Gourmet Foods, Inc. *and* Warehouse Employees of St. Paul, Minnesota, Local Union No. 503, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 18-CA-6947, 18-CA-7081, 18-CA-7144, and 18-CA-7251

14 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 26 April 1982 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The Respondent subsequently filed an answering brief to their cross-exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified.

As fully set forth in the attached decision, the judge found that the Respondent committed numerous 8(a)(3) and (1) violations. We agree with his findings.[2]

We also agree with the judge that the General Counsel failed to demonstrate the Union's majority status and hence failed to support its argument for a remedial bargaining order predicated on majority status. In so doing, we specifically affirm his finding, for the reasons he stated, that an appropriate unit including the general warehouse employees must also have included at least the sewing room employees.[3] Their inclusion negates the numerical possibility of the General Counsel's having demonstrated majority status.[4] Therefore, because the in-

[1] 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.

[2] In specific reference to the judge's findings about the 8(a)(3) allegations involving employee Krenner, we interpret the judge's analysis of the element of knowledge as a finding that the Respondent acted *on the belief* that Krenner had been engaged in union activity when it warned and discharged him. See, e.g., *Riverfront Restaurant*, 235 NLRB 319, 320 (1978). While the evidence did not demonstrate the Respondent knew which particular prounion activities Krenner participated in (for example, the Respondent was not shown to have known Krenner signed a union authorization card), there was reliable evidence, described by the judge, which provides a sound basis for finding that the Respondent believed Krenner was engaged in union activity. Further, as stated by the judge, the circumstances surrounding both the warning and the discharge reinforce this finding. Thus, the Respondent knew about the existence of union activity before the warning and the discharge, and was found to have verbalized and unlawfully acted on its union animus both before and after the warning and discharge. Also, the timing of the warning coincided with the Respondent's explicitly antiunion "get tough" policy, the reason for the warning was appropriately found to be pretextual, and the reason given by the Respondent for Krenner's discharge was correctly found to evidence disparate treatment.

[3] Our dissenting colleague would reverse the judge, find the sewing room employees excluded from the appropriate unit, and therefore find the Union represented a majority of unit employees as of the demand date. In our view, the exclusion of the sewing room employees would represent an unjustifiable fragmentation of an appropriate unit for the apparent purpose of limiting the size of the unit to conform to the Union's organizing efforts and to achieve majority status for the Union. As found by the judge such exclusion can be justified neither by the number of hours worked by the sewing room employees nor by the fact that they are also students. During the relevant period, they were regularly employed for a sufficient number of hours to warrant their unit inclusion as regular part-time employees. And the record reflects that several of the part-time general warehouse employees, indisputably in the unit, were students from the same school as the sewing room employees. Moreover, what the dissent attempts to obscure in its detailed description of the sewing room employees' conditions of employment is that the job of sewing room employees is to perform warehouse functions under the supervision of the warehouse supervisor. While the sewing room employees' wage rate is lower than that of the part-time general warehouse employees, explained at least in part by the lighter, less physically rigorous work in the sewing room, the record does not demonstrate that either group of part-time employees has actually received fringe benefits. While on a different schedule of hours, the sewing room employees perform their work while general warehouse employees are also working. Their minimal contact with general warehouse employees is explained by their separate work area, not closed off by a door from the general warehouse area, which is, in turn, explained by the location of the units on which they work in that room. In light of the commonality of function and supervision between the sewing room employees and the general warehouse employees, the insubstantial distinctions between the two groups of employees, as well as the fact that the sewing room employees do not share a community of interest with any other employees at the Respondent's facility, we can see no legitimate justification for excluding the sewing room employees from the general warehouse unit.

[4] There were 24 general warehouse employees, 9 sewing room employees, and 4 sales trainee/cooler employees in the appropriate unit found by the judge. The judge found there were 16 valid authorization cards as of the demand date; the 16 card signers were all general warehouse employees. The General Counsel and the Charging Party both argue that sewing room employee Herschel Foster should be excluded from the unit and the Charging Party alone argues that sewing room employee Debbi Ross should be excluded from the unit; both employees were included in the judge's count of sewing room employees. They contend that Foster and Ross may be "presumed" to have begun their employment after the 14 October 1980 demand date because they began their employment at some time during the 2-week payroll period ending 18 October 1980 and because Foster and Ross respectively worked 15 and 42 hours during that payroll period. Their exclusion on this basis was not raised to the judge; the General Counsel did not raise it in its brief to the judge and the Charging Party did not file a posthearing brief to the judge. Further, at the hearing the parties stipulated to the joint introduction in evidence of the Respondent's payroll records as reflecting the general warehouse, the sewing room, and the sales trainee/cooler employees. Also, the General Counsel introduced in evidence a list of warehouse employees which the Respondent submitted to the Region on 21 October 1980; that list included the names of Foster and Ross. There was no evidence submitted by the General Counsel or the Charging Party showing that Foster or Ross began working after 14 October 1980. The only rationale for exclusion now urged on exception is what the General Counsel and the Charging Party refer to as a "presumption" of ineligibility. We find this to be an insufficient basis for concluding that Foster and Ross should be excluded from the unit as of the demand date. It is the General Counsel's burden to establish the Union's majority status if it seeks a bargaining order remedy predicated on that status. As part of that burden, the General Counsel must establish the number of employees within the appropriate unit on the critical date. See, e.g., *Sumco Mfg. Co.*, 251 NLRB 427 at fn. 2 (1980). Yet here, the General Counsel introduced evidence indicating Foster and Ross may have been employed on the critical date. Considering the number of hours Foster and Ross worked

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clusion or exclusion of an additional category of employees in dispute—the sales trainee/cooler employees—is numerically nondeterminative and because that category of employees ceased to exist several months after the Union's demand for recognition, we do not find it necessary to decide here whether they would have been appropriately included in or excluded from the general warehouse employees unit.

Having determined that the Union was not at any relevant time the majority representative of the Respondent's employees in an appropriate unit, the judge apparently considered the matter of a bargaining order remedy foreclosed. He found it unnecessary to determine whether the Respondent's misconduct would have warranted a bargaining order remedy had majority status been demonstrated.[5] Further, while referring to the Supreme Court's dictum in *NLRB v. Gissel Packing Co.*,[6] about "imposing a bargaining order, without need of inquiry into majority status . . . in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," the judge refrained from examining the appropriateness of granting a nonmajority bargaining order,[7] apparently because the General Counsel did not specifically raise the issue.[8]

The Charging Party contends that a bargaining order remedy is warranted here, even absent a showing of the Union's majority status, because of what it characterizes as the Respondent's "outrageous" and "pervasive" unfair labor practices. Had majority status been demonstrated we would have agreed with both the General Counsel and the Charging Party that a remedial bargaining order was warranted. The Respondent embarked on an approximately 5-month campaign of unfair labor practices almost immediately after it learned of the likelihood its employees would seek union representation. The campaign intensified following the Union's withdrawal of an election petition and continued throughout an unfair labor practice strike and the period of reinstatement. The violations here include discriminatory discharge; discriminatory discipline; threats of discharge and plant closure; and the retaliatory imposition of harsher working conditions. All these violations directly affected a number of employees. The impact of the violations was likely heightened by the relatively small size of the unit and by their orchestration and commission by high-level management officials and supervisory personnel. The Respondent's president's statement early in the campaign that he "would do anything to keep a union out" coupled with the continuation and intensification of unfair labor practices indicates the Respondent's predisposition to engage in unlawful misconduct in response to union activities. Given the circumstances of this case, we would in all likelihood have found that the possibility of erasing its effects and ensuring a fair election by the use of traditional remedies was slight and that the sentiment of a majority of the employees, reflected by valid authorization cards, would probably have been better protected by a bargaining order than by an election. We do not, however, now determine whether we would have viewed the Respondent's misconduct as an "exceptional" case, within the description of the *Gissel* category one, that is, "marked by 'outrageous' and 'pervasive' unfair labor practices" and "so coercive that, even in the absence of an 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effects" of the misconduct.[9]

per payroll period through the end of the year there is a likelihood that their employment during their first payroll period spanned the entire 2-week period. In contrast, as emphasized above, the General Counsel and the Charging Party introduced no evidence to support a presumption of their nonemployment on the critical date. The General Counsel has thus not demonstrated that the unit was conclusively limited to 31 employees. Consequently, it has not shown that the 16 valid cards constitute a majority showing in the unit.

[5] Because he found no majority, the judge did not find the Respondent violated Sec. 8(a)(5) by a refusal to bargain upon demand and by a subsequent unilateral change in attendance policies. We affirm the dismissal of those 8(a)(5) allegations.

[6] 395 U.S. 575, 613–614 (1969).

[7] Our reference to a nonmajority bargaining order is limited to those situations in which a union has not been shown to have had majority support at any relevant time.

[8] The judge's decision here issued after *United Dairy Farmers Cooperative Assn.*, 257 NLRB 772 (1981) (herein *United Dairy II*), in which the Board, for the first time, imposed a bargaining order in the absence of any showing of majority support, but before *Conair Corp.*, 261 NLRB 1189 (1982), in which the Board next imposed such a remedy and specifically asserted the Board's authority to do so.

[9] *Gissel Packing Co.*, supra at 613–615. In *Gissel*, the Supreme Court approved the Board's use of a bargaining order remedy where "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that [majority] employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." (395 U.S. at 614.) The Court specifically limited the effect of its holding to approval of a bargaining order involving "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." However, in its general discussion of possible factual circumstances meriting the exercise of Board remedial authority, the Court referred to a "third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." (395 U.S. at 615.) The Court did not itself similarly define the characteristics of more extraordinary cases marked by more pervasive practices—what have come to be known, and will be referred to here, as *Gissel* category one cases. It instead began its discussion by noting that, despite its reversal of the Fourth Circuit on all major issues, the actual area of disagreement was not large since although the Fourth Circuit did not "validate the general use of a bargaining order in reliance on cards [it] nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." (395 U.S. at 613.) The Court further continued to quote the Fourth Circuit decision in *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), as saying that a bargaining order would be appropriate if the unfair labor practices were of "such a nature that their coercive effects cannot be eliminated by the application

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The Board's post-*Gissel* cases show an array of factual circumstances that have been determined to fall within the *Gissel* category one, including some which appear of equivalent or less severity[10] than the circumstances involved here and some which are of clearly greater severity.[11] Under these circumstances, we are not disposed to decide this case on the narrower issue of a *Gissel* category determination since we have come to the conclusion that we would, under no circumstances, issue a nonmajority bargaining order.[12]

I.

The Board and two courts of appeals, the Third Circuit and the D.C. Circuit, have directed attention to the nonmajority bargaining order issue on several occasions within the past several years.[13] That attention has by no means led to a sustained consensus among Board members or the courts. That lack of consensus together with the comparative recency of Board precedent asserting authority to issue such orders led us, as a four-member Board with two new members who had not earlier addressed the issue, to review the area.

Beginning with *United Dairy I*, 242 NLRB 1026, a variety of differing positions have been articulated concerning whether the Board has the remedial authority under Section 10(c) of the Act to impose nonmajority bargaining orders and whether, assuming its authority in that regard is not specifically limited by statute, it should exercise any such authority in view of the majority rule principle embodied in the Act and of other policy considerations. The following review provides an understanding of the parameters of the dispute as well as of the particular points of contention.

In *United Dairy I*, a Board majority consisting of Members Penello, Murphy, and Truesdale agreed on the result not to impose a nonmajority bargaining order. Members Murphy and Truesdale, based on the above-quoted language from *Gissel* and other Supreme Court comment about the breadth of the Board's remedial authority under Section 10(c), found that the Board "may" have the statutory authority to issue nonmajority bargaining orders. However, while finding the respondent's conduct in that case to fall within the "outrageous" and "pervasive" category described in *Gissel*, they chose not to exercise their "discretion" to grant such a bargaining order because, under the facts of the particular case, they deemed it "less destructive of the Act's purposes" (most importantly the principle of majority rule) to provide an election than "risk negating [employee] choice . . . by imposing a bargaining representative upon employees without some history of majority support for the Union." Id. at 1028. They stated that they would continue to balance the competing interests, leaving open the possibility they would issue a nonmajority bargaining order in other circumstances. In contrast, Member Penello asserted that the Board lacked remedial authority to issue a nonmajority bargaining order. He noted the evolution of Board precedent eschewing nonmajority bargaining order remedies. He reviewed the majority rule principle as a dominant theme in the Act's construction and subsequent interpretation. He analogized the principle to another—freedom of contract—which was found to preclude the Board from ordering a party to agree to a contract provision. *H. K. Porter Co. v.*

of traditional remedies, with the result that a fair and reliable election cannot be had." (395 U.S. at 614.) The Court then went on to compare the Fourth Circuit's statements to the established and "similar" Board policy of issuing bargaining orders "in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices." (395 U.S. 614.) It is the Court's statements about the Fourth Circuit's statements that have been a major element in the controversy over the Board's authority to issue nonmajority bargaining orders.

[10] See, e.g., the three cases remanded by the Supreme Court to the Board pursuant to its decision in *Gissel. Heck's Inc.*, 180 NLRB 530 (1970), and 166 NLRB 674 (1967); *General Steel Products*, 180 NLRB 56 (1969), and 157 NLRB 636 (1966); *Gissel Packing Co.*, 180 NLRB 54 (1969), and 157 NLRB 1065 (1966). See also *Winco Petroleum Co.*, 241 NLRB 1118 (1979); *Curtin Matheson Scientific*, 228 NLRB 996 (1977).

[11] See, e.g., *Conair Corp.*, 261 NLRB 1189 (1982). But see *United Supermarkets*, 261 NLRB 1291 (1982), wherein the Board found the circumstances to "fall short" of the *Gissel* category one despite 7 discriminatory discharges and approximately 31 additional independent violations of Sec. 8(a)(1).

[12] Were we to determine simply that the Respondent's misconduct did not fall within the *Gissel* category one, we would conceivably leave the misimpression that the issuance of a nonmajority bargaining order was a future possibility, and thereby engender needless litigation on the issue. Were we to determine that the Respondent's misconduct did not fall within *Gissel* category one and also state that we were not thereby expressing an opinion on the continued viability of nonmajority bargaining order remedies, we would conceivably leave the impression that we no longer adhered to *Conair* without providing our reasoning. We think the better practice is to directly reach the issue and to state our position and supporting rationale.

[13] The first extensive examination of the issue was in the 1979 case of *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026 (herein *United Dairy I*). Further examination, as well as the shift of a *United Dairy I* dissenting position to the majority position, occurred in *United Dairy II*, supra, and *Conair Corp.*, 261 NLRB 1189 (1982). Prior to *United Dairy I*, the Board had repeatedly declined to issue bargaining orders absent a showing of majority support for the union. See, e.g., *Fuqua Homes Missouri, Inc.*, 201 NLRB 130 (1973); *GTE Automatic Electric*, 196 NLRB 902 (1972); *Loray Corp.*, 184 NLRB 557 (1970); *Scott's, Inc.*, 159 NLRB 1795 (1966), enfd. as modified sub nom. *Electrical Workers IUE v. NLRB*, 383 F.2d 230 (D.C. Cir. 1967), cert. denied 390 U.S. 904; *J. P. Stevens & Co.*, 157 NLRB 869 (1966), enfd. as modified 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005; *W. H. Elson Bottling Co.*, 155 NLRB 714 (1965), enfd. as modified 379 F.2d 223 (6th Cir. 1967). In determining not to impose bargaining orders in those cases, even in the face of characterizations of respondents' conduct as "outrageous" and "pervasive," it emphasized the absence of showings of the unions' majority status. Moreover, in *W. H. Elson*, the Board stated: ". . . in consideration of the majority principle in Section 9(a) of the Act, we are not convinced that the policies of the Act require or even permit the issuance of a bargaining order where majority status has not been attained." Thereafter, the Board continued to cite *W. H. Elson* and to specifically refer to that statement about its remedial authority.

NLRB, 397 U.S. 99 (1970). He concluded that the principle of majority rule, recognized as a fundamental policy of the Act, necessarily limits the Board's authority under Section 10(c). He interpreted *Gissel* as at most leaving open the issue of the Board's authority to issue nonmajority bargaining orders. Then Chairman Fanning and Member Jenkins would have granted a nonmajority bargaining order. They did not perceive any congressional intent to limit the Board's broad remedial authority by the principle of majority rule. They looked to the *Gissel* language as Supreme Court recognition of the Board's authority to grant a nonmajority bargaining order remedy. They also looked to circuit court references and descriptions of the *Gissel* language[14] as confirmation of that interpretation. Moreover, they considered it appropriate to acknowledge, consider, and then balance the principle of majority rule against the objective of fashioning a remedy to best effectuate the policies of the Act. Their balancing analysis led to their conclusion that, when the employer's misconduct has frustrated employee free choice and prevented the ascertainment of the majority's wishes, the only effective remedy is to enable the employees to experience the fruits of the alternative choice denied to them so that they may ultimately make a free choice.

On petition for review and cross-application for enforcement of *United Dairy I*, the Third Circuit announced that the Board had remedial authority to issue nonmajority bargaining orders. It added the caveat that in that case there existed a reasonable possibility that the union would have attained an election majority but for the action of the employer, and it was not deciding whether "the Board lacks the authority" when such a reasonable possibility is absent.[15] While referring to the *Gissel* language as dictum and while also questioning whether the Supreme Court's purpose in including such dictum was to guide lower courts or to simply raise an issue of intellectual interest, the court determined to follow its own prior descriptions of the *Gissel* categories as including the requisite authority.[16] The court's further analysis appears to have focused on the effects of denying the Board such authority—that is, what it perceived as the insufficiency of other remedies to redress the interference with employee free choice and the concurrent potential incentive for employers to illegally prevent the attainment of majority status. It maintained that these same concerns motivated the Court and that the rationale of *Gissel* "suggests that the mere absence of such indicia of majority support does not in itself preclude the issuance of a bargaining order by the Board." (Id. at 1068.) The court remanded the case to the Board for findings as to whether the respondent's misconduct was "outrageous" and "pervasive" and therefore warranted issuance of a nonmajority bargaining order.

On remand, a three-member Board[17] focused on categorizing the misconduct and evaluating its impact on the possibility of a fair election. On the issue of the Board's remedial authority, then Chairman Fanning and Member Jenkins adhered to their position in the case's orginal Decision and Order while Member Zimmerman found it unnecessary to determine whether the Board had such authority although he recognized the Third Circuit's decision as binding on the Board for the purposes of the case.

