiunion remarks made to employees. Under these circumstances I am prepared to credit Replogle's testimony concerning what Font told him after the discharge.

<sup>24</sup> While the First Circuit Court of Appeals enforced the Board's order, that court disagreed with the Board with regard to the exact nature of the employer's burden once the General Counsel had established a *prima facie* case. In the court's language:

Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.

The Board may properly provide, therefore, that "Once [a *prima facie* showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21 (footnote omitted). The "burden" referred to, however, is a burden of going forward to meet a *prima facie* case, not a burden of persuasion the ultimate issue of the existence of a violation.

The Third Circuit has expressed its agreement with the First Circuit in *Behring International*, 675 F.2d 83 (3d Cir. 1982). The Seventh Circuit has expressed agreement with the First Circuit, *NLRB v. Webb Ford*, 688 F.2d 743 (7th Cir. 1982). The Ninth, Eighth, Sixth, and Fifth Circuits have indicated their agreement with the Board's position. *Zurn Industries v. NLRB*, 680 F.2d 683 (9th Cir. 1982); *NLRB v. Fixtures Mfg. Co.*, 669 F.2d 547 (8th Cir. 1982); *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442 (6th Cir. 1981); *NLRB v. Charles H. McCauley Associates*, 657 F.2d 685 (5th Cir. 1981).

employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>14</sup>

<sup>14</sup> In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

The threshold question is, therefore, whether the General Counsel has by a preponderance of the credible evidence made out a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Replogle's discharge.

Replogle was active in union affairs and the Respondent learned of that activity. The Respondent harbored a virulent animosity against employees who engaged in union activities and it expressed that animosity through a broadside of unlawful activity. As found above that unlawful activity included coercive interrogation of employees concerning their own and other employees' union activities; promising increased hours and other benefits to employees to discourage union activity; threatening to discharge and take other reprisals against employees because of their union activity; threatening to take action that would make union organization futile; threatening to make life miserable for union employees so as to make them want to quit; creating the impression that it was engaging in surveillance of its employees' union activities; changing the schedules of certain employees because the Union was organizing; increasing the hours of certain employees because of the belief that they were antiunion; decreasing the hours of other employees because of the belief that they were prounion; and changing its past practice and denying employees a free aftershift drink and the use of the salad bar because the employees engaged in union activity.

Beginning on October 12, 1981, just 2 days after Font learned of the union activity, Replogle's schedule was rearranged so that he did not work at all on some days and on others he worked less hours than he previously had. As found above, that change was motivated by Replogle's union activity. On October 24 Font told Replogle that Replogle had started something that he could not finish. On November 11, about a month after Font learned of the union activity, Replogle was discharged. At the time of discharge Font made it clear to Replogle that Replogle was being discharged because of his union activity. Font spoke of his signing the paycheck rather than the Union. He said that it was free enterprise and he did not have to have the Union in his restaurant if he did not want to and in the context of that remark he told Replogle to "get the hell off" his property. Font said that Replogle had gotten into something that he could not finish and that Font would make sure that Replogle

did not work in Ventura County. Font said that he was going to blackball Replogle.<sup>25</sup>

The General Counsel has made out a strong prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision to discharge Replogle. The next question to be considered is whether the Respondent has met its burden of demonstrating that Replogle's termination would have taken place even in the absence of his union activity. The Respondent has established that Replogle, an employee who worked for the Scotch & Sirloin for less than 2-1/2 months, was a poor employee. It has also been shown that on two occasions before the incident that occurred on November 11 Font had seen Replogle serve drinks without immediately ringing them up on the cash register and had informed Replogle that that was against company policy. On November 11 Font once again saw Replogle serve a drink without ringing it up on the cash register. Replogle was fired shortly thereafter. Font contends that it was Replogle's conduct as a bartender which caused the discharge and that the union activity had nothing to do with it. The evidence belies that assertion. Before November 11 Font had twice told Replogle about the policy of ringing up drinks. Though it was a serious matter, there was no mention of possible discharge for a repeat offense. On November 11 when Font asked why Replogle had served a drink without ringing it up, Replogle truthfully told him that the drink was a replacement for a mistaken order. That reason could have been easily checked by Font by his merely asking the other bartender, Linda Miller, whether it was true. Font had previously told Miller to watch Replogle and apparently he trusted Miller. Miller testified that Replogle was correcting a mistake on that occasion. Instead of checking out Replogle's assertion, Font used the incident as a pretext for getting rid of a known union sympathizer. He in effect admitted that to Replogle when he ordered Replogle off the property, threatened to blackball him, and said that he did not have to have the Union in his restaurant if he did not want it. Evaluating the evidence as a whole, I find that the Respondent has not demonstrated that it would have discharged Replogle even in the absence of his union activity. The Respondent has not produced evidence to balance, much less to outweigh, the evidence produced by the General Counsel. I therefore find that, by discharging Replogle, the Respondent violated Section 8(a)(3) and (1) of the Act.