The Board next addressed the issue in *Conair Corp.*, supra, 261 NLRB 1189 (1982). There, for the first time, a majority of the full five-member Board[18] asserted the Board's authority to issue a nonmajority bargaining order. They reiterated adherence to the Fanning-Jenkins position of *United Dairy I*. They rearticulated (id. at 1194) their rationale that "in the exceptional *Gissel* category I case, we find that the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation." They also commented on the subject which had caused the court in *United Dairy* to place a reservation on its holding—the subject of whether a certain measure of union support, albeit less than a majority, would have to exist as a basis for concluding that a respondent's misconduct precluded, in fact, a union's enjoyment of majority status. They stated (ibid.) they would not "necessarily withhold a bargaining order in the absence of a close election vote, a high majority percentage card showing, or any other affirmative

[14] In none of those cases cited was the court involved being called upon to enforce a nonmajority bargaining order. See *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1002 (10th Cir. 1977); *NLRB v. Armcor Industries*, 535 F.2d 239 (3d Cir. 1976); *J. P. Stevens & Co.*, 441 F.2d 514 (5th Cir. 1971).

[15] *United Dairy Farmers Cooperative Assn. v. NLRB*, 633 F.2d 1054 (3d Cir. 1980).

[16] The court acknowledged that its own prior descriptions of the Board's authority, as derived from *Gissel*, occurred only in review of cases in which the Board had found majority status. *United Dairy Farmers*, supra at 1066.

[17] At that time, the only participating Board members were then Chairman Fanning and Members Jenkins and Zimmerman.

[18] Member Zimmerman joined with Members Fanning and Jenkins, while then Chairman Van de Water and Member Hunter wrote separate opinions dissenting on the nonmajority bargaining order remedy.

showing of a reasonable basis for protecting a union's majority support."[19] They described the "critical predicate" of a nonmajority bargaining order as a finding that an employer's unlawful conduct falls within *Gissel* category one. In his dissent, then Chairman Van de Water followed the position of Member Penello in *United Dairy I* that the "[h]oldings of the Supreme Court, the plain words of the statute, and its legislative history . . . establish that the Board's remedial authority is limited by the majority rule doctrine." (Id. at 1195.) He added that "even if the Board did not lack the requisite statutory authority, [he] could not conclude that employee free choice is best effectuated by imposing a labor organization upon employees without their consent." (Ibid.) He also detailed his disagreement with the Third Circuit opinion in *United Dairy*. First, to explain what he perceived as an inapt analogy between *United Dairy* and *Gissel*, he pointed to the "fundamental difference" between the expressed purpose of bargaining order remedies in *Gissel*—to restore the status quo ante—and the fact that a nonmajority bargaining order in *United Dairy* did not reestablish preexisting conditions but rather, based on speculation, created a bargaining representative which was not designated or selected by a majority of employees in accord with Section 9(a). Second, he considered the court's "reasonable possibility" standard and limitation to have no support in *Gissel* and to lack empirical support in view of the number of elections lost by unions which have had a preelection 30-percent showing of interest. Third, he referred to a 1981 opinion of the Court of Appeals for the District of Columbia,[20] in which that court, although finding it unnecessary to decide the nonmajority bargaining order issue, expressed potential disagreement with the Third Circuit's *United Dairy* decision. While expressing a "deep concern" that the majority's assumption of authority was proscribed by the Act, Member Hunter focused on "important policy reasons" for declining to issue nonmajority bargaining orders. (Id. at 1198.) He stated that public confidence in the Board as an impartial agency would be eroded if the Board were perceived as imposing a choice on employees instead of protecting the employees' right to choose. Moreover, he contested the majority's characterization of the nonmajority bargaining order as one which "best vindicates the employees' right of self-determination."[21] In his view, the damage to employees' right of free choice is exacerbated by the imposition of a choice. Finally, he raised questions about potential difficulty in applying any consistent standard in assessing the seriousness of employer misconduct and the consequent possibility that what would begin as an exceptional remedy would become a commonplace remedy.

In the most recent development regarding this issue, the D.C. Circuit, on 15 November 1983, issued its opinion based on Conair's petition for review and the Board's cross-petition for enforcement of its Order.[22] The court declined to enforce the Board's nonmajority bargaining order remedy. The court described the nonmajority bargaining order issue as presenting the following dilemma (721 F.2d at 1378):

> . . . if the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant unfair labor practices, employees may be saddled for a prolonged period with a union not enjoying majority support.

Its response to the dilemma followed along the lines of Member Penello's opinion in *United Dairy I* to the conclusion that "[g]iven the current shape of the statute, however, we believe Congress has not placed nonmajority bargaining orders within the NLRB's remedial discretion."[23] (Id. at 1384.)

In contrast, noting that *Gissel* and subsequent judicial interpretations of that decision were the mainstay of the Board's claim of statutory authority, the dissenting judge (Wald) agreed that such precedent supports the Board's authority to issue nonmajority bargaining orders. She goes on to find that (1) neither statutory language nor legislative

[19] Despite this assertion, the majority first noted (ibid.) that the "risk of even temporarily contravening the wishes of an employee majority" was lessened by an authorization card showing from approximately 46 percent of the respondent's employees and an election showing, which followed the respondent misconduct, of approximately 33 percent of the participating voters. They then found a reasonable basis existed for concluding that the union would have enjoyed majority support but for the respondent's unfair labor practices.

[20] *Teamsters Local 115 (Haddon House Food Products) v. NLRB*, 640 F.2d 392 (1981), cert. denied 102 S.Ct. 141 (1981).

[21] *Conair Corp.*, supra at 1194.

[22] *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983) (Wald, J., dissenting).

[23] An additional point made by the court in its analysis of the Act and its legislative history is that Congress has been explicit in the one circumstance in which it has authorized a union's selection as exclusive bargaining agent absent advance approval by a majority of employees—Sec. 8(f), the building and construction industry provision. Further, it was noted that Congress had expressly limited "prehire" agreements permitted by that section by negating the agreements' effect as a bar to an election. It was also noted that both the Board and the Supreme Court had subsequently stressed the voluntary, voidable character of 8(f) agreements and made clear that *all* the benefits and legal rights attached to exclusive collective-bargaining status only exist for a union party to an 8(f) agreement when its majority status has been demonstrated. See, e.g., *NLRB v. Iron Workers Local 103*, 434 U.S. 335 (1978); *Dee Cee Floor Covering*, 232 NLRB 421, 422 (1977); *R. J. Smith Construction Co.*, 191 NLRB 693 (1971).

history "contains anything to show that Congress intended to prohibit the Board from issuing a nonmajority bargaining order if it is truly necessary 'to effectuate the purposes of the Act,'" (2) "the fundamental statutory policy of protecting employees' freedom to choose by majority rule . . . is not undermined but rather is advanced by a temporary non-majority bargaining order where it is reasonable to conclude that the union would have gained majority support but for the employer's outrageous and pervasive unfair labor practices, and where no other remedial measures available will remove the taint of those practices so as to permit a fair election in the foreseeable future,"[24] and (3) by denying the Board such authority, "the Board is deprived of its only effective means to remedy and deter a massive campaign of coercive and illegal conduct by an employer bent on crushing inchoate union organization."

As is apparent from this review, the majority rule principle has been the focus for Board opponents of nonmajority bargaining orders. In contrast, the imposition of nonmajority bargaining orders as the only effective remedy for "pervasive" and "outrageous" unfair labor practices has been the focus for Board proponents. Our own review of the statute, its legislative history, Board and court precedent, and legal commentary have convinced us that the majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to in fashioning a remedy, even in the most "exceptional" cases. We view the principle as a direct limitation on the Board's existing statutory remedial authority as well as a policy that would render improper exercise of any remedial authority to grant nonmajority bargaining orders which the Board might possess. We are thereby endorsing Member Penello's concurring and dissenting position in *United Dairy I*, as expressed in parts I and II of that opinion, and as further discussed by then Chairman Van de Water in his *Conair* opinion, as well as Member Hunter's position in *Conair*.[25] There is substantial similarity between these two positions in their acknowledgement of the predominance of the majority rule principle. The latter position may invite broader examination of whether the remedial authority to "effectuate the policies of the Act" warrants issuance of such an order, but it finds its definitive answer in the majority rule principle.[26] Accordingly, we overrule those cases in which the Board has found that it has statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that authority.[27]

II.

Although we have stated our conclusions and general endorsement of certain positions, we consider it incumbent to further explicate the course of our analysis. We start with the authority Congress granted the Board to remedy unfair labor pactices under Section 10(c) "to take such affirmative action . . . as will effectuate the policies of this Act." That authority though undeniably "broad" and "subject to limited judicial review"[28] has been recognized as limited when its exercise would "violate a fundamental premise on which the Act is based."[29] *H. K. Porter Co. v. NLRB*, supra at 108. In *H. K. Porter*, the fundamental premise violated was freedom of contract. There a Board order affirmed by the Court of Appeals for the D.C. Circuit required an employer to grant a union a contractual dues-checkoff provision in response to the employer's refusal to bargain in good faith about the provision. As described by Member Penello in *United Dairy I*, the Supreme Court "rejected the court of appeals' approach of balancing conflicting policy considerations and declined to examine the merits of the remedy" and found that the Board lacked the power to impose the remedy in dispute

[24] In reaching this position Judge Wald relies on what she regards as a "critical" finding of the Board: that a reasonable basis existed to conclude that the union would have enjoyed majority status but for the respondent's unfair labor practices. She appears to consider that such a finding averts the strict dichotomy of the issue between employee freedom of choice and majority rule on the one hand and the Board's evaluation of an effective remedy and deterrent on the other hand.

[25] For further explication of Member Hunter's position, see Hunter, *Conair: Minority Bargaining Orders Usher in 1984 at NLRB*, 33 Lab. L.J. 571 (1982).

[26] We do not endorse the balance-of-competing-interests test proposed by Members Murphy and Truesdale in *United Dairy I*. Adoption of that test would require a case-by-case determination of whether, in the absence of a prior showing of majority support, it is less destructive of the Act's purposes to provide for an election, even in the face of "outrageous" and "pervasive" unfair labor practices, than it is to risk negating employee choice altogether by imposing a bargaining representative on employees. See *United Dairy I*, supra at 1028. We do not think such a case-by-case balancing could ever be warranted. In our view the balance is now conclusively weighted against issuing a nonmajority bargaining order by the majority rule principle.

[27] *Conair Corp.*, 261 NLRB 1189 (1982). While we do not agree with the Board's decision in *United Dairy II*, we do not expressly overrule it, as it followed from the remand direction of the Third Circuit; we shall not however consider it of precedential value.

[28] *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964).

[29] Our dissenting colleague argues that the Board's remedial authority includes the power "to devise remedies which will deter employers and unions from engaging in unfair labor practices" and suggests that a deterrent effect justifies the use of nonmajority bargaining order remedies. But, as stated in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940): ". . . it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." Thus the deterrence value alone, a value which remains nonquantifiable, cannot be the basis for creation of a remedy. Further, because of what we view as the statutory and policy impediments to the imposition of a nonmajority bargaining order remedy, any potential deterrent value of such a remedy becomes an abstract and irrelevant consideration.

as that authority resided solely with Congress.[30] He drew what we consider to be several convincing analogies between *H. K. Porter* and the issue involved here. Thus, in both cases (1) "it is claimed that the Board can issue a remedial order that conflicts with a fundamental principle of the Act," (2) "it is argued that violation of the basic precept must be tolerated in order to further the policy of the Act of securing employees' rights to bargain collectively," and (3) "support for the extraordinary remedy is allegedly found in the inadequacy of less dramatic measures and Respondent's prior violations of the Act."[31] We agree with Member Penello that "the policy of majority rule . . . cannot be seriously contended to be . . . any less fundamental than freedom of contract" (id.), and that the rationale of *H. K. Porter* must be applied here.

The principle of majority rule is written into Section 9(a) of the National Labor Relations Act: "Representatives designated or selected . . . *by the majority of the employees* in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." (Emphasis added.) It is this standard of majority rule that enables the Act's policies of "protecting the exercise by workers of . . . designation of representatives of their own choosing"[32] and "encouraging the practice and procedures of collective bargaining"[33] to be realized. For it is the culmination of choice *by a majority of employees* that leads to the process of collective bargaining; the choice by a majority gives legitimacy and effectiveness to a union's role as exclusive bargaining representative and correlatively gives rise to an employer's obligation to deal exclusively with that representative.[34] As Senator Wagner stated in support of the bill which became the foundation for our current Act: "[C]ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule."[35] In Senate debate on the bill, Senator Wagner further stated:[36]

> Collective bargaining is not an artificial procedure devoted to an unknown end. Its object is the making of agreements which will stabilize employment conditions and promote fair working standards. It is well nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time or to apply the terms of one agreement to only a portion of the workers in a single unit. For this reason *collective bargaining means majority rule.* This rule is conducive not only to agreements, but also to friendly relations. Workers find it easier to approach their employers in a spirit of good will if they are not torn by internal dissent. And employers, wherever majority rule has been given a fair chance, have discovered it more profitable to deal with a single group than to be harassed by a constant series of negotiations with rival factions.
>
> Majority rule makes it clear that the guaranty of the right of employees to bargain collectively through representatives of their own choosing must not be misapplied so as to permit employers to interfere with the practical effectuation of that right by bargaining with individuals or minority groups in their own behalf *after representatives have been picked by the majority to represent all.* [Emphasis added.][37]

As pointed out by the court majority in *Conair*,[38] another aspect of the Act's legislative history that supports our view relates to the Taft-Hartley Act's amendment to Section 7 providing that employees "shall also have the right to refrain from any or all such [concerted] activities."[39] The court quoted a House Report's comments on that language:

> A committee amendment assures that when the law states that employees are to have the rights guaranteed in section 7, *the Board will be prevented* from compelling employees to exercise such rights against their will . . . . In

[30] *United Dairy I*, supra, 242 NLRB at 1041.

[31] Id.

[32] National Labor Relations Act, 29 U.S.C. § 151.

[33] Id.

[34] In a discussion of the Wagner Act's legislative history in her dissenting opinion in *Conair*, Circuit Judge Wald asserted that the principle of majority rule was therein discussed in the context of an employer's bargaining obligations or the employees' representation choices but not as a limitation on the Board's powers. She further asserted that "[i]n general . . . non-majority bargaining orders as remedial measures were not discussed," and cited to a House report setting forth "examples of remedial measures within [the] Board's power." *Conair Corp. v. NLRB*, supra, 721 F.2d at 1395. We note, however, that among the examples given in that report of affirmative remedial actions to effectuate the policies of the bill was that of "recognition of the agency chosen *by the majority* for the purposes of collective bargaining" (emphasis added). H.R. Rept. No. 972, 74th Cong., 1st Sess. 21 (1935), reprinted in 2 Leg. Hist. of the National Labor Relations Act, 1935, at 2978 (1949).

[35] Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. (1935), reprinted in 1 Leg. Hist. of the National Labor Relations Act, 1935, at 1419 (1949).

[36] Member Penello excerpted additional statements from the legislative history to show the centrality of the majority rule principle in collective bargaining and its derivation from the same principles as democracy in government. See discussion in *United Dairy I*, supra at 1040.

[37] 79 Cong. Rec. 7565 (1935), reprinted in 2 Leg. Hist. of the National Labor Relations Act, 1935, at 2336 (1949).

[38] *Conair Corp. v. NLRB*, supra at 721 F.2d at 1382.

[39] Labor Management Relations Act, Ch. 120, § 101.61 Stat. 136, 140 (1947).

> other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so. [Emphasis added.][40]

The court gleans from the report a legislative intent "to preclude the Board from imposing the agency's choice on the employees." We view this point as significant since in granting a nonmajority bargaining order the Board indisputably would be substituting its own designation and selection of an exclusive representative for that of the employees.

We agree with Member Penello that the theme of majority rule and minority rights has been dominant in the legal development of the Act and we adopt his analysis in that regard.[41]

We similarly agree with Member Penello that the *Gissel* category one dictum does not dispose of the issue here and we adopt his entire analysis of the import of that dictum.[42] Thus, we agree with his interpretation[43] that

> [T]he Court's description of category one cases was limited to approving the Board's "policy of issuing a bargaining order, in the absence of a §8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. . . ."[44]

We further agree that "even under the interpretation of *Gissel* most favorable to [Board proponents of nonmajority bargaining orders], all that can be fairly said is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support."[45]

Following from the above discussion we conclude that nonmajority bargaining order remedies are not within our remedial discretion.[46] In reaching this conclusion we are cognizant of the approaches to the majority rule principle taken by Board proponents of nonmajority bargaining orders and the Third Circuit and Judge Wald of the D.C. Circuit. Neither of these approaches convinces us that issuance of a nonmajority bargaining order falls within an application of the majority rule principle. Rather, attempts to stretch the majority rule principle to accommodate an absence of proof of majority status or speculation about proof of majority status serves only to reinforce how central the majority rule concept is in the framework of the Act.

In *United Dairy I*, then Chairman Fanning and Member Jenkins argued that the Board regularly departs from the majority rule principle. They generally characterized the departures as the Board's failure to require *conclusive* proof of current majority support when issuing bargaining orders,[47] and sought to classify a nonmajority bargaining order situation as simply another situation in which conclusive proof of current majority status would not be required. However, the fact that the Board and the courts have accepted different modes of proof of majority status under different circumstances[48]

[40] H.R. Rept. No. 245, 80th Cong., 188 Sess. 27 (1947).

[41] *United Dairy I*, supra, 242 NLRB at 1040–1041.

[42] *United Dairy I*, supra, 242 NLRB at 1038–1040.

[43] Member Penello found support for this interpretation of *Gissel*, inter alia, in the Court's holding with regard to *Sinclair Co.*, 164 NLRB 261 (1967), one of the four cases involved therein. The Court found in *Sinclair*, where the union had a valid card majority, that the Board did not have to make the determination called for in category two cases because the Board had already found that the employer's misconduct was "so coercive that, even in the absence of an 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *NLRB v. Gissel Packing Co.*, supra, 395 U.S. at 615. The majority and dissenting opinions of the D.C. Circuit in *Conair* debate the proper interpretation of that Court finding, with the dissent asserting that "the Court's language may be read to mean that the Court did not feel it necessary to inquire into the majority status of the union in disposing of the *Sinclair* case." (*Conair Corp. v. NLRB*, supra, 721 F.2d at 1392.) Reference back to the trial examiner's decision in *Sinclair*, summarily affirmed by the Board at 164 NLRB 261 (1967), reveals that the dissent's interpretation is not supportable. In his decision, the trial examiner found the respondent violated Sec. 8(a)(5) and (1) by its refusal to bargain with the union, which represented a majority of the respondent's employees, and recommended a bargaining order issue. He added that even if the record had warranted the conclusion, contended for by the respondent, that it relied on a bona fide doubt of the union's majority in refusing to bargain, he would nonetheless recommend the same bargaining order; in the latter regard, he reasoned that the union had represented a clear majority when the respondent began its unlawful campaign directed at destroying the majority and that any loss of support revealed by the subsequent election was attributable to the respondent's unfair labor practices. *Sinclair Co.*, 164 NLRB at 269. At the time of the Board's *Sinclair* decision, a necessary element of the General Counsel's case in proving an 8(a)(5) allegation of refusal to recognize and bargain on the request of a majority-supported union was the respondent's bad faith in rejecting the union's request. *Sinclair Co.*, 164 NLRB at 269 fn. 16. By his alternative analysis, the trial examiner in *Sinclair* was clearly postulating a failure of proof on the bad-faith element alone and not on the element of majority status. Thus, when the Court's discussion of *Sinclair* is viewed in relation to the specific Board findings in that case there is no foundation for asserting that the Court was authorizing bargaining orders without regard to majority status.

[44] *United Dairy I*, supra, 242 NLRB at 1039.

[45] Id. at 1040.

[46] See *Conair Corp. v. NLRB*, supra, 721 F.2d at 1391; *Conair Corp.*, 261 NLRB at 1198; *United Dairy I*, 242 NLRB at 1042.

[47] They pointed to the "recognized limitations of authorization cards as absolute proof of majority support for the union." They pointed to the fact that a "union may be certified even though less than a majority of the unit employees cast ballots." They pointed to the issuance of a bargaining order "after a union, which bases its claim . . . on signed authorization cards, has lost an election following flagrant unfair labor practices." *United Dairy I*, supra at 1034.

[48] See the Court's statement in *Gissel* (395 U.S. at 603), "that the cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded, needs no extended discussion." See also *Regal 8 Inn*, 222 NLRB 1258 (1976); *Piper Industries*, 212 NLRB 474 (1974); *Stiefel Construction*, 65 NLRB 925 (1946), for an explanation that the Board will permit an election to be decided by a majority of the valid votes cast in an election so long as a

Continued

is not equivalent to and cannot justify dispensing entirely with reliable proof of some sort that a majority of employees in a unit, at some relevant time, in some recognized form, asserted their choice and selected and designated a union as their respresentative.[49]

The Third Circuit and Judge Wald of the D.C. Circuit appear to have attempted to satisfy the majority rule principle when they limited their conclusions about the Board's remedial authority to those situations in which a "reasonable possibility" or a "reasonable basis" exists for concluding the union would have enjoyed majority support but for a respondent's unfair labor practices.[50] General criteria for determining what evidence would constitute a "reasonable possibility" or "reasonable basis" were not promulgated. In our view application of such standards would result in the substitution of guesswork and speculation for objective evidence, thereby eroding the majority rule principle. As stated by the court majority in *Conair*, absent objective evidence of majority status "the Board cannot estimate with any degree of reliability how the employees would have responded in a free election."[51]

We now turn from our position on the scope of our statutory remedial authority to our position regarding those policy considerations which would compel us to decline to issue a nonmajority bargaining order even if we had the authority to do so. As described above, Member Hunter has already forcefully charted out this position in his *Conair* opinion. Thus he stated:

> . . . the principle of majority rule is so much a part of established Board policy and Board precedent, and looms so large in the public's understanding and acceptance of this Board's function in industrial life, that undercutting that principle by issuing a nonmajority bargaining order can serve only to diminish the heretofore widely held public view of the Board as an impartial agency that protects the employees' *right* to choose under Section 7 of the Act, but does not make that choice *for* employees.
>
> When all is said and done, it is the particular employees involved here who will have to live with the Board's selection of a bargaining representative for them. And this selection has been accomplished without benefit of an election or *any* other clear and objective manifestation that the selection of that representative reflects the wishes of a majority of the employees.[52]

We reiterate simply that the undesirable and unacceptable results of forsaking the majority rule principle and granting a nonmajority bargaining order remedy are governmental imposition of a choice of representative in lieu of governmental protection of the right to choose that representative and the negative impact of such imposition on the public's perception of the Board as an impartial agency. We have considered the essential policy argument of Board proponents of nonmajority bargaining orders, i.e., that "where the employer's misconduct has prevented the ascertainment of the wishes of the majority . . . the only effective remedy to offset this unlawful action is a bargaining order."[53] We seriously question however whether a nonmajority bargaining order, in practice, is an effective remedy. The bargaining environment established at the Board's instigation alone does not replicate that which arises from employees' impetus. What is lacking is the leverage normally possessed by exclusive bargaining representatives that derives from unions' and employers' knowledge that a majority of employees at one time, in some form, united in their support for a union and may do so again in support of bargaining demands. To gain that leverage, employees may be called on to demonstrate active support for a representative in a far more open way than a secret-ballot election. Accordingly, in imposing a representative on employees, the Board may be changing only the sphere of employ-

representative complement of eligible employees participates in the election. These cases indicate that the Board considers assent to abide by the results of an election implicit in the consent of the parties to the conduct of the election, and considers that employees who do not vote acquiesce in the majority choice of those voting, absent interference with the right to vote or exercise of free choice.

[49] We note that then Chairman Fanning and Member Jenkins pointed to one case in which the Board issued a bargaining order without a demonstration of majority status among the employees affected by the bargaining order. *Garwin Corp.*, 153 NLRB 664 (1965). In that case, an employer had attempted to avoid its statutory bargaining obligation toward a union, whose majority status had been long established, by relocating to a distant site. The Board's bargaining order remedy at the new location was not enforced precisely because it "deprive[d] employees of a basic right of free choice on the theory that this is the best way—or at least a permissible way—to deprive the Employer of the fruits of his proscribed conduct." *Garment Workers Local 57 v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967). On remand the Board appeared to retreat from its earlier position by accepting that the Act's objectives could be achieved, consistent with the Court's decision, without resort to an unconditional bargaining order. It fashioned a variety of remedies designed to provide employees a free atmosphere in which to formulate their representational desires but ordered bargaining *only* upon proof that a majority of employees in the unit affected had designated the union as their representative. *Garwin Corp.*, 169 NLRB 1030 (1968).

[50] *Conair Corp. v NLRB*, supra, 721 F.2d at 1401; *United Dairy Farmers Cooperative Assn. v. NLRB*, supra, 633 F.2d at 1069 and fn. 16.

[51] *Conair Corp. v. NLRB*, supra, 721 F.2d at 1378.

[52] *Conair Corp.*, 261 NLRB at 1198.

[53] *United Dairy I*, supra at 1036 (concurring and dissenting opinion of then Chairman Fanning and Member Jenkins).

ees' choice. And yet the Board can be no more certain that, in this new sphere of employee choice, employees can more freely exercise their choice without regard to any lingering effects of massive unfair labor practices[54] than it can be if a new election is directed after the Board has applied traditional as well as appropriate extraordinary remedies. The Board can be certain, however, of the possibility that it is forcing a majority of employees who do not have an interest in participating in the collective-bargaining process into that process and, potentially and consequently, into undesired terms and conditions of employment negotiated by an unchosen representative. Given these policy considerations we do not believe we would ever be justified in granting a nonmajority bargaining order remedy.

While we have determined that nonmajority bargaining orders cannot be considered a remedial option, we emphasize that in response to flagrant and repeated violations of the statute we will continue to impose all appropriate traditional and extraordinary remedies at our disposal. In this case, for example, in addition to adopting those remedies recommended by the judge,[55] we shall also require the Respondent to mail copies of the notice to employees to all those employees who have been on the payroll since 10 October 1980. That is the date when the Respondent began its campaign of unfair labor practices. Because this case involves extensive violations which, as the judge found, exhibit "a general disregard for the employees' fundamental rights," we thereby seek to ensure that all of the Respondent's employees who may have been directly affected by the violations or by knowledge of the violations throughout the long period this case has been pending are assured that such unlawful acts are being remedied and will not be repeated.[56]

AMENDED CONCLUSIONS OF LAW

Delete paragraph 5 of the judge's "Further Conclusions of Law" and renumber the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gourmet Foods, Inc., St. Paul, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(c), (e), and (f).

"(c) Make unfair labor practice strikers Michael Pettis, Wayne Kolberg, James Ricker, and Steven Schoenecker whole for any loss of earnings they may have suffered as a result of the Respondent's failure to reinstate them at the conclusion of the strike to their former positions, in the manner set forth in the section of the judge's decision entitled 'The Remedy.'"

"(e) Remove from its files any reference to the unlawful warning and the termination of employee Richard Krenner; to the warning given to employee Lloyd Schmotter on or about 12 November 1980 for failure to meet the unlawfully increased 1200 case production quota and to warnings given to any other employees for failure to meet such quota; and to fines for misperformance of job duties in relation to specific employees; and notify in writing each employee affected by the described conduct that the Respondent has complied with this provision and that its unlawful conduct will not be used as a basis for future personnel action against such employees.

"(f) Post at its place of business in St. Paul, Minnesota, copies of the attached notice marked "Appendix."[55] Copies of said notice, on forms provided by the Regional Director for Region 18, 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.

"Copies of said notice shall also be mailed to the homes of all present employees and all employees on the Respondent's payroll since 10 October 1980."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER DENNIS, concurring.

The Charging Party's exceptions raise the issue whether the Board possesses the statutory authority to remedy an employer's unfair labor practices by requiring it to bargain with a union that does not represent the majority of the employer's work-

[54] A similar argument is made in a recent law review article in which it is concluded that the "promise [of *Gissel*-type bargaining orders in general] has proved—and must inevitably prove—illusory." Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769 (1983). We believe, however, that the value of majority bargaining orders lies in restoring employees to their previously demonstrated choice.

[55] We modify the judge's recommended order and notice to employees to conform to his findings and recommended remedy by adding the name Michael Pettis to the list of those employees to be made whole for the failure to reinstate them to their former positions and by ordering the revocation of all warnings given involving the failure to meet the 1200 case production quota. We have also added appropriate expunction language. *Sterling Sugars*, 261 NLRB 472 (1982).

[56] *Eastern Maine Medical Center*, 253 NLRB 224 (1980).

ers. The Third Circuit decided that we do have such power under the Act.[1] The District of Columbia Circuit held to the contrary.[2] After considering the issue in light of these court decisions, as well as the conflicting opinions expressed in the underlying Board cases,[3] I am persuaded that the *Conair* court carefully and correctly analyzed the issue in section V,A of its decision. I therefore rely on that court's reasoning that the imposition of nonmajority bargaining orders is inconsistent with the Act's bedrock principles of employee free choice and majority rule.[4]

One supporting argument against granting nonmajority bargaining orders that the *Conair* court touched on only briefly deserves elaboration.[5] In his separate opinion in *United Dairy*,[6] former Member Penello drew an apt analogy between the issue presented here and the one the Supreme Court addressed in *H. K. Porter*.[7] In *H. K. Porter*, the Board and the court of appeals ordered an employer to accept a dues-checkoff provision in its labor contract to remedy its refusal to bargain in good faith with the union. The Supreme Court reversed, stating:[8]

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. [Footnotes omitted.]

Put differently, the Court concluded that the Board's remedial authority extends only to the extent that it does not impinge on principles Congress embodied elsewhere in the Act. Nor was the Court swayed by the possibility that such a limitation left the Board with inadequate authority to deal with significant labor problems, stating:[9]

> [I]t is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.

In language echoing that of the Supreme Court in *H. K. Porter*, the court of appeals in *Conair* identified the fundamental statutory principles at stake here and noted their incompatibility with nonmajority bargaining orders, as follows:[10]

> Our national labor relations policy is designed to "effectuat[e] ascertainable employee free choice" and "expressed" majority sentiment. *NLRB v. Gissel*, 395 U.S. 575 at 614. A nonmajority bargaining order departs from this design. Absent a union election victory or some other concrete manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances runs a high risk of opposing the majority's will. . . . Without a clear direction from Congress, we are not prepared to recognize administrative authority, or arrogate power to ourselves, to remedy one possible injustice by taking the substantial chance of imposing another.

MEMBER ZIMMERMAN, dissenting.

My colleagues in the majority have erred twice in one decision. First, they have determined that for statutory and policy reasons the Board lacks the authority to remedy an employer's egregious unlawful conduct with a bargaining order unless the union involved has at some relevant time achieved a showing of majority status in an appropriate employee bargaining unit. Second, they have held that the Union here never achieved a majority showing in an appropriate unit. I dissent on both counts.

On the paramount issue of the remedial nonmajority bargaining order, for reasons discussed in sections I through III of this opinion, I adhere to

[1] *United Dairy Farmers Cooperative Assn. v. NLRB*, 633 F.2d 1054 (1980).

[2] *Conair Corp. v. NLRB*, 721 F.2d 1355 (1983).

[3] *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026 (1979), remanded 633 F.2d 1054 (3d Cir. 1980), supplemental decision 257 NLRB 772 (1981); *Conair Corp.*, 261 NLRB 1189 (1982), enf. denied in pertinent part 721 F.2d 1355 (D.C. Cir. 1983).

[4] I agree with my colleagues' unfair labor practice findings and their notice-mailing requirement.

I agree with the judge's inclusion of the sewing room employees in the unit for the reasons he stated, but find it unnecessary to decide whether he also properly included the sales trainee/cooler employees, because their exclusion would leave the Union with only 16 valid cards in a 33-employee unit.

Even if, contrary to my reading of the Act, the Board had the statutory authority to issue a nonmajority bargaining order, I would decline to issue one here because, on the facts of this case, I do not believe that such an order would best effectuate the policies of the Act.

[5] 721 F.2d at 1381, 1384 fn. 93.

[6] 242 NLRB 1038, 1041-1042.

[7] *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[8] Id. at 108.

[9] Id. at 109.

[10] 721 F.2d at 1383.

the view expressed by the majority in *Conair Corp.*, 261 NLRB 1189 (1982), and shared by several courts of appeals,[1] that the Board has the authority under Section 10(c) of the Act to impose such an order in exceptional unfair labor practice cases, described by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–617 (1969). Not only does the Board have such authority, it should exercise that authority in cases of the most flagrant and egregious unfair labor practices. Otherwise, the Board will fail to fulfill its statutory mandate to prevent unfair labor practices and its obligation to preserve employee rights to self-organization and free choice of a collective-bargaining representative. Those rights cannot be adequately protected if, in exceptional cases, employers are permitted by the Board to engage in unlawful acts that are so coercive as to prevent majority support from ever developing. The contrary view of the majority in overruling *Conair* rests on a questionable interpretation of the Court's famous dictum in *Gissel*, on a distortion of the principle of majority rule, and on an inappropriate disclaimer of restitutional and deterrent powers vested in the Board through the Act.

On the issue of the Union's majority status at some relevant time in this case, I would reverse the judge's unit findings, exclude sewing employees and sales trainee/cooler employees from the general warehouse employee unit that the Union sought to represent, and find that the Union achieved an authorization card showing of majority support within the described appropriate unit. Based on this showing, I would issue a bargaining order to remedy the Respondent's 6-month campaign of unfair labor practices which followed the Union's achievement of majority status and its demand to the Respondent for recognition. On this issue, Chairman Dotson and Member Hunter do not find that a majority-based bargaining order would be inappropriate. They disagree with me only as to the appropriate unit for measuring the Union's majority claim.[2]

I.

Fifteen years ago, the Supreme Court identified in *Gissel* a class of "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." In "exceptional" cases involving such unfair labor practices, now often denominated *Gissel* category one cases, the Court agreed with the Fourth Circuit in *NLRB v. S. S. Logan Packing Co.*, supra, 386 F.2d at 570 (1967), about "the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise."[3]

The *Gissel* Court's direct ruling on remedial bargaining orders was limited to holding that the Board had the authority to issue bargaining orders based on a prior showing of the union's majority status in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[4] Although I appreciate the cautionary wisdom of Judge Wald that "as always with Supreme Court dictum and even with Supreme Court holdings, what the Court giveth it can as easily taketh away,"[5] both the context and source material of the *Gissel* dictum strongly suggest the Court's endorsement of a remedial nonmajority bargaining order in *Gissel* category one cases.

The argument that the *Gissel* language is of little or no precedential value is based on the view that the Court did not need to say what it did. That argument rejects dicta by definition, yet lower courts and administrative tribunals constantly refer to the Court's dicta for guidance. Moreover, I find remarkable my colleagues' apparent agreement with precisely the proposition which the Third Circuit in *United Dairy* posed and rejected: that the *Gissel* Court's statements about issuing bargaining orders in exceptional cases "without need of inquiry into majority status" were merely an "intellectual excursion not intended as a sign post giving directions which lower courts should follow in the future."[6] The Court had no apparent need for "intellectual excursion" when faced in the consolidated *Gissel* proceedings with directly ruling on: whether a union can establish a bargaining obligation by means other than a Board election; whether union authorization cards can be reliable indicators

[1] *United Dairy Farmers Cooperative Assn. v. NLRB*, 633 F.2d 1054 (3d Cir. 1980); *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967); *J. P. Stevens Co. v. NLRB*, 441 F.2d 514 (5th Cir. 1971); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996 (10th Cir. 1977); *Ona Corp. v. NLRB*, 729 F.2d 713, 714 fn. 4 (11th Cir. 1984). Contra *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983) (Wald, J., dissenting).

[2] Because I would find that the Union did in fact have majority support at the onset of the Respondent's unfair labor practices, I find no need to decide whether those unfair labor practices were of such severity as would justify issuance of a remedial nonmajority bargaining order. Accordingly, I will focus only on the authority and, in appropriate circumstances, necessity for such an order.

[3] 395 U.S. at 613–614.

[4] 395 U.S. at 614.

[5] *Conair Corp. v. NLRB*, supra, 721 F.2d at 1391.

[6] *United Dairy Farmers Cooperative Assn. v. NLRB*, supra, 633 F.2d at 1065, et seq.

of employee sentiment; whether the Board can issue a remedial bargaining order where there is a showing that the union once had majority support; and whether the first amendment precluded finding certain employer speech to be violative of the Act.