#### D. *The Constructive Discharge of Sandra Lee Sargent*

##### 1. The sequence of events

Cocktail waitress Sandra Lee Sargent signed a union authorization card on September 26, 1981. She attended a number of union meetings and actively sought to organize employees at the Respondent's premises. Font knew of her union sympathies. On October 14, 1981, he acknowledged to cocktail waitress Nicely that he knew Sargent had signed for the Union. As is set forth in detail above, on October 10, 1981, Font began a wide scale an-

tiunion campaign that involved numerous violations of Section 8(a)(1) of the Act. On November 6, 1981, as part of that campaign, he told several employees that the restaurant would never be a union house, that he was going to make life miserable for employees who signed for the Union, and that that way employees would want to quit on their own.

From the time that Sargent began working at the restaurant on March 26, 1981, she had regularly worked on Tuesdays from 5 p.m. until closing at 2 or 2:30 a.m. On October 13, 1981, Font told her that he was rearranging her schedule and she was not to report for work that night. When she asked about the new schedule he told her that he did not know. After that time she was not scheduled for Tuesdays. Tuesdays had been a particularly good day for her because she worked her area alone and received substantial tips. Font scheduled her to work on Thursdays. When she started to work she had made arrangements with Font so that she would not have to work on Thursdays. Before the change she had worked full time on Fridays, Saturdays, and Sundays, and part time on Mondays and Tuesdays. After the change she worked Thursdays, Fridays, and Saturdays, and started each of those days at a later time. When she reported to work on Thursday, October 15, Font put her on a new work station where there were less bar customers and fewer tips.

On November 6 or the early morning of November 7 Font had a conversation with Sargent concerning a bottle of champagne. That was the same day that Font had told some other employees that he was going to make life miserable for employees who signed with the Union so that they would quit on their own. Font told Sargent that she was \$12 short because there was a bottle of champagne that she had not written down. Sargent had served a table three bottles of champagne and she was not aware that a fourth bottle had been served. Font kept personal control over the champagne bottles and they could be served only with his permission. He sometimes delivered champagne to tables himself. Font told Sargent to look through the trash and find the additional bottle there. Sargent dug through the trash container and found four bottles of champagne. Font asked her whether she had found it and she said that she did. He then told her that he did not like his employees stealing from him. She said that he knew she did not steal any money from him and he replied, "We know that, don't we?" She asked him why he was doing this to her and he replied, "Well, you should never have brought the Union in here." She told him that everyone was interested in the benefits and she was not the only one. He then said, "You should be glad that I took you back. Even your ex-husband didn't want you."<sup>26</sup> Sargent asked Font why he was hurting her that way and he replied, "I haven't even begun to hurt you yet. I can think of ways that you haven't even dreamed of."<sup>27</sup>

<sup>26</sup> Sometime before this event Sargent had considered leaving her employment and reconciling with her exhusband. That attempted reconciliation did not bear fruit and she returned to work.

<sup>27</sup> These findings are based on the testimony of Sargent. Font testified that he never told Sargent that she was responsible for bringing in the

*Continued*

<sup>25</sup> That threat to blackball Replogle because of his union activity constituted an additional violation of Sec. 8(a)(1) of the Act.

Shortly after Font assigned Sargent to Thursday work she began to make inquiries concerning possible employment with other employers so that she could obtain additional hours of work. In the early morning of November 7 Sargent injured her ankle. She called in and told Font that she would not be able to report for work on Saturday, November 7. However, on Monday, November 9, 1981, she began working for another employer, the Oxnard Hilton. That involved a sitdown job so that the injury to her ankle did not interfere with her work. Sargent reported for work at the Respondent again on Thursday, November 12. She also worked Friday, November 13. She was visibly limping but Font assigned her to a work station where she would have stairs to climb.

Sargent was scheduled to work for the Respondent again on November 14. She called in to say that she was ill and could not work. Instead she went to work on that date for the Oxnard Hilton.

On November 14 Font was told by a customer and an employee that Sargent was seen working at the Hilton. He called the Hilton and learned that she was in fact working there, but he did not speak to her. After November 14 Sargent continued to work at the Hilton. She never spoke to a management official of the Respondent after that time and she had no way of knowing from her own knowledge whether or not she was scheduled to work at the Scotch & Sirloin.

Font, in a pretrial affidavit, averred that he terminated Sargent when he learned she was working at the Hilton. At the trial Font testified in substance that Fridays and Saturdays were the Scotch & Sirloin's busy periods, that cocktail waitresses who refused to work on those days were not allowed to remain as employees, and that, after he found out that Sargent was working at the Hilton on a Saturday night, he would not have permitted her to return to work even if she had tried to do so. Font terminated Sargent on November 14 in the sense that he had made a mental determination not to accept her back if she offered to return to work. However, there is no indication that he did or said anything to terminate her on that date. His intention to terminate her never matured into action because Sargent had taken another job and never came back to work for the Respondent. She never even made an inquiry concerning her schedule. Her testimony clearly indicates and I find that she quit her employment with the Respondent on November 14. However, consideration must be given to the question of whether or not the Respondent's illegal activity forced Sargent to quit under circumstances that should be considered a constructive discharge.

## 2. Analysis and conclusions

The *Wright Line* analysis set forth above with relation to the discharge of Replogle applies equally to the discharge of Sargent. In addition the law relating to constructive discharge must also be considered.

Union and he never said that he was going to make it tougher on her. Particularly in view of his remark to other employees on the same day that he was going to make life miserable for union adherents so that they would quit, I credit Sargent and do not credit Font.

The Board succinctly set forth the law relating to constructive discharge in *Keller Mfg. Co.*, 237 NLRB 712, 722-723 (1978), *enfd.* denied in part 106 LRRM 2546 (7th Cir. 1980), which held:

Conceptually, constructive discharge occurs when an employee quits "[because] an employer deliberately makes [his or her] working conditions intolerable. . . ." *J. P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490, 494 (C.A. 4, 1972). It becomes unlawful when this is done because of an employee's union activity. *Id.* Accordingly, when it is shown that an employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it reasonably should have foreseen would induce that employee to quit, a *prima facie* case of constructive discharge is established, requiring the employer to produce evidence of legitimate motivation.

Sargent joined and actively supported the Union. Font knew of her activity. On October 14, 1981, he acknowledged to another employee that he knew Sargent signed for the Union. Font harbored a virulent animosity against employees who were prouder. He manifested that animosity by engaging in the campaign of unlawful activities set forth in detail above. On November 6 he openly acknowledged to employees that he was going to make life miserable for the union employees so that they would quit. The evidence clearly establishes that that was just what he did with regard to Sargent. Shortly after he learned of the union activity Font began to tinker with Sargent's work schedule so that she would work days, hours, and stations that she found undesirable. On November 6, the same day he told other employees that he planned to make life so miserable for union supporters that they would quit, he took particular aim at Sargent. He made her dig through the trash for a champagne bottle and accused her of stealing from him. When she said that he knew she had not stolen, he said, "We know that, don't we?" When she asked him why he was doing that to her, he told her that she should never have brought in the Union. in. He coupled that with a personal remark about her exhusband not wanting her. She asked why he was hurting her that way and he replied, "I haven't begun to hurt you yet. I can think of ways that you haven't even dreamed of."

Sargent looked for another job and a week after Font's November 6 diatribe, she quit. Font literally drove her to that action through his unlawful threats<sup>28</sup> and other unlawful conduct. I find that Sargent's cessation of employment with the Respondent on November 14, 1981, resulted from the Respondent's constructive discharge of her.<sup>29</sup> In sum, I find that the General Counsel has made out a strong *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's constructive discharge of Sargent,

<sup>28</sup> I find that in that November 6 conversation Font violated Sec. 8(a)(1) of the Act by threatening to take reprisals against Sargent because of her union activity.