My colleagues in this case have adopted in full the analysis of the *Gissel* dictum contained in the partial dissent in *United Dairy I*,[7] contending that the Court meant something quite different from what it said. This analysis focuses on two passages in *Gissel* that followed the Court's discussion about the appropriate circumstances for imposing a remedial bargaining order "without need of inquiry into majority status." In the first passage, the Court said:

> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See, e.g., *United Steelworkers of America v. N.L.R.B.*, 376 F.2d 770 (C.A.D.C. 1967); *J.C. Penney Co., Inc. v. N.L.R.B.*, 384 F.2d 479, 485–486 (C.A. 10th Cir. 1967). [395 U.S. at 614.]

Later, the Court applied its analytical framework to the facts in *Sinclair*, one of four cases consolidated for decision in *Gissel*, and stated:

> In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effects of those threats. The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards. [395 U.S. at 615, footnote omitted.]

The foregoing language and a union's achievement of majority status in each of the three cases cited demonstrated that the Court did not really intend any waiver of the requirement of majority showing, argue my colleagues. Instead, they maintain, the Court's description of category one bargaining order cases was limited to approving existing Board policy. This interpretation, however, does not square with the precise words of the Court.

In the first quoted passage, the Court said that the Board had a "similar" remedial policy, not an *identical* one. If the Court were simply approving majority-based bargaining orders in the absence of an 8(a)(5) violation, why did it expressly refer to the possibility of issuing category one bargaining orders "without need of inquiry into majority status or otherwise"? The more logical interpretation is that the Court was emphasizing the similarity between its authorization of nonmajority bargaining orders in category one cases and existing Board policy with respect to the propriety of issuing majority-based bargaining orders when they are "the only available, effective remedy for substantial unfair labor practices." The Court's identification of *Sinclair* as a category one case is also consistent with the view that because of the severity of the employer's threats not only an 8(a)(5) finding but also a prior majority showing was expendable as predicate to issuing a bargaining order.

Were there any doubt about interpreting Gissel as meaning what it says—and I have no such doubt—reference to the ideological source of the dictum should dispel the doubt. This source is no mystery. Both the *Gissel* and *Logan Packing* opinions cite Professor Bok's article on *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*.[8]

In this article, Professor Bok addressed, among other things, the need for more effective remedies to deter employers from engaging in unfair labor practices to nullify employees' rights to free choice of a bargaining representative in Board elections. Focusing on the bargaining remedy, he advocated expansion of this remedy based on its approval in the Supreme Court's decision in *Franks Bros. v. NLRB*.[9] In particular, he advocated the use of bargaining orders, subject to certain limitations, "in cases where the union cannot demonstrate that it was ever supported by a majority of the employees."[10] Among the specific limitations proposed was that the nonmajority bargaining order not be issued "unless the unfair labor practices involved were serious and deliberate. . . . As a general rule, therefore, the order to bargain might well be restricted to cases involving discriminatory discharges or clear threats of retaliation."[11]

The similarity between the language of the Bok article and the judicial language in *Gissel* and *Logan Packing* transcends coincidence. It further

[7] *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1039–1040 (1979). The D.C. Circuit panel majority echoed this analysis in denying enforcement of the Board's bargaining order in *Conair Corp. v. NLRB*, supra, 721 F.2d 1355. See also Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards*, 4 Ga. L. Rev. 779, 793–797 (1970).

[8] 78 Harv. L. Rev. 38 (1964).

[9] 321 U.S. 702 (1944).

[10] 78 Harv. L. Rev. at 133.

[11] Id. at 137–138 (citation omitted).

underscores what the Third, Fourth, Fifth, Tenth, and Eleventh Circuits have believed about the *Gissel* dictum: it stands as both a definition and implicit endorsement of remedial nonmajority bargaining orders.

II.

The plurality opinion summarizes its entire rationale in these sentences:

> Our own review of the statute, its legislative history, Board and court precedent, and legal commentary have convinced us that the majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to in fashioning a remedy, even in the most "exceptional" cases. We view the principle as a direct limitation on the Board's existing statutory remedial authority as well as a policy that would render improper exercise of any remedial authority to grant nonmajority bargaining orders which the Board might possess.

My rebuttal can as briefly be summarized: (1) Nothing in the Act or its legislative history substantiates interpreting the majority rule principle as a bar to the remedial nonmajority bargaining order. (2) A review of precedent makes clear that the majority rule principle is not absolute and must be balanced against other principles and policies of the Act. (3) The nonmajority bargaining order entails only a minimal interim encroachment, if at all, on the majority rule principle. Ultimately, the order is the best available Board remedy to serve uncoerced majority rule.[12]

Clearly, the principle of majority rule is an important feature of the Act. Section 9(a) states: "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining . . . ." Section 8(a)(5) defines when an employer's refusal to bargain with the majority's choice is an unfair labor practice. Section 8(a)(2) proscribes an employer's recognition of a union supported by only a minority of unit employees. Section 8(f) details a construction industry exception to the 8(a)(2) proscription. Finally, Section 7 states that employees have the "right to self-organization" and the right "to bargain collectively through representatives of their own choosing," as well as the "right to refrain from any or all such activities."

None of these sections of the Act makes explicit reference to the Board's remedial powers under Section 10(c); in particular, they do not expressly limit those powers. As Judge Wald wrote: "Congress most assuredly knew how to limit the Board's authority. For example, section 9(b), following directly after section 9(a) and dealing with determination of bargaining units, clearly limits the Board's power."[13] Similarly, Section 10(c) itself contains the express limitation against reinstatement or backpay orders for employees "suspended or discharged for cause."

Although not an express limitation, the majority rule principle might still warrant implying a limitation on the Board's bargaining order authority. The legislative history, however, contradicts such an implication.[14] Extensive remarks by Senator Wagner defended majority rule in the original Act against employer critics who wanted to weaken or avoid collective bargaining altogether by bargaining with individuals, with dominated company unions, or with unions only on the basis of proportional representation.[15] The Taft-Hartley Act's amendment to Section 7, making express an employee's "right to refrain" from protected concerted activities, must be read in conjunction with its new Section 8(b)(1)(A) and was added to prevent the Board from condoning "closed shops" and various forms of union coercion of employees into joining in concerted activities.[16] Finally, Section 8(f) was clearly designed as an exception to the 8(a)(2) violation when an employer, not the Board, has recognized a union which has not demonstrated majority support.

It requires a remarkable distortion of context to use this legislative history as proof of Congress' intent to bar the Board from ordering to bargain an employer which has violated the Act in order to avoid collective bargaining by preventing majority support for union representation from ever developing. The principle of majority rule has been im-

[12] I endorse Judge Wald's detailed analysis of the majority rule issue in her dissenting opinion in *Conair Corp. v. NLRB*, supra, 721 F.2d at 1400.

[13] *Conair Corp. v. NLRB*, supra, 721 F.2d 1394.

[14] The plurality opinion correctly states that there is brief specific mention of Board remedial powers in the legislative history. In the House report on the original Act, among the examples given of affirmative remedies was "recognition of the agency chosen by the majority for the purposes of collective bargaining." 2 Leg. Hist. at 3074. It is clear, however, that specific references to remedies in the Act and in its legislative history are merely illustrative, not exclusive of other remedies. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187–189 (1941).

[15] E.g., Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong. 1st Sess. (1935), reprinted in 1 Leg. Hist. at 1419–20 (NLRA 1935); Hearings on H.R. 6288 before the House Comm. on Labor, 74th Cong. 1st Sess. (1935), 2 Leg. Hist. at 2490–92; Debates on S. 1958 in Senate, 79 Cong. Rec. 7565 (1935), 2 Leg. Hist. at 2336–37. See also House Report No. 1147 on S. 1958, Comm. on Labor, 2 Leg. Hist. at 3071.

[16] House Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. (1947), 1 Leg. Hist. at 543–544.

posed on the Act as a limitation on coercion by employers and unions of employee rights to free choice and self-organization, not as an absolute limitation on the Board's ability to remedy such coercion when it occurs.

Judicial and Board precedent have been consistent with the view that majority rule is not an absolute all-encompassing principle in the Act. "That principle is, unquestionably, an important feature of the Act, but it has never been interpreted as standing in supreme isolation from the Board's other statutory policies and purposes."[17] For example, rather than requiring the existence of actual and absolute majority support of a collective-bargaining representative at all times, the Board has, with judicial support: adopted irrebutable presumptions about majority status during the union representative's certification year,[18] or after voluntary recognition;[19] ordered an employer to bargain after a union's actual loss of majority status in the wake of unfair labor practices;[20] certified a union after an election in which less than 50 percent eligible unit employees voted;[21] and revoked the certification of a union as a remedy for the union's discriminatory practices without any inquiry into majority status.[22]

The question really presented then is what weight the Board should give the majority rule principle in assessing the remedial worth of a nonmajority bargaining order. The plurality opinion's assessment begins with a fallacious characterization of the employees' situation prior to an employer's outrageous and pervasive unfair labor practices. It concludes without considering the several factors that safeguard majority rule in the use of the disputed bargaining order. In reality, it is they and not the proponents of a *Gissel* category one remedial order who are obstructing employee free choice and indefinitely postponing the determination of an uncoerced employee majority preference for or against collective-bargaining representation.

Confronted with *Gissel* category one violations and the absence of an affirmative showing of majority preference, the Board cannot know for certain what was in the hearts and minds of employees prior to the unfair labor practices. It is equally possible that a majority of employees desired union representation or that a majority opposed it. The union's failure at the time to have garnered an authorization card majority is not conclusive.

> Of paramount significance, however, is the fact that, but for Respondent's unlawful conduct, its employees would have had the opportunity to express openly their opinions about unionism and to resolve the representation debate by making a free and uncoerced majority choice in a Board-conducted election. Respondent, by the massive and numerous violations discussed above, has destroyed any opportunity for free and open debate of the representation question.[23]

Under these circumstances, "the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation."[24] Moreover, several factors minimize the risk of even an interim imposition of a minority union. First, the nonmajority bargaining order is an extraordinary remedy reserved for use in only a few exceptional cases where the Board's review of various factors leads to the conclusion that an employer's violations fall within *Gissel* category one.[25] Second, most proponents of the remedy agree that at least a significant factor in deciding whether to issue an order is the degree to which it can be shown likely that the union would have enjoyed majority support, but for unfair labor practices.[26] Third, the wishes of an employee unit majority will likely be a critical determinant in framing bargaining demands, in deciding whether to resort to strike action, and in accepting a contract. Finally, as the *Gissel* Court itself stressed,[27] the bargaining order is temporary, designed to insure only a reasonable period of good-faith bargaining and to dissipate the lingering effects of the employer's unfair labor practices.[28] It is not intended to guarantee a prolonged collective-bargaining relationship, only the right of employees freely to choose or reject this relationship.

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[17] *Conair Corp.*, supra, 261 NLRB at 1193.

[18] *Brooks v. NLRB*, 348 U.S. 96 (1954).

[19] *Keller Plastics Eastern*, 157 NLRB 583 (1966).

[20] *NLRB v. Gissel Packing*, supra; *Franks Bros. v. NLRB*, supra.

[21] *Piper Industries*, 212 NLRB 474 (1974); and see *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946).

[22] *Metal Workers Local 1 (Hughes Tool Co.)*, 147 NLRB 1573 (1964).

[23] *Conair Corp.*, supra, 261 NLRB at 1193-1194.

[24] Ibid. at 1194.

[25] Compare *Conair Corp.*, supra, with *United Supermarkets*, 261 NLRB 1291 (1982), where the Board found a nonmajority order inappropriate.

[26] E.g., *Conair Corp. v. NLRB*, supra, 721 F.2d at 1400 (Wald, J., dissenting); *United Dairy Farmers Cooperative Assn. v. NLRB*, supra, 633 F.2d at 1060; *Conair*, supra, 261 NLRB at 1194; Bok, supra at 138.

[27] "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." *NLRB v. Gissel Packing Co.*, supra, 395 U.S. at 613.

[28] The Board has found that a "reasonable period of time" to bargain may be as little as 3 months. "[T]he issue turns on what transpired during [negotiations] and what was accomplished therein." *Brennan's Cadillac*, 231 NLRB 225, 226 (1977). In addition, it does not necessarily follow that a contract executed in the aftermath of a nonmajority bargaining order will have the same contract bar effect as contracts executed after recognition, certification, or a majority-based bargaining order.

Based on the foregoing, I remain convinced that the principle of majority rule presents neither statutory nor policy bar to the issuance of a remedial nonmajority bargaining order. In truth, such an order represents the "most effective application of majority principles" in *Gissel* category one cases.[29]

III.

Section 10(c) of the Act empowers the Board "to take such affirmative action . . . as will effectuate the policies of the Act." Included among those policies are the prevention of unfair labor practices and the protection of employees' rights to self-organization and to free choice of a bargaining representative. By renouncing the use of *Gissel* category one bargaining orders, my colleagues render the Board powerless to provide full deterrence of unfair labor practices and full restitution of employee rights in cases of the most egregious misconduct, if an employer acts before an organizing union can achieve majority status. The employer then is left with the fruits of its lawlessness, defeat of the employees' self-organization; the employees are left with no redress for their rights. This is an impermissible emasculation of the Board's remedial mandate under Section 10(c).

The Board's statutory remedial authority is "a broad discretionary one, subject to limited judicial review."[30] It includes the power to devise remedies which will deter employers and unions from engaging in unfair labor practices.[31] This policy of deterrence accords with the general principle that a wrongdoer should not be allowed to benefit from misconduct.

The Supreme Court has repeatedly emphasized that this deterrent principle applies under the Act. In *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), the Court explained that the Board's remedial duty extends not merely to the prevention of violations by the employer in the future but also "to the prevention of his enjoyment of any advantage which he has gained by violation of the Act . . . as the means of defeating the statutory policy and purpose." The same remedial deterrent emphasis appeared in *Franks Bros.*, supra, 321 U.S. at 704–705, in which the Court affirmed an order requiring an employer to bargain with a union that had lost its majority support after an unlawful refusal to bargain. The Court said that in the absence of bargaining order authority there would be "repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose a probability of such frustrations of the Act seems too plain for anything but statement." Finally, in *Gissel*, the Court stated that denying a bargaining order would "in effect be rewarding the employer" for its own wrongdoing.[32]

The majority in this case has ignored the ramifications of its decision for the Board's remedial deterrent policy. As summarized quite accurately by Judge Wald in her *Conair* dissent:

> The deterrent value of a bargaining order against an employer who has engaged in egregious illegal behavior is apparent. The prospect of a remedial bargaining order should create a strong incentive for the anti-union employer to keep its campaign within legal limits. For even if the company wins the organizational battle, it may lose the collective bargaining war. On the other hand, today's decision that no bargaining order can ever issue unless the union has gained the support of more than half the unit employees at some point in the process creates reverse and indeed perverse incentives. The anti-union employer can avoid ever dealing with a union by rushing in at the first sign of union sentiment, before employees have begun to experience the collective strength of numbers, with threats of plant closings, mass discharges and close surveillance, thereby creating an atmosphere of coercion that outlasts the tenure of current employees and outdistances the remedial policies of the Board.[33]

Apart from the question of deterrence, the repudiation of nonmajority bargaining orders contra-

[29] The much-bruited analogy drawn between the remedial nonmajority bargaining order and the remedy at issue in *H. K. Porter v. NLRB*, 397 U.S. 99 (1970), is inappropriate. In *H. K. Porter*, the Court denied enforcement of a Board order to an employer to accept a dues-checkoff provision in a collective-bargaining agreement as a remedy for a bad-faith refusal to bargain. The Court held that the Board lacked the statutory authority for this remedy because it directly contravened a fundamental policy of the Act, freedom of contract. The Court emphasized that the Act itself contained express language in Sec. 8(d) stating that the bargaining "obligation does not compel either party to agree to a proposal or require the making of a concession." Explicit legislative history further supported the Court's view that Sec. 8(d) precluded the Board from setting the terms of a collective-bargaining contract. In the case of nonmajority bargaining orders, however, there is no comparable express restriction in the Act, no comparable legislative history, and ultimately no interference with the fundamental policy of majority rule.

[30] *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964).

[31] The Board may not, of course, prescribe remedies that are purely punitive in nature. E.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). The clearest definition of the distinction between proscribed punishment and permissible deterrence appears in the concurring opinion of Justices Harlan and Stewart in *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 658 (1961). The Board "must show more than that the remedy will tend to deter unfair labor practices. The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry." The nonmajority bargaining order meets this standard.

[32] 395 U.S. at 610.

[33] *Conair Corp. v. NLRB*, supra, 721 F.2d at 1400.

venes the Board's mandate to make whole the employee victims of an employer's outrageous and pervasive unfair labor practices. By definition, *Gissel* category one cases are those in which the unlawful conduct has been so severe as to foreclose any possibility of holding a fair representation election. In *Conair*, supra, 261 NLRB at 1193, I joined the Board majority in stating:

> Under these exceptional circumstances, we find that a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

A nonmajority bargaining order is the only potentially effective remedy currently available for the Board to restore to employees in category one cases the uncoerced right ultimately to decide for themselves whether they desire collective-bargaining representation. The majority does not profess a belief that any alternative remedies could be effective. It simply denies our authority to provide the bargaining order because it would allegedly violate the majority rule principle.

The plurality opinion presents only one other possible reason for not issuing nonmajority bargaining orders in *Gissel* category one cases. It suggests that the orders will not be effective in restoring free choice. How do my colleagues know this? The Board has issued only two nonmajority bargaining orders in its history, in *United Dairy* and *Conair*, and the latter order was denied enforcement by the D.C. Circuit panel majority. This fleeting experience with an extraordinary remedy hardly seems sufficient basis for an informed opinion.[34] Nonmajority bargaining orders *may* have the desired restitutional value, and surely *will* have an extra deterrent value, where other remedies surely will not. The progenitor of the nonmajority bargaining order concept expressed a similar view:

> In the last analysis, however, those who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies. As matters now stand, there are many workers whose apprehensions cannot be allayed by notices posted in the plant or by the possibility of reinstatement and backpay at some future date. Because of these fears, some elections are lost while others must be abandoned for long periods of time. If an order to bargain could help deter the commission of flagrant unfair labor practices, there is good reason to believe that the net effect would be to promote, and not impair, the legitimate interests of employees as a whole.[35]

The choice to me is clear. The Board has the authority to issue remedial nonmajority bargaining orders in *Gissel* category one cases, and the Board must exercise that authority to effectuate the policies and purposes of the Act.

IV.