<sup>29</sup> See *C. Markus Hardware*, 243 NLRB 903, 916 (1979).

that the Respondent has not demonstrated that it would have constructively or otherwise discharged Sargent even in the absence of her union activity, that the Respondent has not produced evidence to balance, much less to outweigh, the evidence produced by the General Counsel, and that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging Sargent.

#### E. The Discharge of Larry Allen Flaitz

##### 1. The sequence of events

Flaitz was employed as a waiter by the Respondent from March until November 1, 1981. He signed an authorization card for the Union on September 26, 1981. In addition to attending a number of union meetings, he actively solicited union support among the Respondent's employees and he passed out union authorization cards in the company parking lot. On October 11, 1981, Font coercively interrogated Flaitz and Moraga. He asked them why they signed for the Union. On that occasion Font told them that the Scotch & Sirloin would never be a union house and that he was going to have to cut their hours if the house went union. In addition he impliedly threatened to fire them by adding, "if you come back to work."

In early October, which was before there was any indication that Font knew of the union activity, Flaitz asked Font whether he could have Sunday, November 1, off for his birthday. Font agreed to the day off but said that Flaitz should remind him of it. In mid-October Flaitz did remind Font about his request and Font replied, "You can have it, you were the ones that are displeased with me, I am not displeased with you." About a week after that Flaitz once again reminded Font that he would be off on November 1 and Font replied that Flaitz could not have that day off. Flaitz said that he had never asked for time off before and Font responded by saying, "No, but you have done other things." Font scheduled Flaitz to work on November 1.

On October 31, 1981, Font kept finding fault with Flaitz. Font told Flaitz to perform busboy's duties that Flaitz would not normally have been asked to do. When there were no customers at Flaitz' station, Font told him to get busy so that Flaitz went to help other waiters. When he did that Font told him to get to his station even though there were no customers there. After being harassed most of the day, Flaitz told Font that he was sick and was going home. Flaitz also said that he was so sick that he would not be in to work the next day. Font replied, "Well, then you don't work here anymore."<sup>30</sup>

Flaitz called in on November 1 and told Assistant Manager Lynn Managos that he was sick and would not be at work. He called again on November 2 to find out his schedule and Managos told him that he would need a doctor's excuse before he could come back to work. His next scheduled day of work was on November 6. When he reported for work that day Managos told him that Font had said that he could not come back unless he had a doctor's excuse. He did not have such an excuse and

he was not allowed to work. Flaitz admitted in his testimony that he was not really sick on November 1. He also acknowledged that he was not sick on October 31 but that he was so upset from Font's harassment that he was too nervous to deal with the customers.

Sonya Nicely credibly testified that she overheard a conversation between Font and Linda Miller immediately after Flaitz left the restaurant on October 31, 1981. She averred that Font said, "Larry went home sick. He is too sick to work but he is not too sick to go to a party . . . Well, that is one less to go." She also averred that at that point Font started laughing.

##### 2. Analysis and conclusions

Once again the *Wright Line* analysis is applicable. Flaitz was an active union supporter and Font knew of that support. Font harbored a virulent animosity against union supporters and he expressed that animosity through a number of unfair labor practices. Some of those unfair labor practices were directed specifically against Flaitz. On October 11 Font coercively interrogated Flaitz, threatened to reduce his hours if the house went union, and impliedly threatened to fire him. As is detailed above in the discussion of Sargent's discharge, Font told employees that he was going to make life so miserable for union adherents that they would quit. Font constructively discharged Sargent. Before Font knew of Flaitz' union activity he agreed to give Flaitz time off for his birthday on November 1. After he learned of Flaitz' union activity he reneged on that agreement and impliedly admitted that he did so because of Flaitz' union activity by saying, "You have done other things" when Flaitz said that he had never asked for time off before.<sup>31</sup> On October 31 Font manifested his intention to make life so miserable that union adherents would quit by continually harassing Flaitz to the point that Flaitz said that he was sick and was going to leave. Flaitz also said that he would be out sick the next day when in fact he was not really sick. Font replied, "Well, then you don't work here anymore." Shortly after Flaitz left, Font laughed and told another employee that that was one less to go. After November 1, Flaitz was not allowed to return to work.