I turn now to the question whether the Union here actually did achieve majority support in an appropriate unit, entitling it to a *Gissel* category two bargaining order.[36] My colleagues have adopted as much of the judge's bargaining unit findings as permits them to agree with the judge that the Union did not ever have majority support in an appropriate unit. The plurality opinion states, however, that "[h]ad majority status been demonstrated we would have agreed with both the General Counsel and the Charging Party that a [*Gissel* category two] remedial bargaining order was warranted." I would reverse the judge's findings which expand the unit alleged to be appropriate by the General Counsel and the Union. Changing the context from hypothetical to factual, I also agree with Chairman Dotson and Member Hunter that a majority-based bargaining order is warranted.

[34] Chairman Dotson and Member Hunter refer to Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1793–1795 (1983). In this article, Professor Weiler argues the inadequacy of majority-based *Gissel* remedial orders. For empirical substantiation he relies on a study of 38 *Gissel* cases in which few bargaining orders ever led to the execution of a contract and even fewer led to second contracts. Initially, I note that the study did not attempt to measure the deterrent effect of the orders in abating unfair labor practices by the employers involved or by other antiunion employers. Second, a nonmajority bargaining order, like a majority bargaining order, does not seek the execution as such of a contract but rather the vindication of employee rights of unimpeded choice. I therefore question whether the "success" of a nonmajority or majority bargaining order can be measured in terms of contracts executed. Finally, I do not read Professor Weiler's article as an argument for the abandonment of the *Gissel* remedy; he argues that it is ineffective as compared to the reforms he advocates as greater safeguards for rights to self-organization.

[35] Bok, supra at 135–136.

[36] In *Gissel*, the Court sanctioned the Board's use of a remedial bargaining order in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process. . . . where there is also a showing that at one point the union had a majority." A bargaining order is appropriate in this class of cases—commonly referred to as *Gissel* category two cases—when "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ." 395 U.S. at 614–615.

The judge found appropriate a larger warehouse bargaining unit than the unit alleged because of the inclusion of the sewing room and sales trainee/cooler employees. Since the judge found 37 employees to be in the unit and only 16 valid authorization cards from unit employees as of the 14 October 1980 date of the Union's demand for recognition, he found that the Union lacked majority status and denied the General Counsel's request for a bargaining order. He found no need to reach the issue of whether the Respondent's conduct warrants a bargaining order remedy under the balancing test for *Gissel* category two cases.

Both the General Counsel and the Charging Party contend that the judge erred by including the sewing room and sales trainee/cooler employees in an otherwise appropriate warehouse unit. They state that, with the exclusion of those employees from the appropriate unit, the Union did represent a majority of unit employees on the demand date and further contend that a bargaining order remedy is warranted because of the Respondent's numerous unfair labor practices. As indicated, I agree with these contentions.

As found by the judge, the Respondent has a total work force—including sales, office, and warehouse—of approximately 125 employees. Its St. Paul, Minnesota warehouse operates on three shifts. Goods are received on the first shift, stocked on the second shift, and pulled from stock and loaded onto trucks on the third shift.

Those employees whose placement within the unit is not in dispute are those who perform the normal warehouse functions on a full- or part-time basis within the general warehouse area. Such employees are assigned to one of the three shifts; the part-time general warehouse employees have regular scheduled starting times. General warehouse employees are directly supervised by the respective foremen on each shift, who are in turn supervised by the warehouse supervisor.

The pay rate for all full-time general warehouse employees as of the demand date was between $10.28 and $10.43 per hour, with a differential for third-shift employees; the pay rate for the part-time general warehouse employees varied from $4.50 to $8.50 per hour with the average wage among the part-timers at approximately $5.80 per hour. Further, order fillers received incentive pay of approximately $.04 per case for all cases picked over 1100 per shift. The full-time employees received a variety of benefits, including hospitalization, dental, disability and life insurance, profit sharing, funeral leave, and paid holidays and vacation. While there was testimony that part-timers received no fringe benefits, the Respondent's employee manual showed that part-timers who worked a minimum of 1400 hours per year were entitled to the same vacation benefits, prorated to hours worked, as full-time employees, and those who worked a minimum of 1000 hours per fiscal year were eligible for participation in the profit-sharing plan.

Wages, benefits, and other conditions of employment of the full-time general warehouse employees were set forth in the 26 May 1976 "Articles of Agreement" between the Respondent and the general warehouse employees. The Respondent had required a majority of the full-time general warehouse employees to sign a memo approving that agreement before it went into effect. The 1976 agreement arose in the wake of a union organizing attempt when the Respondent met with general warehouse employee representatives and "set up" the agreement. In May 1980 the Respondent again met with representatives of the general warehouse employees to discuss terms and conditions of employment. The Respondent and the employees reached agreement on several items that were immediately implemented but no overall agreement was ever reached. In October 1980, when the Respondent held a meeting with general warehouse employees and sought their agreement on a new "Working Agreement," neither the sales trainee/-cooler employees nor the sewing room employees were present.

The judge's finding that the sales trainee/cooler employees' "basic duties and functions are within the warehouse" is the primary basis for their inclusion in the unit. An examination of the overall circumstances of their employment leads to a contrary result.

The distinct circumstances of employment of these employees began with their hire. When the Respondent advertised for sales trainee/cooler employees, it explicitly sought sales trainees and offered sales training and future assignment to a sales route, salary, and use of a car. Employees hired into the position had been interviewed exclusively by the sales manager or by the sales manager and the head of the sales trainee program. During job interviews, sales trainee/cooler employees were told about the duties of salespersons; they were also told they would be in training for approximately 6 months, they would work in the cooler initially to learn the business and also go out on sales routes with salespersons, and they would eventually be offered a sales route.[37] On their hire,

[37] While the Respondent's president testified that sales jobs were posted and might be filled by anyone from within or without the Company, the evidence did not show that any nonsales trainee employees actually had an opportunity to bid on or were offered sales positions.

the sales trainee/cooler employees were required to sign individual employment contracts. The form contract stated, among other things, that the "sales trainee" (or "cooler employee") was being employed "to work in various capacities which will serve the purpose of training . . . to be a sales person with the company"; it also stated that the employee was not permitted to engage in any business other than employment for the Company and that the employee would "travel in sales territories as required and perform duties related to training for a sales position with the company in accordance with instructions of the sales manager." Other contract provisions set forth terms and conditions of employment covering salary, expenses, vacation and insurance benefits, personal use of a car, and termination.

The sales trainee/cooler employees[38] began work in the cooler. The approximately 8000 or 9000 square foot cooler is enclosed within the general warehouse area, which is approximately 95,000 square feet. Gradually, sales trainee/cooler employees were assigned to accompany salespersons on their routes. Estimates of the time sales trainees spent out of the cooler on sales routes varied from 8 to 16 hours a month (by the Respondent) to 5 to 10 days a month (by the employees); the amount of time spent accompanying salespersons increased with seniority.

In the cooler, the sales trainee/cooler employees received and weighed refrigerated products, stored products, and filled orders. They worked day hours and had varied starting times from 7 to 9 a.m. so that their hours either overlapped the midnight and first shifts or the first and second shifts. While working in the cooler, the sales trainee/cooler employees were supervised by the first-shift warehouse foreman. Occasionally, when there was insufficient cooler work, the sales trainee/cooler employees worked in the warehouse. The record does not reflect that there were transfers between the sales trainee/cooler and the general warehouse employee positions at any material time.[39]

When the sales trainee/cooler employees accompanied the salespersons on sales routes, they were under the supervision of the salesperson. They physically arranged the products on customers' shelves, and occasionally took sales orders and relayed orders to the Respondent. All sales trainees attended monthly sales meetings together with all salespersons in the Twin City area. They also attended training meetings, held at least twice a month. At the training meetings, sales trainee/cooler employees were instructed about company policies and salespersons' duties. They reviewed a training manual given to all sales trainees; the manual was specifically addressed to the Respondent's sales trainees and described the Respondent's organization, the Respondent's expectations about salespersons, selling skills and selling procedures, paperwork, and selling tools furnished by the Respondent. The sales trainee/cooler employees were also given the Respondent's sales manual and personalized business cards.

The sales trainee/cooler employees were paid a starting rate of $5 per hour for time worked in the cooler; for those days spent on sales routes, the employees were paid for 9 hours work at their hourly rate. Under the "sales trainee" employment agreement, sales trainee/cooler employees were also granted lump-sum "adjustments" ranging from $90 to $265 depending on the number of periods worked. It appears from the payroll records in evidence that they received such adjustments at the end of December 1980. They were also reimbursed for travel expenses, food, and lodging when they accompanied salespersons on sales routes. They received the same fringe benefits as the Respondent's other full-time employees.

There were four sales trainee/cooler employees employed as of 14 October 1980. Of those four, one received a sales job in March 1981, after having been a sales trainee/cooler employee since April of the prior year; and one who was employed from October 1980 to May 1981 turned down a particular sales job offer at some point during his employment. Another of the four stated that during his employment from July 1980 to May 1981 he knew of two additional sales trainees who received sales jobs—one a sales trainee/cooler employee and the other a sales trainee/office employee.[40]

I would find that the sales trainee/cooler employees did not share a community of interest with the general warehouse employees. Their hire as

[38] The Respondent also employed sales trainees who worked in the office taking phone orders and dealing with customer complaints during their training period.

[39] About September 1981, the Respondent eliminated the sales trainee program and thereafter assigned the cooler work to general warehouse employees. By August 1981, all sales trainee/cooler employees employed on the demand date, and one hired thereafter, had left the Respondent's employ.

[40] In view of the history of sales trainees being offered sales jobs, I do not agree with the judge that their prospect of promotion to sales positions was "at best, speculative." In the case he cited, *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), the trainee in issue was not told he was in training for any particular supervisory position and his duties were not otherwise distinguishable from other unit employees.

I further place little reliance on the Respondent's characterization of the sales trainee program as merely an inducement to secure employees for "low paying, generally undesirable work" in view of the Respondent's creation of a full-blown program complete with manuals, training sessions, and eventual assignment to sales jobs.

sales trainees, their individual employment contracts setting forth particular terms of employment, their training, work schedule, pay rate substantially lower than full-time warehouse employees, wage adjustments, and expense benefits all distinguished them from general warehouse employees.[41] While they did spend a substantial amount of time working in the cooler, they were told that this work was merely for interim training.[42] Moreover, they spent a significant amount of their worktime accompanying salespersons on sales routes and being trained in the process. Further, their workplace was separate from the general warehouse employees, they were not always under warehouse supervision, and at all material times there were no transfers between the sales trainee/cooler employee and the general warehouse employee positions. Accordingly, I would exclude them from the unit of warehouse employees.

I would also find that the sewing room employees do not share a sufficient community of interest with the general warehouse employees to warrant their inclusion in the warehouse unit. These employees were all students at a local college and all worked on a part-time basis. The judge found that all nine of those employed as of the demand date *averaged* five or more hours per week during certain periods of their employment that included the demand date. Only two of those sewing room employees who worked during the 1979–1980 school term also worked during the 1980–1981 school term, and only one of those two, referred to here as the leadperson, worked during the summer between the school terms. Most of the sewing room employees who worked during the 1980–1981 school term began their employment in September or October 1980. The judge focused on their hours through December 1980 only. Some of the sewing room employees no longer worked thereafter, however, and some did not work during every 2-week pay period.[43] Further, only one of the sewing room employees employed during the 1980–1981 school term was still on the payroll after September 1981.

The sewing room employees do not have a set schedule of hours each week; they usually work hours between 2 and 10 p.m. Individual sewing room employees work different numbers of hours within each week and each employee's total hours vary from week to week. Some of the sewing employees work only on an as-needed basis; for all sewing room employees, the number of hours worked depends on the amount of available work as well as the desire of the employees to work.[44]

The primary workplace of the sewing room employees is a separate room, known as the sewing room, in the same building as the general warehouse area. The sewing room employees spend most of their time in that room filling orders for a sewing product; that work involves stringing together individual items that make up an order, price marking the order, and individually boxing each order for shipment. They also work in the general warehouse area when date-stamping one particular product and repacking certain other products. Finally, some sewing room employees frequently do filing work in the office.

The sewing room employees are directly supervised by the warehouse supervisor. For the most part, however, the sewing room employees work independently. The order sheets, on which they are to work, are simply left for them in the sewing room. It appears that the Respondent communicates with the sewing room employees primarily through the sewing leadperson. For example, when the sewing room employees were laid off in March 1981, they were notified of the layoff by the leadperson whereas the part-time general warehouse employees were notified of changes in their status by formal letters from the warehouse supervisor.

The sewing room employees are hourly paid and punch the same timeclock as the general warehouse employees. As of the demand date, the hourly wage rate of all sewing room employees, except the leadperson, was $3.50; hers was $4.11. Sewing room employees receive no fringe benefits.

There was scant support in the record of interchange of job duties between the sewing room employees and the general warehouse employees. The date-stamping and repacking work performed by the sewing room employees in the general warehouse area was not shown to be work that general warehouse employees also perform. Further, while there is some evidence that during the strike in January 1981 and thereafter the sewing room employees occasionally pulled orders in the general warehouse area, it is clear that such work is not their normal assignment. The duties of the general warehouse employees do not include sewing room work. With respect to ordinary contact between the two groups of employees, while the evidence reflects that warehouse employees must walk

[41] See, e.g., *Wisconsin Bearing Co.*, 193 NLRB 249, 261 (1971); *Garrett Supply Co.*, 165 NLRB 561 (1967).

[42] See *Garrett Supply Co.*, supra.

[43] Looking at the Respondent's payroll records from the beginning of 1980, it appears that while there were a few part-time employees paid at sewing room wage rates who consistently worked during each 2-week pay period for at least a 4-month period, many such employees worked for short periods and/or did not consistently work during each payroll period.

[44] Sewing room employees were not penalized for absences and no absence policy applied to them prior to May 1981.

through the sewing room to get to the lunchroom, the warehouse supervisor acknowledged that the sewing room employees had little contact with the other employees.

There is no evidence of substantial transfers between the two groups of employees. There was testimony that one sewing room employee became a full-time general warehouse employee after the strike and after both an interim 6-month absence from the payroll and a brief tenure as a part-time general warehouse employee. Otherwise, the record fails to show that any other sewing room employee became a full-time or part-time warehouse employee. There also were several poststrike temporary transfers of part-time general warehousemen into the sewing room. In March 1981, all the sewing room employees except the leadperson were laid off and part-time general warehouse employees were given the option of a layoff or taking those jobs in the sewing room at reduced wage rates. A few initially chose the sewing room option. In July 1981, these part-time general warehouse employees were either recalled or returned to their general warehouse duties and their wage rates were adjusted to previous levels. This was the only period when general warehouse employees worked in the sewing room and it occurred some 6 months after the demand date.

In analyzing the unit placement of sewing room employees, I have, as with the sales trainee/cooler employees, examined the overall circumstances of their employment. I have not focused simply on the issues of the regular basis of their employment or their student status. I emphasize that these employees work primarily in a separate room, perform job functions different from those of the general warehouse employees at a significantly lower wage rate, work during a different schedule of hours, have minimal contact with the general warehouse employees, and have virtually no interchange. In view of all of the above, I would exclude the sewing room employees from the unit of warehouse employees.[45]

Based on the foregoing, I would find that the appropriate unit consists of all full-time and regular part-time warehouse employees, but excluding truckdrivers, sewing room employees, sales trainee/cooler employees, office clerical employees and guards and supervisors as defined in the Act.[46]

[45] See *Institutional Food Services*, 258 NLRB 650 (1981) (in reference to the doughnut maker).

[46] This warehouse unit comports with traditional appropriate warehouse units. *C. P. Clare & Co.*, 191 NLRB 589 (1971); *Pacific Abrasive Supply Co.*, 182 NLRB 329 (1970); *Garrett Supply Co.*, 165 NLRB 561 (1967).

The record and the judge's findings demonstrate that by 10 October 1980 the Union had obtained valid cards from 16 unit employees. On that date, and on the date the Union first requested recognition, 14 October 1980, there were 24 full-time and regular part-time warehouse employees. Accordingly, by 10 October 1980, the Union represented a majority of employees in the appropriate bargaining unit.[47]

The Respondent's campaign of unfair labor practices—which began on the date of the Union's bargaining demand and continued for over half a year until the unlawful failure to give proper reinstatement to certain unfair labor practice strikers—is fully detailed in the judge's decision and summarized in the plurality opinion. I agree with my colleagues that, for the reasons fully and fairly stated by them, the possibility of erasing the effects of the Respondent's serious misconduct and of ensuring a fair election is slight. Because I would also find that the Union had achieved a majority card showing in an appropriate unit when the Respondent launched its lawless attack, I believe that "employee sentiment once expressed through cards would, on balance, be better protected" by a *Gissel* category two bargaining order.

[47] Even if the four sales trainee/cooler employees were included in an appropriate unit, the Union had majority support on the demand date.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to take any measures necessary to prevent our employees from becoming represented by a union.

WE WILL NOT falsify payroll records in an effort to prevent our employees from voting in favor of union representation.

WE WILL NOT threaten our employees with loss of their profit sharing if they join a union.

WE WILL NOT threaten to impose or impose stricter working conditions, higher production quotas, fines for production errors, or to reduce working hours in order to discourage our employees from seeking union representation.

WE WILL NOT threaten to discharge employees who refuse to agree to the unlawfully increased production quotas; WE WILL NOT issue disciplinary warnings to employees who fail to meet the unlawfully increased production quotas; and WE WILL remove any and all such disciplinary warnings previously given to employees from their personnel files.

WE WILL NOT threaten our employees with plant closure because they engage in union activities or to discourage them from seeking to be represented by a union.

WE WILL NOT threaten unfair labor practice strikers with loss of their jobs if they fail to return to work.

WE WILL NOT interrogate prospective employees as to their union sympathies and activities.

WE WILL NOT discontinue benefits previously given to our warehouse employees because they engage in union activities and WE WILL reinstitute the floating holiday benefit which was revoked in December 1980 and make whole our employees for any moneys deducted from their pay for previously granted floating holidays.

WE WILL NOT discharge or issue written disciplinary warnings to our employees because they have joined or supported Warehouse Employees of St. Paul, Minnesota, Local Union No. 503, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union, or because they have engaged in any other protected concerted activity.

WE WILL NOT discontinue such job practices as the third-shift job rotation system because our employees engage in union or other protected concerted activity and WE WILL reinstitute the job rotation system previously followed on the third shift.

WE WILL NOT fail to reinstate unfair labor practice strikers to the positions they held prior to the strike and WE WILL make Michael Pettis, Wayne Kolberg, James Ricker, and Steven Schoenecker whole for any loss of wages or other benefits they may have suffered as a result of our discrimination against them.

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 revoke the increase in the production quotas and the policy of fining employees for mispicks.

WE WILL make whole those third-shift employees who lost incentive earnings because of the elimination of the job rotation system.

WE WILL offer Richard Krenner immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any references to the unlawful warning and the termination of employee Richard Krenner; to the warning given to employee Lloyd Schmotter on or about 12 November 1980 for failure to meet the unlawfully increased 1200 case production quota and to warnings given to any other employees for failure to meet such quota; and to fines for misperformance of job duties in relation to specific employees; and WE WILL notify in writing each employee affected by the described conduct that we have complied with this provision and that the unlawful conduct will not be used as a basis for future personnel action against such employees.

GOURMET FOODS, INC.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heared in Minneapolis, Minnesota, on 11 days between September 21 and November 17, 1981, based on unfair labor practice charges filed by Warehouse Employees of St. Paul, Minnesota, Local Union No. 503, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union)[1] and complaints issued on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Regional Director and Acting Regional Director of Region 18.[2] The complaints allege

[1] The charge in Case 18-CA-6947 was filed on November 12, 1980, and was amended on December 22, 1980, and January 2, 1981. The charge in Case 18-CA-7081 was filed on February 10, 1980, and amended on February 20 and March 24, 1981. The charge in Case 18-CA-7144 was filed on March 24, 1981, and the charge in Case 18-CA-7251 was filed on May 18, 1981. All charges were duly served on or about the dates of their filing.

[2] The consolidated complaint in Cases 18-CA-6947 and 18-CA-7081 issued on March 26, 1981. That complaint was amended and consolidated with the complaint issued in Case 18-CA-7144 on May 8, 1981. An order consolidating those cases with Case 18-CA-7251 and further amending the complaints issued on July 28, 1981. The complaints were amended further at hearing.

that Gourmet Foods, Inc. (the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and the Respondent had filed briefs which have been carefully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent is a Minnesota corporation engaged in St. Paul, Minnesota, in the wholesale sale and distribution of specialty food products. Jurisdiction is not in dispute. The complaint alleges, the Respondent admits, and I find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), (7) of the Act.

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

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

II. THE UNFAIR LABOR PRACTICES

A. *Background—The Respondent's Knowledge of Employee Union Activity and Evidence of its Attitude Thereto*

Arthur Stone, the Respondent's president, started Gourmet Foods, Inc. about 1963. It now sells and distributes ethnic foods and other specialty items in the Minneapolis-St. Paul, Minnesota area and throughout a six-or seven-state area. It has a total work force, including sales, office, and warehouse employees, of about 125. Its warehouse, the aspect of its business principally involved herein, occupies approximately 100,000 square feet and is operated on a three-shift basis. Essentially, goods are received on the first shift, stocked on the second, and pulled from stock for shipping on the third. There is, of course, some overlap in duties between shifts. The Respondent has also employed truckdrivers for in-town delivery work and has utilized both common and contract carriers for city and over-the-road driving.

The Respondent's general attitude toward the unionization of its employees is candidly set forth in the employee manual handed out to new employees, including those hired in the warehouse.[3] In a section of the manual entitled "Non-Union Status Policy" the Respondent's policy of treating each employee fairly and individually is described. The following is then stated:

> It is our policy to deal directly with each employee without interference from outsiders who do not know our Company, our industry, our employees, or have any stake in your individual success.
>
> Therefore, we have remained non-union since the inception of the Company, and it is our policy to remain non-union in the future.

There have been at least two attempts, including the instant situation, to organize the Respondent's warehouse employees. The first, for which the record does not indicate a date, was unsuccessful.

As discussed in somewhat greater detail, infra, the Respondent had a practice of signing individual or group agreements concerning terms and conditions of employment with the full-time warehouse employees. A meeting to discuss such an agreement for the period beginning in May 1980 was held in that month. In the course of that meeting a third-shift warehouse employee, Richard Krenner, told Stone, "You know, there is talk of union in the warehouse." Stone replied that he had no such knowledge; Krenner reiterated his assertion.[4]

Stone's May 1980 meetings with the warehouse employees resulted in an agreement for a new wage rate for the coming year (10 cents per hour more than the rate being paid at a nearby unionized warehouse) and two additional floating holidays (to be taken as "sick days" so that the office employees would not learn of this additional benefit). Stone agreed to have the understanding drafted for signing. However, throughout the summer there were delays or other unexplained problems in its presentation. This failure to produce a written agreement contributed to dissension and morale problems among the warehouse employees. Also contributing to these problems was the employees' concern over the treatment being accorded Jack Rohde, an employee who had been injured in December 1979 while working in the warehouse. Pursuant to the procedures of Minnesota's workmen's compensation agency, Rohde was undergoing rehabilitation and was working in the Respondent's office. The warehouse employees questioned whether he was being treated fairly. While there was no overt union organizational activity underway in the warehouse during the summer of 1980 there was, to some unspecified extent, union talk among the employees.

At some point during that summer, a group of the employees, including Krenner, Pettis, Hansen, and O'Brien, went to the home of Warehouse Superintendent Leroy Fonteyn and discussed the warehouse problems, particularly their inability to get a signed contract from Stone.

[3] Stone's attempt to establish that the employee manual was not applicable to the warehouse employees was unconvincing. That manual was handed out to those employees, as even he acknowledged, describes the benefits applicable to all full-time employees, and makes reference to the warehouse workweek in describing the hours of employment.

[4] Stone initially testified that he had no recollection of Krenner making any such statement and said that while he was not sure, he did not believe that this statement had been made. He subsequently denied that there had been any such statement. Krenner's testimony was credibly offered and was corroborated by at least two other employees who were present, Pettis and Hansen. Noting Stone's initial uncertainty and the corroboration of Krenner's testimony by other credible witnesses, I credit Krenner.

Fonteyn told them that he had taken the contract to Stone for signature and, in the course of his conversation with the employees, intimated that he was in favor of having the employees represented by a union. While Pettis testified generally that the Respondent, and particularly Fonteyn, knew that the employees were talking union and that the employees were aware of the Respondent's knowledge, neither his testimony nor Krenner's was any more specific than the above. Fonteyn offered no testimony about this meeting and did not specifically deny the statement attributed to him. He did admit, however, that during the summer and fall of 1980 he observed that the employees were very quiet, not talking. He concluded that there was dissension in the warehouse but claims that he did not ask any of the employees what the problems were. Fonteyn reported his observations to Stone.

About mid-August 1980, Ben Marz, an industrial and organizational consultant who had been retained to provide consulting services to the Respondent since 1978, met individually with the third-shift warehouse employees, at Stone's request, in order to identify what was causing morale problems and to determine what could be done to improve the organization of the warehouse. In commissioning these interviews, Stone did not mention any union activity. Marz, the Respondent's admitted agent, questioned the employees individually, asking them where they felt improvements could be made. He did not question them about their union interest or activities.

The General Counsel alleges that the Marz interviews were an attempt to solicit "employee opinions and grievances in order to discover employee attitudes and isolate those employees with union sympathies" which, in the context of "the totality of Respondent's course of conduct . . . constituted impermissible interrogation." I cannot agree. Such union activity as may have existed during the summer of 1980 was at a low level and the remark attributed to Fonteyn by both Krenner and Pettis is insufficient to establish any significant knowledge that the employees were seriously considering unionization. There were other factors contributing to a decay in employee morale such as might warrant the Respondent's concern and Respondent's reliance on its consultant to look into such matters was not inconsistent with its general practice. Moreover, there was no mention of union activity either by Stone to Marz or by Marz to the employees and there were no promises, express or implied, made to the employees in regard to the problems they related. While it is not inconceivable that a perceptive interviewer could have determined from such interviews which employees were the most disgruntled and the most likely to seek the help of a collective-bargaining representative, this record is insufficient to establish that such was the Respondent's purpose. I shall therefore recommend that this allegation be dismissed.

About October 9, 1980,[5] Fonteyn called first-shift employee Mike Pettis into his office to discuss warehouse morale. Pettis confirmed that there was dissension and attributed it to the employees' concern regarding the treatment of Jack Rohde. There was no mention of union activity in either Pettis' or Fonteyn's testimony concerning this meeting. Fonteyn related this conversation to Stone and Stone asked to meet with both of them. As they proceeded to Stone's office, Pettis asked what Fonteyn had told Stone. Fonteyn replied, "I told him that there was talk of union in the warehouse."[6] In Stone's office, the three discussed the Rohde situation, Stone's failure to sign the contract with the warehouse employees, and what Pettis described as "the feelings of everybody in the warehouse and stuff like that." Stone asked Pettis if anything could be done concerning the problems in the warehouse and whether a meeting with the employees might help. Pettis told Stone and Fonteyn that he could see no problem in the holding of such a meeting but thought it was "too late." Pettis' testimony contains no specific reference to the employees' interest in unionizing and Fonteyn, while corroborating that Pettis told them that it was too late to do anything, claimed that the Union was not mentioned. Stone, however, claimed that this meeting was his first knowledge of the employees' union activity, that Pettis had stated that the warehouse employees believed that Rohde had been mistreated and would, in all probability, go union. Noting that Pettis' "too late" remark makes little sense in the absence of some reference to union activity and noting further that the October 10 meeting, discussed infra, which was called in response to this conversation, dealt in part with the Respondent's opposition to unionization, I must conclude that there was in fact some discussion of the possibility of unionization when Pettis met with Stone and Fonteyn about October 9.

B. *The October 10 Meeting*

Stone called a meeting of the warehouse employees, excluding the sewing room employees and sales trainees, on October 10.[7]

Stone distributed copies of the agreement purportedly reached with the employees in May 1980. It covered the full-time warehouse employees and those of the Respondent's drivers who were not already members of a labor organization and set forth, inter alia, the new wage rate and the two additional floating holidays, referred to as "paid days sick leave." Additionally, the agreement set 1200 cases per night as the minimum required of order fillers, an increase from the earlier minimum 1100. Stone went on to explain the Respondent's position in regard to Jack Rohde who was, at that time, working in the company offices. He described Rohde as a malingerer or worse. The employees suggested that Rohde be

[5] Virtually all of the events herein occurred from the fall of 1980 until the spring of 1981. Therefore, all references hereinafter to October, November, and December refer to 1980 and all references to January, February, March, and April refer to 1981, unless otherwise specified.

[6] Fonteyn did not specifically deny this statement.

[7] In view of Stone's admission that he acquired knowledge of the employees' interest in union organization from his October 9 conversation with Pettis, and in view of the topics discussed in the October 10 meeting, I deem Stone's assertions that this meeting was called to explain the Respondent's position regarding Rohde and was not intended to persuade the employees not to select a union representative to be self-serving and implausible.

permitted to work in the warehouse as a permanent order checker. According to Stone's testimony, as corroborated by at least some of the employees who were present, Stone made reference to the current practice of rotating the various warehouse jobs and said that it would not be fair to future warehouse employees for him to agree with the current employees to give up that rotation.

The discussion, all agreed, turned to the subject of unions. Virtually all of the employees recalled Stone stating that if they joined the Union they would lose their profit sharing. Stone denied making that outright threat. He told them, he testified, that if the employees were represented and had a third party pension plan they would not qualify for distribution of benefits under the Respondent's profit-sharing plan. However, he said, "if they joined an outside bargaining agent while they were . . . employees of Gourmet Foods, they would be vested at that point. They would not lose what they had invested in the plan." There was, he claimed, no room for misunderstanding. His statement was "You can't have both . . . that the profit sharing fund would be vested at the point people joined a union, and at that point they would have either ours or theirs." Additionally, Stone told the employees that if they were members of a union they would be fined for not attending union meetings, that union dues were not tax deductible, and that Gourmet Foods would not be able to survive if a union came in. There was discussion of the Company's open door policy and an invitation to employees to freely discuss their problems with their supervisors.

The General Counsel contends that Stone's October 10 statements about the profit-sharing plan constituted a threat, in violation of Section 8(a)(1) of the Act. The Respondent, however, argues that Stone's statements were not threatening but were merely accurate statements that the employees could not have both a union pension plan and the Respondent's profit-sharing plan. I find, in agreement with the General Counsel, that Stone's statements concerning profit sharing were violative of Section 8(a)(1). Clearly, the statement heard and credibly testified to by so many employees was such a threat. Moreover, even if Stone's version were to be credited, I would find a violation. That statement, by referring to the vesting of the profit-sharing plan at the point when employees join a union, clearly implied that it was their selection of a union and not subsequent negotiations over the alternatives of a profit-sharing plan or a union sponsored pension plan which would determine whether or not they were covered by the Respondent's profit-sharing plan. Included under a union pension plan, however, is a product of collective bargaining, at least to the extent that employer contributions are required, and not an automatic consequence of union membership. Thus, while an employer may lawfully tell employees that collective bargaining might result in the substitution of a union's pension plan for their profit-sharing plan, it neither states nor implies "that unionization would *ipso facto* result in loss of the profit-sharing plan, or . . . that union members would be ineligible to participate in the plan." See *Pressure Science*, 227 NLRB 844, 846 (1977). See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), wherein the Supreme court stated:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications that might be more readily dismissed by a more disinterested ear.

Stone left the meeting while the employees considered whether they would sign his proffered working agreement. After some discussion they decided not to sign. Rather, they decided to go to the Union and sign cards authorizing union representation. Approximately 12 employees left the Respondent's premises, went to the Union's office, and did, in fact, sign cards that day. Approximately five other employees signed cards within the same week.

Mike Pettis testified that later that same day, after the employees had gone to the union hall, second-shift Supervisor Ken Reno walked by him and asked, "Did you guys go down there?" Pettis answered "Yes." Reno denied asking Pettis that specific question on October 20 and testified that he had asked it months later. However, the remainder of Reno's testimony on this question was incomprehensible or nonresponsive. On balance, considering the nature of Reno's answer and my impression of Pettis as a candid and straightforward witness, and notwithstanding that the statement attributed to Reno by Pettis was not included in Pettis' investigative affidavit, I credit Pettis.[8] The Respondent knew of its employees' visit to the Union's office.

On Saturday, October 11, the Respondent's supervisors, including Michael Still, the third-shift foreman, met with Stone, Marz, and an attorney. Stone described his October 10 meeting with the employees and stated that he did not think that the employees had believed what he had told them. He told of his anticipation that a representation petition would be filed that week and asked counsel whether he could require the employees to sign the contract he had presented them. In regard to the warehouse, Stone stated, "We were going to have to get tough. There was to be no laxity in the warehouse." He also stated that a number of the least senior employees of the third shift were going to be reassigned from a Sunday night through Friday morning shift to a Monday night through Saturday morning shift. Still had not participated in that decision. There was no discussion of re-

[8] While the General Counsel amended the complaints at hearing to allege various statements by Reno as violations of Sec. 8(a)(1), no amendment alleging this question to be unlawful interrogation was offered. Accordingly, I reach no conclusion on that issue.

ducing those employees' hours.[9] Still was discharged the following evening.[10]

Stone had correctly anticipated the filing of a petition. On October 14 the Union demanded recognition. On October 15, it filed a representation petition, Case 18-RC-12796, seeking an election in a unit of the Respondent's full-time and regular part-time employees excluding truckdrivers, office clerical, salesmen, sales trainees, casual employees, and supervisors as defined in the Act.

C. *Shift Changes and Reduced Hours*

The orders taken by the Respondent's salespersons were generally filled by the Respondent's third-shift warehouse employees. Their workweek commenced at midnight on Sunday and concluded at 8 a.m. on Friday. During the first week in October, Stone and Fonteyn decided to institute a new order filling shift to accommodate a large and regularly scheduled shipment which was shipped from the Respondent's dock on Monday mornings. That new shift, made up of the four least senior third-shift employees, Groves, Beckjorden, Schmotter, and Schwerha, was to work from midnight on Monday through 8 a.m. on Saturday, thus permitting order pulling for Monday shipments to be done after midnight on Fridays. Fonteyn told payroll clerk Toni Malik of the schedule change on October 9 and the affected employees on the morning of October 10, prior to their meeting with Stone. Groves, the most senior of the four and the only one of them who had not signed a union authorization card, remained on the newly instituted shift for about 1 week and was returned to his original shift. Beckjorden, Schmotter, and Schwerha continued to work on the new Monday through Friday shift for about 3 or 4 weeks. During at least 2 weeks, the weeks ending October 18 and October 25, they were laid off for 1 or more days and worked less than a full workweek. The Respondent submits that there was a slowdown in business resulting in the short workweeks for these employees and finally resulting in the termination of the new shift experiment. The employees were then transferred back to their original schedule.

The General Counsel contends that the assignment of these individuals to the new shift and their layoff for one or more days during some weeks was discriminatorily motivated. However, the General Counsel was in error when he contended that Stone's testimony established that these people were laid off as the Respondent entered its busiest season and while all other third-shift employees, including part-time employees, were working 40 or more hours per week. The busy season, as previously noted, occurs in November, by which time these employees had apparently returned to their regular shift. Stone similarly testified that it was in November that all of the third-shift employees were working 40 or more hours per week. Taking note of the fact that the Respondent offered a plausible explanation for the shift change, and further noting that the employees selected were the least senior employees on the third shift, I cannot accept the General Counsel's contention that the creation of the new shift or the short term reduction in hours of the selected employees was discriminatorily motivated.[11] Accordingly, I shall recommend that these allegations of discrimination against Beckjorden, Schwerha, and Schmotter by changing their shift and reducing their hours be dismissed.

D. *Falsification of Payroll Records*

About October 17, controller Hagen told payroll clerk Toni Malik that Stone needed a list of all the warehouse employees. She asked Stone specifically what he wanted. Stone told her, "They have petitioned for a union in the warehouse and I'll be damned if the union is going to get in. I don't need a union. I don't want a union." When questioned further by the General Counsel about anything else Stone said he might do, Malik recalled Stone stating, "I would do anything to keep a union out."[12]

The Respondent contends that even if Malik's testimony is credited, Stone's remark to her may not be found violative inasmuch as she was a confidential employee excluded from the Act's protection. The record establishes that Malik was the payroll clerk and personnel secretary, supervised by the controller and Office Manager Mayberry and she performed secretarial work for both of them. According to her job description, she maintained the personnel files; Stone testified that those files contained confidential records regarding personnel.

The Board has long and consistently adhered to the standard establishing as confidential employees only those who "assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations." *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450, 451 (1980); *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The record in this case does not establish that either Hagen or Mayberry formulated, determined, and effectuated management labor relations policies. Malik, therefore, is not a confidential employee notwithstanding that she maintained personnel files containing what the Respondent deemed to be confidential material or handled insurance claims and paper work required by state agencies and insurance carriers in regard to terminated

[9] Still's testimony concerning the October 11 meeting is uncontradicted.