The General Counsel has made out a strong prima facie showing sufficient to support the inference that protected activity was a motivating factor in the Respondent's decision to discharge Flaitz. The Respondent did establish that Flaitz called in sick on November 1 when he was not really sick. However, Font had promised Flaitz November 1 off and then unlawfully withdrew that promise because of Flaitz' union activity. Font's activity in general can be fairly described as an attempt to either drive union adherents into quitting or into taking some action that could be used as a pretext for discharge. An employer cannot unlawfully push an employee into taking certain action and then use that action as a basis for discharge. That is just what happened here. Evaluating the evidence as a whole, I find

<sup>30</sup> These findings are based on the credited testimony of Flaitz.

<sup>31</sup> I find that the Respondent violated Sec. 8(a)(1) and (3) of the Act by denying Flaitz the day off because he engaged in union activity.

that the Respondent has not demonstrated that it would have discharged Flaitz even in the absence of his union activity. The Respondent has not produced evidence to balance, much less to outweigh, the evidence produced by the General Counsel. I therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Flaitz on November 1, 1981.

*F. Font's Activities at the Board-Conducted Election—  
Findings and Conclusions*

The election in Case 31-RC-5225 was scheduled to be held 4:30 to 5 p.m. on December 15, 1981, at the Respondent's premises.

At or about 4:30 p.m. on December 15 Sargent, Replogle, and Galligos were at the Scotch & Sirloin waiting to vote. The Board agent conducting the election told them about the Board's challenge procedure and said that they could vote after the other employees. About 4:45 p.m., while they were in the polling area waiting to vote, Font entered the room. He told the three of them that they had no right to be there and that if they did not leave he would call the police and have them removed. The Board agent then told them that it would be best if they did leave. They left about 4:50 p.m. and did not vote.<sup>32</sup>

As found above the discharge of Replogle and the constructive discharge of Sargent were unlawful. At the time of the election they were employees and clearly were eligible to vote. By preventing them from voting Font not only interfered with the conduct of the election but unlawfully interfered with rights guaranteed to employees under Section 7 of the Act. In doing so he violated Section 8(a)(1) of the Act. The situation with regard to Ann Galligos is not quite so clear. She worked for the Respondent as a cocktail waitress from June to the beginning of November 1981. Before she left work she gave Font 2 weeks' notice that she was going to take off and go with her mother to Florida. The Respondent certainly had the right to challenge her ballot and claim that she was no longer an employee as of the date of the election. The Union could have argued that she was an employee on temporary leave of absence. That issue was not before me. If it were it is likely that more evidence on that subject would have been adduced. The Board has set forth detailed procedures in its rules and regulations for the resolution of challenged ballots. Font short-circuited those procedures by preventing Galligos from voting and threatening to call police if she stayed on the premises to vote. He did so in the presence of other employees. I find that conduct interfered with the conduct of the election and also violated Section 8(a)(1) of the Act. Cf. *S. S. Kresge Co.*, 229 NLRB 10, 15 (1977); *Grant's Home Furnishings*, 229 NLRB 1305 (1977).

<sup>32</sup> These findings are based on the credible testimony of Replogle which was substantially corroborated by Galligos and Sargent. Font acknowledged in his testimony that he did tell the Board agent that, unless the Board agent removed Sargent and Replogle, he would call the police. He averred that at that time he did not know they were there to vote but in the next breath he stated that he knew that they were not on the list of people authorized to vote.

IV. THE REPRESENTATION CASE

Conduct that occurs between the date of filing of the petition and the date of the election can be considered in determining whether the election should be set aside. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). The petition in Case 31-RC-5225 was filed on October 8, 1981, and the election was conducted on December 15, 1981. Between those dates the Respondent discharged Replogle and Flaitz and constructively discharged Sargent in violation of Section 8(a)(3) and (1) of the Act. During the same time period the Respondent engaged in a massive effort to undermine the Union through threats, promises, and other unlawful activity that was found to violate Section 8(a)(1) of the Act. In addition the Respondent unlawfully prevented employees from voting and threatened to call the police if prospective voters remained on the premises to vote in the Board election. I find that the Respondent's conduct interfered with the free and untrammelled choice of the employees in the election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). I therefore recommend that the election of December 15, 1981, be set aside, that Case 31-RC-5225 be remanded to the Regional Director, and that a new election be directed by the Regional Director at an appropriate time.<sup>33</sup>

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES  
UPON COMMERCE

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

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their own and other employees' union activities; by promising increased hours and other benefits to an employee to discourage union activity; by threatening to discharge and take other reprisals against employees because of their union activities; by threatening to blackball an employee because of his union activities; by threatening to take action that would make union organization futile; by threatening to make life miserable for union employees so as to make them want to quit; by creating the impression that it was engaging in surveillance of its employees'

<sup>33</sup> This recommendation shall not be construed as precluding the Regional Director from reconsidering the challenged ballots in the light of the finding that Larry Flaitz was discharged in violation of Sec. 8(a)(3) of the Act. If such a reconsideration results in a finding that a majority of the employees voted for the Union, then the election will not be set aside and the Union will be certified.

union activities; by changing the schedules of certain employees because the Union was engaging in organizational activity; by increasing the hours of certain employees because of the belief that they were antiunion; by decreasing the hours of an employee because of the belief that he was prounion; by denying a day off to an employee because of that employee's union activities; by changing its policy and denying employees a free after-shift drink and the use of the salad bar because employees engaged in union activities; and by preventing employees from voting and by threatening to call the police if prospective voters remained on the premises to vote in the Board-conducted election.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Replogle and Flaitz and by constructively discharging Sargent because of their union activities.

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

6. By engaging in the conduct described above the Respondent has interfered with the employees' freedom of choice in the election conducted on December 15, 1981.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As the Respondent has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights, I recommend that a broad cease-and-desist order issue. *Hickmott Foods*, 242 NLRB 1357 (1979); *Cutting, Inc.*, 255 NLRB 534 (1981).

Having found that the Respondent discharged Replogle and Flaitz and constructively discharged Sargent in violation of Section 8(a)(3) and (1) of the Act, I recommend that the Respondent be ordered to reinstate and to make them whole for any loss of earnings resulting from their discharges by payment to each of them a sum of money equal to the amount he or she normally would have earned as wages, tips, and other benefits from the date of his or her discharge to the date on which reinstatement is offered, less net earnings during that period. It is also recommended that the Respondent be ordered to make Replogle whole for any loss he suffered due to his reduction in hours between October 12 and November 11, 1981. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>34</sup>

It is further recommended that the Respondent be ordered to preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due.

<sup>34</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On the basis of these findings of fact and conclusions of law, and on the entire record of this case, I issue the following recommended<sup>35</sup>

#### ORDER

The Respondent, M.B.K., Inc. d/b/a Scotch & Sirlon Restaurant, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, constructively discharging, or otherwise discriminating against any employee for engaging in activity on behalf of Culinary Alliance & Bartenders Local No. 498, Hotel and Restaurant Employees and Bartenders International Alliance, AFL-CIO, or any other union.

(b) Coercively interrogating employees concerning their own or other employees' union activities; promising increased hours or other benefits to employees to discourage union activities; threatening to discharge or take other reprisals against employees because of their union activities; threatening to blackball employees because of their union activities; threatening to take action that would make union organization futile; threatening to make life miserable for union employees so as to make them want to quit; creating the impression that it is engaging in surveillance of its employees' union activities; changing the schedules of employees because a union engages in organizational activity; increasing the hours of employees because it believes that they are antiunion; decreasing the hours of employees because it believes that they are prounion; denying time off to employees because of their union activities; changing its policy and denying employees a free after-shift drink and the use of the salad bar because employees engage in union activities; or preventing employees from voting or threatening to call the police if prospective voters remain on its premises to vote in a Board election.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights under the Act.

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

(a) Offer D. Wesley Replogle, Larry Allen Flaitz, and Sandra Lee Sargent full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges and make them whole, with interest, for lost earnings in the manner set forth in the section of this decision entitled "The Remedy."

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

<sup>35</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.

(c) Expunge from its files any reference to the discharges of Replogle and Flaitz and the constructive discharge of Sargent and notify them in writing that that has been done and that evidence of those unlawful discharges will not be used as a basis for future personnel action against them.

(d) Post at its Ventura, California place of business copies of the attached notice marked "Appendix."<sup>36</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted on December 15, 1981, in Case 31-RC-5225 be set aside, that that case be remanded to the Regional Director for Region 31, and that a new election be directed by the Regional Director at an appropriate time.

<sup>36</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."