[10] Based on his specific recollection of the date of his discharge and his uncontradicted description of the October 11 meeting (which he would not have attended had he been discharged earlier), I credit Still's recollection that his discharge occurred on October 12 over Stone's testimony that the discharge took place on October 10.

[11] In reaching this conclusion I have considered as essentially irrelevant the testimony of Toni Malik concerning Stone and Fonteyn's statements. Neither Stone's query as to why she had questioned Fonteyn about the timecards nor Fonteyn's response of "Don't ask" when she asked him why all the changes had been made, established discriminatory intent. Moreover, it cannot be determined from the testimony whether she had asked Fonteyn if the union activity was the reason or whether it was Fonteyn who told her that it was. In any event, I would deem it implausible that Fonteyn would have made such a remark.

[12] This testimony was credibly offered and is uncontradicted. I must reject the Respondent's contention that it is not worthy of belief because of Malik's alleged bias and hostility or because of the somewhat leading manner in which part of her answer was elicited. Malik was not an entirely disinterested witness, but her limited interest, stemming from the reasons for her voluntary termination and litigation between her husband's company and the Respondent, is not sufficient to render Malik inherently incredible.

employees. See *Greyhound Lines*, 257 NLRB 477, 479 (1981), and cases cited therein. See also *Clinton Corn Processing Co.*, 253 NLRB 622 (1980). As Malik is an employee entitled to the Act's protection, Stone's threat to her to take any action necessary to avoid unionization clearly violates Section 8(a)(1). I so find.

Malik prepared a handwritten list of the warehouse employees, as directed. A few days later, Hagen gave her a sheet of paper containing three names to be added, Gary and Steven Lowenthal, who were not currently employed by the Respondent, and Joel Stone, who was employed elsewhere in the Company. He told her to see Arthur Stone for their social security numbers, addresses, and rates of pay. When she asked Stone for this information, he asked what date she had put on the payroll records. She said that she had inserted the prior day's date and Stone told her that he wanted the records and their paychecks backdated 6 weeks. Malik went back to Hagen and refused to change the dates. He instructed her to white out the dates of hire on the forms and said that he would fill them in. When the forms were subsequently returned to her, they bore at the top the date of October 20, 1980. In the spaces provided for date of hire, the date had been whited out and September 8, 1980, had been inserted with what appears to be a different pen, and in handwriting which differs from Malik's handwriting on the remainder of the form. The forms, as so completed, were sent to the bank and paychecks were prepared.[13] Beginning with the payroll period ending October 18 and continuing until after the end of the year, the names of these three individuals were listed in the Respondent's payroll register as being employed in the warehouse. The designation "S," the salary rather than an hourly wage, and the omission of any total of hours worked, all in the manner that acknowledged supervisors were listed, indicates that Joel Stone was considered to be a supervisor.

A list of 44 purported warehouse employees, including Joel Stone and the two Lowenthals, was mailed to the Board on October 21, 1980. On October 23, 1980, a second letter was addressed to the Board requesting that a 45th name be added. That second letter contained no reference to striking the three extra names from the first list. However, according to Stone's testimony, he had met with company counsel on either October 18 or 20 to discuss the list requested by the Board and discovered the three improperly added names. His counsel immediately called the Board and directed that those names be struck.[14] A request that these names be deleted was ultimately received by the Board and the names were deleted.

Stone denied that he directed the inclusion of the three names to the payroll list in order to "pad" the unit. His instructions to Malik, he testified, were intended as a test to determine whether she was the source of leaks of information from the office to warehouse. He had been impelled to conduct this test, he claimed, by information from Fonteyn to the effect that when Fonteyn told Beckjorden, Schmotter, and Schwerha of the change in their shift assignment, they already knew of it. Fonteyn, who claimed to be "stunned" by this information, had called Stone from his home to tell him (having forgotten to do so while he was in the warehouse). According to Fonteyn, only Stone, Malik, and he had known of the proposed change. The Respondent also claimed that there had been other incidents causing them to be suspicious of Malik as a source of "leaks." Thus, Stone and his secretary described an incident occurring during the summer of 1980 when, in a lunchroom conversation, Malik had mentioned that a fellow-employee, Roger Carp, did not have to punch the timeclock and could take longer lunchbreaks than the hourly rated employees. This allegedly upset Carp and he complained to Stone. Carp did not testify.

The information concerning Stone's addition of three names to the payroll rapidly reached the unit employees and Malik did not deny that she was the source of their knowledge. Stone learned of their acquisition of this information almost immediately. However, he did not confront Malik for almost 3 weeks. When he did, he only asked her who else she had told about what was going on in payroll.

The General Counsel contends that the Respondent's efforts to falsify payroll records in order to expand the number of warehouse employees and to include in the unit persons who might be expected to hold antiunion sympathies violates Section 8(a)(1) of the Act. I agree. The Respondent's explanation is simply beyond belief and its effort to subvert the Board's processes, even though corrected before any harm was done, cannot be condoned. Such an attempt to interfere with the employees' organizational activities and the electoral process must be restrained by an appropriate order. See for example *St. Francis Hosptial*, 249 NLRB 180 (1980); *Garry Mfg. Co.*, 242 NLRB 539 (1979); and *Florida Power & Light Credit Union*, 238 NLRB 937 (1978).

Moreover, even if the Respondent's intention were only to plumb leaks of confidential information, I would be required to find a violation herein. The Respondent directed Malik to pad the payroll list. By the testimony of both Fonteyn and Stone, it is clear that if their intent was to find the source of leaks, they fully expected her to tell the unit employees. (Indeed, an employer should expect that such patently illegal conduct would be brought to the attention of the affected employees by a conscientious whistle-blower.) The employees were in fact informed of the unit-padding attempt by Malik, acting, in essence, as a conduit of the information from Stone. There is clear interference with the free exercise of statutory rights when an employer causes its employ-

[13] Stone admitted giving Malik these instructions but testified that he had done so on October 10, immediately after Fonteyn had reported a "leak of information" about the shift change, as discussed infra. Stone's testimony, however, does not square with the payroll records which show preparation of the employee forms on October 20. For that reason, and because I consider Stone's explanation of this entire incident implausible, as also discussed infra, I do not credit his testimony as to when these instructions were given to Malik.

[14] The Respondent's attorney corroborated Stone's testimony about this meeting. However, he did not state when it had been held. Inasmuch as the initial list of 44 names was not mailed until October 21, and the amendment, adding one name but making no reference to the three to be deleted, was dated October 23, Stone could not have met with counsel and requested the elimination of those names from the payroll list on October 18 or 20.

ees to learn that it is willing to engage in unlawful conduct in order to defeat their efforts toward unionization. The Employer's intent is immaterial. See *Florida Steel Corp.*, 224 NLRB 45 (1976), where the Board pointed out that the "test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on a respondent's motive. . . ."

E. *The Meetings of November 10 and 11, 1980*

On November 6, the Union filed a request to withdraw its petition. That request was approved on November 10. Upon its withdrawal, Stone directed his warehouse superintendent Fonteyn to speak to the warehouse employees. According to Stone, Fonteyn was directed to give a speech which would pull the Company together, to tell the employees that there would be no reprisals or retribution. Fonteyn, however, recalled that he was instructed to tell the employees how he felt about the union activity. An outline was prepared. Fonteyn testified that he prepared that outline pursuant to Stone's direction to let the employees know his own, rather than Stone's, feelings about the union activity. His testimony in this regard is contradicted by both Stone's testimony and the wording of the purported outline, which sounds as if it were voicing the views of Stone and Fonteyn.

Fonteyn conducted two meetings so as to encompass the employees of all three shifts. In these meetings, he testified, he used the outline as a guide; he denied varying from it significantly. The outline states, inter alia, as follows:

> I don't know who signed the cards; and who didn't; and I really don't want to know; I am not going to ask you, but I want you to know that I don't think we need a union here; and I am very much against having one.
>
> . . . .
>
> We feel that whatever problems we might have, we can handle them better on our own. We don't need an outside third party coming in here. As far as what a union could do, your wage rates are very competitive; your fringes are very good. We would like to think that this is a pleasant place to work and that the work environment is good. So we don't think there is really much a union could do for you anyway. You have to remember, if a union does come in here, it would only have the right to collect dues, and bargain with me. . . .

Fonteyn testified:

> I started out with the meeting telling them that the union had withdrawn, and I told them that I didn't think we needed a union shop here, and I told them that if they wanted it run as a union shop I would run it as a union shop, but I felt that they didn't need a union shop because I had given them 40 hours before; as an union shop, if they were order fillers they would strictly fill orders; and if they were forklift operators, they would strictly be forklift operators; and as order fillers before we always gave them 40 hours. If their work ran out for filling orders, we found work for them to do and gave them 40 hours; and with the union . . . . we wouldn't be able to do that because they would be considered strictly order fillers.

The employees remember Fonteyn's statements similarly. Thus, virtually all of them recall Fonteyn indicating his displeasure at their having sought union representation and stating that if they wanted the warehouse run as a union shop, that is they way it would be run. Third-shift employees Wangsness and O'Brien recalled Fonteyn stating that with the warehouse run as an union shop, employees would only do one job, order filling or forklift driving, for example, and when that work ran out they would be sent home rather than being used to complete other work. Their testimony, mutually corroborative, is further corroborated by the testimony of Schumacher.[15]

I cannot find, as argued by the Respondent, that Fonteyn's statements in these two meetings were merely a comparison of the relative advantages and disadvantages of working in a union or nonunion shop. Fonteyn's statements, and whether as phrased in his own testimony, that Shcumacher, or as credibly described by employees, at the very least implies that the warehouse would now be run as Fonteyn believed that unionized warehouses were run. Such a change, Fonteyn threatened, would inure to the employees' detriment in that they would no longer switch from one job to another when their primary duties were completed and would no longer be permitted to complete their 8-hour shifts when their assigned duties were concluded earlier. As such, he was clearly threatening them with retribution for their having engaged in the union activity which had displeased him so much. Such threats violate Section 8(a)(1) of the Act and I so find.[16]

Shortly after these meetings with the entire warehouse crew, Fonteyn held a separate meeting with the employees on the third shift, and the shift where the order filling was primarily performed. In this meeting, pursuant to Stone's instructions, Fonteyn announced that henceforth the order fillers would be required to fill a minimum of 1200 cases per night, an increase from the earlier requirement of 1100. Their incentive pay, 4 cents per case over 1100 per shift would, however, remain the same.[17] Fon-

[15] As described by Schumacher, Fonteyn said:

> If you want to run it like a union shop, in a union shop, if you were an order filler and there were not any orders to fill, that you would be sent home and that had never been done in the past and he [Fonteyn] did not feel that we needed a union to start telling us how to run it now.

[16] Notwithstanding Fonteyn's threat, there is no evidence that, following the meeting of November 10, the employees were ever required to leave work before the completion of their 8-hour shift.

[17] Stone testified that he directed this increase in the quota because productivity in the warehouse under Still's supervision had dropped to an average of 1100 of 1150 cases per night notwithstanding that at least two employees, Gorr and Millerin, demonstrated an ability to average 1400 or more cases per night. Fonteyn contradicted Stone's testimony as to both where the new quota originated and why the quota was raised. Fonteyn claimed responsibility for raising the quota after discussing it with Stone only that day, and attributed the increase in the quota to the existence of a large number of seasonable holiday orders containing multiple case requirements thus making it easier for employees to fill the new quota. The record reflects that the new quota was not lifted at the conclusion of the holiday season.

teyn also required the third-shift employees to sign a letter acknowledging the increase in their quota, and Mark Wangsness repeatedly objected, Fonteyn stated that the employees did not want to work for him if they did not want to meet the new quota. If they did not want to work for the Respondent, he said, the door was open. The employees were told that warning letters would be issued to employees who failed to achieve the quota. The employees were also told that the order fillers would be fined 50 cents for each mispicked case. The record establishes that the fining of order fillers for mispicks is not a new regulation in the Respondent's warehouse; for many years there had been a procedure whereby order fillers would lose 50 cents of incentive earnings for each mispick caught and the order checker would, in his place, receive that 50 cents. The fines-for-mispicks rule, however, had been enforced only sporadically.

One or two nights following this meeting, Wangsness failed to meet his 1200-case quota; his failure was orally brought to his attention by supervision. About the same time, Schmotter, who had received a written warning on October 7 for failure to fill the 1100 case quota then applicable, received a written warning for his failure to achieve the new level of production.[18] Mike Hansen was subsequently warned, orally, for failing to achieve the 1200 case minimum.

The General Counsel contends and I agree that the Respondent increased the quota to 1200 cases per night and reasserted its sometimes applied mispick-fine policy in retaliation for the employees having engaged in union activity. This conclusion flows from Stone's October 11, 1980 statement encouraging warehouse supervision "to get tough" and eliminate laxity in the warehouse. It further flows from Fonteyn's threat, uttered only a day or two earlier, to run the warehouse like a union organized warehouse and from the Respondent's shifting justification for the new quota. In reaching this conclusion I have noted that the 1200-case quota had been proposed and discussed, but not imposed, earlier in the year, prior to the advent of overt union activity. Similarly, I find essentially irrelevant the fact that there had been a long-standing policy concerning fines for mispicks; the threat of fines is made no less threatening by reference back to an earlier and inconsistently enforced rule. Accordingly, I find that by increasing the daily quota for cases to be picked, by threatening employees with discharge unless they agreed to the new quota, by issuing warnings to employees for failing to meet the new quota, and by threatening to impose and imposing fines for mispicks in retaliation for the employees having engaged in union activity, the Respondent has violated Section 8(a)(3) and (1) of the Act.[19]

F. *Loss of the Floating Holidays*

In May 1980, as previously noted, the Respondent continued its practice of negotiating working agreements with its full-time warehouse employees. In a short series of meetings, the employees sought and the Respondent ultimately agreed to a wage increase which maintained a differential over the wages paid at a nearby unionized warehouse and two additional floating holidays.[20] The pay raise went into effect immediately and the employees began to take their floating holidays. Fonteyn authorized Louis Berkovitz to take floating holidays in the pay periods ending July 19, September 13, and October 11.[21]

The wage increase and the two new floating holidays were contained in the working agreement presented by Stone on October 10, 1980. The employees did not sign that agreement.

Eleven employees had taken one or both of the new floating holidays by December 1980. However, when these employees[22] received their paychecks in the week preceding Christmas, they discovered that the pay they had received for those floating holidays, approximately $82 per day, had been deducted. Those who asked were told by Fonteyn that the payments had been made in error, that inasmuch as the employees had not signed the working agreements they were not entitled to the floating holidays. It was Stone's testimony that the alleged error had been made by payroll clerk Toni Malik and had been discovered "when Mark Wangsness resigned from the company and Toni Malik had left shortly before . . . ." Malik had left the Respondent's payroll on November 4, 1980, and Wangsness' last day was December 23 or 24, 1980.

The General Counsel, pointing to the timing of this deduction from the employees' pay, the Respondent's apparent knowledge that the employees were taking the floating holidays, the fact that the contemporaneously agreed to wage increase was never revoked, and what he deems to be an inadequate explanation for the revocation of the floating holidays, asserts that the Respondent deducted the floating holiday pay from its employees' checks in retaliation for their union activity. The Respondent, noting that the employees had not signed the

[18] While the Respondent's policy permitted discharge upon the receipt of a second written warning, Schmotter was not discharged at this time.

[19] The General Counsel's complaint also alleges that the Respondent violated Sec. 8(a)(1) by Fonteyn's November 10 statements to the effect that the employees would have no chance to be represented by the Union even if its organizing efforts were renewed because the Respondent would inflate the unit by adding students, trainees, truckdrivers, and foremen. I find no evidence in the record to support this allegation. Accordingly I shall recommend that it be dismissed. Additionally, the General Counsel contended at the hearing that after the quota was raised to 1200, the Respondent's foreman Schumacher instituted new procedures in the warehouse and permitted an increase in the amount of overstock material stored in the aisles so as to purposely interfere with the employees attaining the new minimum. The Respondent offered credible testimony explaining the new procedures (such as, preventing the crushing of more delicate products by requiring that they be picked last) and the overstock (the elimination of the expense of leasing outside warehouse space and the influx of imported product in large quantities at certain times of the year). The General Counsel did not allege this conduct as specifically violative in its oft-amended complaints and did not reassert its arguments on brief. In view of all the above and because I find it difficult to believe that the Respondent would be so willing to "cut off its nose to spite its face" as to interfere with its own production, I shall henceforth disregard these unpleaded contentions.

[20] The Respondent had previously granted one floating holiday.

[21] The Respondent, however, contends that Fonteyn did not keep track of the number of floating holidays taken by any single employee and thus argues that one should not conclude that he knowingly or intentionally authorized more than one floating holiday for this individual.

[22] Harold Beckjorden, Louis Berkovitz, Bill Bickel, Alan Gorr, Mike Hansen, Richard Krenner, Jeff Kuehn, Tom O'Brien, Gene Pelshaw, Mike Pettis, and Mark Wangsness.

agreement which provided for the floating holidays, that the revocation affected those who had not signed authorization cards as well as those who had[23] and that there was no mention by either Stone or Fonteyn of the union activity as the reason for the revocation, asserts that its actions were nondiscriminatory and were not intended to interfere with employees' union activities. While the issue is less than free from doubt, I find in agreement with the General Counsel that retaliation was the motivation for the revocation of the floating holidays and the deduction of the moneys previously paid. In reaching this conclusion, I have considered the factors referred to above, particularly the continuation of the wage increase, in light of the Respondent's strong opposition to its employees' union activities and the animus reflected in the threats and other unlawful conduct engaged in both before and after this particular act. The Respondent's motivation and the extent of its animus, I believe, is reflected in the timing of the payroll deductions to fall just before Christmas, a clear effectuation of the Respondent's intention to get tough with the warehouse employees. Accordingly, I find that by deducting the previously paid floating holidays from their wages, the Respondent has discriminated against its employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act.[24]

G. *Discrimination Against Richard Krenner*

Richard Krenner was hired by the Respondent as a full-time warehouse employee on the third shift following a request made to Stone by Sidney Applebaum, the employer of Krenner's wife, Geraldine. Applebaum was both a friend and customer of Stone. When Applebaum asked whether Stone might have a warehouse position for Krenner, Stone said that Gourmet was "a non-union shop and hoped to stay that way . . . ." But so stating, Stone testified, he intended that Applebaum would tell Krenner, through Krenner's wife, "that if he wanted to work in a union shop, that we were not at that time." Geraldine Krenner testified, without contradiction, that *in her conversations with Stone* prior to the time that her husband was hired by Gourmet, Stone told her that Richard Krenner's employment would be conditioned on his understanding that he was not to organize a union. She assured Stone that such a condition would present no problem as Richard Krenner had been "unhappy with the union he had been in in his former employment. . . ."[25]

As previously noted, it was Richard Krenner who brought the existence of union talk among the warehouse employees to Stone's attention in May 1980.

In early October, before Mike Still was discharged, Fonteyn called on Krenner at his home to find out whether Krenner might be interested in the foreman's job. Krenner was not and that matter was not further pursued. In the course of their conversation, according to Krenner, there was discussion about the union organization and Fonteyn asked whether "there is anything we can do to end this stuff." Krenner told him, "No, it's gone too far. You know what it is like there. You know our demands."[26]

Several days after Stone's October 10 meeting with the warehouse employees, Geraldine Krenner had another conversation with her employer, Applebaum. Applebaum related Stone's request that he tell her that "if Rick continued with the Union, it was possible that he would lose $1500 to $1600 in his profit sharing."[27]

On November 10 Fonteyn gave Krenner a written warning, which stated:

> Work Attitude. Your work attitude is so poor that you are upsetting your fellow employees constantly. You are forever complaining without suggesting improvement, causing other employees to stop working, or slow down to such an extent that they can not do their job properly. This constant complaining and badgering of other employees who you work with has been going on long enough so that it must stop.

The warning threatened suspension or discharge for any further conduct contrary to the Respondent's "established rules and regulations, or . . . . detrimental to the best interest of the company or its employees. . . ."

According to Stone, this warning was issued immediately after Schumacher and Fonteyn had reported to him that Krenner "was carrying on in the warehouse in a manner that he was yelling, shouting, interrupting people, causing them to be demoralized." Stone testified that from the way these facts were presented to him, and from the nature of the conduct described, he believed that Schumacher, who had only started working a week

[23] Of the 11 employees who suffered the deduction from their wages, 2 were not card signers.

[24] It is irrelevant that two of those who suffered this discrimination may not have been card signers. The discrimination was directed against the employee group as a whole.

[25] Stone denied that he had been concerned about the possibility that Krenner might start a union at Gourmet at the time of his hire. He did not, however, deny or contradict the testimony of Geraldine Krenner concerning conversations between them. Given the nature of Geraldine's assurances to Stone, Stone's testimony that he was not concerned about Richard Krenner starting a union *at the time he was hired* is not necessarily in conflict with Geraldine's. Her assurances may have relieved his concerns.

[26] Stone acknowledged that Fonteyn had inquired into Krenner's possible interest in a supervisory position; Fonteyn did not testify concerning this meeting. Fonteyn did deny knowledge that any particular individual supported the Union; he did not deny knowing that there was union related discussion among the warehouse employees. His conversations with a group of employees at his own home earlier in the summer and his statement to Pettis on the way into Stone's office on October 9 establish that he was aware, at least generally, of the union activity. The Respondent contends, on brief, that "it is unlikely that Respondent would have considered Krenner for the foreman's job at this time if it were aware of his union activities." This interesting contention is an implicit admission of hostile intent toward those who might engage in union activities. See *St. Anne's Hospital*, 245 NLRB 1009 (1979); *Little Lake Industries*, 233 NLRB 1049 (1977).

[27] The Respondent objected to the receipt of this evidence as hearsay but offered no testimony to contradict it. Stone's prior use of Applebaum as a conduit to Geraldine and thus to Richard Krenner, the absence of any contradictory testimony, and the similarity of this testimony with that offered concerning the October 10 meeting all tend to establish its reliability and probative worth. See *RJR Communications*, 248 NLRB 920 (1980).

earlier, would leave if the situation were not corrected. Schumacher, he said, told him that he did not know how much longer he could take "this constant harassment." Schumacher testified that he had observed Krenner making loud and obsene comments and accusations to other employees each time he would draw an order to be filled, accusing other employees of speeding up or slowing down so as to get the better orders. Schumacher told Fonteyn that Krenner's behavior was disrupting the work; his testimony does not indicate that he personally discussed this alleged problem with Stone or that he threatened or implied that he might leave if it were not corrected. Fonteyn testified that he observed Krenner for one evening after Schumacher had told him that Krenner's "constantly bitching everytime he picked up an order . . . was driving him crazy." Fonteyn acknowledged that other employees also complained about the orders they drew but, he said, they did not behave as badly as did Krenner or direct their complaints to their fellow employees in the same manner as did Krenner. Fonteyn made the decision to issue the warning. Except for Fonteyn's telling Krenner that the orders were "not that bad," neither Fonteyn nor Schumacher spoke to Krenner or attempted to determine what, if anything, was bothering him. Krenner had received no prior warnings, oral or written.

Krenner did not deny engaging in the behavior described by Fonteyn and Schumacher. Thomas O'Brien, the only employee named by either Fonteyn or Schumacher as being disturbed by Krenner's conduct, denied that this behavior had particularly bothered him. Employees testified that all of the employees made similar accusations, in similar vulgar terms, concerning their fellow employees getting better orders. According to O'Brien, there were some employees who complained less than Krenner but Krenner's complaints were at the level of the average employee working there. Alan Gorr similarly testified that he was unaffected by Krenner's attitude, that the language Krenner used was used by everyone in the warehouse, and that everyone complained about the orders.

The General Counsel contends, and I agree, that the disciplinary notice issued to Krenner on November 10 was discriminatorily motivated. In reaching this conclusion, I find it unnecessary to determine whether the Respondent knew, to a certainty, that Krenner was engaged in union activities. The employees had, in fact, engaged in union activity which led to the filing of a petition, the Respondent knew that Krenner had previously been employed in a union environment, Stone had expressed concern that he might attempt to unionize the Gourmet employees, and Krenner had openly referred to the union activity in both May and during the summer. Thus, there existed ample grounds for any reasonably perceptive employer to suspect Krenner's likely involvement in the current union activity. That suspicion, if not actual knowledge, is reflected in Stone's message to Krenner, related through Applebaum and Geraldine Krenner. Such a suspicion is sufficient predicate on which to conclude discriminatory motivation where, as here, the other elements are present. Those other elements include union animus demonstrated throughout this record and not really concealed by the Respondent and timing. This disciplinary warning followed development of the Respondent's "get tough" policy and occurred on the same day that the Union's petition was withdrawn. Finally, while Krenner did not dispute the testimony concerning his behavior in the warehouse, I must conclude that that behavior was only a pretext for giving him the warning. In reaching this conclusion, I note the following: (a) neither Fonteyn nor Schumacher corroborated Stone's testimony concerning their having brought this conduct to Stone's attention; (b) Stone's alleged concern that Schumacher would quit is unsupported by Schumacher or Fonteyn and appears to be an exaggeration; (c) neither Fonteyn nor Schumacher was sufficiently concerned with Krenner's behavior to verbally admonish him about it or to try to determine whether he had some particular problem causing the alleged outbursts; (d) the language of the notice, including "forever complaining" "constantly," "constant complaining," and "going on long enough," appears to exaggerate the length of time the conduct had been going on; and (e) the conduct attributed to Krenner was similar to conduct engaged in, without discipline, by other employees and did not, contrary to Schumacher and Fonteyn's testimony, disturb Krenner's fellow employees. I note, too, that the broad language of the warning, threatening Krenner with suspension or discharge for conduct "detrimental to the best interest of the company or its employees . . ." could be construed by employees, particularly in light of the Respondent's announced policy of remaining nonunion, as a warning to refrain from any union activity.

Accordingly, I find that the Respondent was discriminatorily motivated when it issued this warning to Richard Krenner and that the Respondent has thus violated Section 8(a)(3) and (1) of the Act.

On Friday, December 19, Fonteyn and Schumacher concluded that overtime would be needed on Saturday to fill orders to be shipped prior to the Christmas holiday. Schumacher asked all of the third-shift employees; only Milleren volunteered. When he was asked, Krenner refused and explained why he was unavailable.[28]

At the conclusion of his shift at 8 a.m. on December 19, Krenner went home. About noon, he received a telephone call from Fonteyn, who asked whether he was working on Saturday morning. Krenner said that he had already explained to Schumacher that he could not come in. Fonteyn said that he was making the overtime mandatory; Krenner explained that he needed the time to make arrangements for the baptism of his youngest child on the following day. According to Krenner's testimony, disputed by Fonteyn, Krenner also stated, in this first telephone conversation, that he would have to find a babysitter for his children. Fonteyn called back an hour or so later and asked Krenner whether he had made the necessary arrangements and would be coming in. Krenner told him that he had been unable to find a babysitter and did not think he would be able to come in. Fonteyn inquired as to whether or not Krenner's wife was work-

[28] Schumacher did not specifically deny that Krenner had explained why he could not work on that Saturday other than to say, "I asked each one individually, and there was just a flat no." I credit Krenner.

ing, Krenner said that she was, and Fonteyn told him to have her take the day off. Krenner said that he would continue trying to find a babysitter and Fonteyn replied that he would call back later. Fonteyn then called a third time and again asked whether Krenner had made arrangements for a babysitter. Krenner said that he had not. He was told to be at work at 8 a.m. and Fonteyn hung up. In at least one of these conversations, when Krenner asked what would happen to him if he failed to come in, Fonteyn replied that he would be written up for insubordination. Notwithstanding Krenner's persistent refusal to agree to work on Saturday, Fonteyn put Krenner's name on a list of employees who would be working that morning. He left the list for Schumacher, who supervised the Saturday work. Krenner did not work on Saturday.

Fonteyn had also asked the other third-shift order fillers (except, apparently, Mark Wangsness) and several of the day-shift employees to work overtime on December 20, 1980. It was made mandatory, however, only for the third-shift employees.[29]

On Friday the employees were also told to report 2 hours early on Sunday evening for overtime hours prior to the start of their regular shift. Krenner reported to work at 10 p.m. on Sunday and asked whether he still had his job. He was told that he did not and was handed his termination papers.[30] The decision to discharge Krenner was made by Fonteyn.

Alan Gorr did not report to work on December 21 until midnight. He received a written warning for tardiness. The record reveals that Gorr had received prior written warnings for failing to show up for work on July 13, 1977, November 21, 1977, and December 28, 1978.

While it might be argued that the Respondent's reliance on Krenner's failure to work mandatory overtime was a pretext, I believe it more appropriate to treat this case as one involving dual motivation. In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board stated, in regard to 8(a)(3) cases turning on employer motivation, that it would first require the General Counsel to "make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." Upon the satisfaction of this burden, "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." Here, the General Counsel's prima facie case has been established by the evidence of the Respondent's union animus, its suspicion or knowledge of Krenner's union activity, and the earlier discriminatory warning given Krenner. The Respondent, however, has failed to establish that Krenner would have been discharged even absent his union activities. Thus, while production on that Saturday was important to the Respondent, it was not so important that the Respondent insisted on the attendance of experienced order fillers who were then employed on the first shift. It would seem, from the Respondent's failure to require Pettis or Hansen to work after Fonteyn knew that it was likely that Krenner would not, that the Respondent was more interested in disciplining Krenner than in securing his productive labors. That conclusion also stems from the Respondent's less onerous discipline of Gorr for failing to comply with the Respondent's order to report to work 2 hours early on Sunday night and from its discharge of Krenner notwithstanding Fonteyn's statement to him to the effect that he would be written up for insubordination if he did not comply. Finally, I note that the Respondent's discharge of Krenner on the first instance on which he failed to report to work as required is inconsistent with the Respondent's own rule providing for two warnings, discussed infra, and its earlier discipline consisting of only written warnings, of Alan Gorr who had on three occasions failed to show up for work on scheduled work days, including two such instances within the same year. There is no logical distinction between failing to show up for a regularly scheduled shift assignment and failing to show up for a "mandatory" overtime shift assignment. In reaching my conclusion, I have rejected Fonteyn's contention that Krenner had given him inconsistent and untrue reasons for not coming to work; Krenner's explanations concerning the planning for the scheduled baptismal ceremony and his need to find a babysitter are complementary, not contradictory. He told both Schumacher and Fonteyn of both reasons.[31]

Accordingly, I must conclude that the Respondent's discharge of Richard Krenner was motivated by his union activities, would not have taken place but for those union activities, and was thus violative of Section 8(a)(3) and (1) of the Act.

H. *The Strike and Related 8(a)(1) Allegations*

The Respondent's warehouse employees began discussing the possibility of going out on strike even before Krenner was discharged. With his discharge those discussions, held essentially spontaneously in small groups, became more serious. The employees discussed all of the things that had been happening in the warehouse: Fonteyn's statement of November 10, the increased quota, the mispick fines, the deductions from their pre-Christmas paychecks, and Krenner's discharge which, as Schmotter stated, was "the last straw." The employees discussed their belief that all that had taken place rendered a free election impossible and decided to seek the Union's recognition through their picketing activities. They went to the Union's office shortly after Krenner's

[29] Alan Gorr, like Krenner, was threatened with a disciplinary writeup if he did not work. He complied. Schmotter agreed to work. Beckjorden was excused upon his explanation that he wished to spend time with a terminally ill brother. Mike Pettis and Mike Hansen, both first-shift employees who were experienced order fillers, rejected Fonteyn's offer of Saturday overtime and were neither threatened with discipline nor disciplined for their refusal. At least one part-time employee, John Roesler, who was not an order filler, was requested to work and did work on that day.

[30] As it had turned out, Krenner's Saturday morning babysitter predicament had been resolved by the expected arrival of Krenner's wife, from whom he was separated. Krenner's failure to report to work that morning was the result of his oversleeping. However, at the point in time at which Krenner was discharged the Respondent did not know of the change in Krenner's circumstances.

[31] It may also be questioned whether a parent's need to secure a babysitter so as not to leave a child unattended is not as reasonable an excuse as that given by Beckjorden, i.e., his desire to visit a terminally ill brother, which excuse was accepted by Fonteyn.

discharge and discussed the mechanics of striking with union representatives.

About December 29 the strike began. The Respondent's premises were picketed with signs indicating that the Union was on strike for recognition. The Union provided the pickets with a letter to explain to those who might be inconvenienced why they were picketing. The letter stated, inter alia:

> Our employer left us no other course of action than to go on strike, by his refusal to be fair in this matter.
>
> Only after the discharge of some of our fellow employees, an increase of our daily work requirements to an unreasonable level, the arbitrary withholding of monies from our paycheck right before Xmas without right and without any signed authorization to do so; and other unfair labor practices which we have filed with the National Labor Relations Board. Only after all of the above did we take the extreme action that we have taken.

On the day the strike began the Respondent delivered letters to its employees, including those on strike, which related that the Union had filed and withdrawn a representation petition. It assured them that they had a right to come to work if they wanted to and would be welcome to do so if they so chose. The letter went on to state:

> You also know that if you decide not to come to work we have the right to hire a permanent replacement for your position. Any employee who does not report for work on their assigned shift by Wednesday, December 31, beginning with the 7:30 a.m. shift will be replaced.

The letter informed striking employees that Minnesota law precluded their receipt of unemployment compensation benefits while on strike and reiterated both the availability of jobs and the eventuality of replacement if they did not return to work.

The General Counsel contends that the strike was an unfair labor practice strike from its inception and that the Respondent's letter unlawfully threatened the unfair labor practice strikers with loss of their jobs. The Respondent argues that, even assuming the Respondent had engaged in unfair labor practices, the employees struck for recognition and not as a protest against such unfair labor practices. Board law is clear; a strike will be deemed an unfair labor practice strike where it may reasonably be determined "from the record as a whole that an employer's unlawful conduct played a part in the decision of employees to strike. . . ." That there may have been additional motivations, such as a desire for union representation or an intention to protest additional conduct not found to be violative, is irrelevant. *Larand Leisurelies, Inc.*, 213 NLRB 197 fn. 4 (1974); *Climate Control Corp.*, 251 NLRB 751 (1980); *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975). I would note that it is clear from the record herein that the employees saw union recognition as the only means to remedy the unfair labor practices and in view of those unfair labor practices, they feared that further efforts toward recognition through the election procedures would be futile. Accordingly, I find that the strike which commenced on December 29 was caused and prolonged, at least in substantial part, by the Respondent's unfair labor practices.

The employees engaged in an unfair labor practice strike are entitled to be reinstated upon application notwithstanding that replacements may have been hired for them. See for example *Larand Leisurelies*, supra. In light of the special rights which unfair labor practice strikers possess, the Respondent's statements in the December 29 letter, threatening to permanently replace them if they did not report back to work by a specific date, constituted an unlawful threat of job loss in violation of Section 8(a)(1) of the Act. I so find.

Two or three days after the strike began, a group of the striking employees had a conversation with second-shift Foreman Kenneth Reno in a van parked at the picket line. Reno, who came out to the van to answer the employees' questions concerning their paychecks, told the employees that they could lose their jobs if they did not come back to work. "Mr. Stone [he said] could lock the place up anytime he wanted to and move to Iowa."[32] Reno's statements are clear threats in violation of Section 8(a)(1) of the Act and I so find.

Shortly after the start of the strike, Ben Marz, the Respondent's industrial relations consultant, received instructions from the Respondent's counsel to conduct prehiring screening interviews. Marz assigned an assistant, Greg Weiler, to this task. According to Marz, Weiler was not given any specific instructions concerning the interviews; Marz denied instructing Weiler to ask applicants about their attitudes toward unions.[33] An advertisement was placed in the newspaper and it appears from the interview worksheets in evidence that approximately 17 applicants were interviewed. Some of the interviews were conducted on the premises of Gourmet Foods; others were held at Marz' office. Each applicant was asked how he felt about unions and whether he would object to replacing "an activist." Their answers, in some cases reflecting strong antiunion feelings, were recorded on the interviewer's worksheets and Weiler made some additional comments thereon concerning the extent of their union animosity. Four of the successful applicants testified; at least three had been hired by the interviewer without further interview or interrogation by the Respondent's supervision. The fourth did not recall whether the supervisor asked him any additional questions before he started to work. The interviewer's work-

[32] Testimony of James Ricker as corroborated by John Roesler and Alan Gorr. Reno described the conversation without specifically denying the statements attributed to him. His general denial that he had "ever told an employee that the plant was going to close" avoids the issue of whether he said that Stone *could* close and move or that the employees would lose their jobs if they did not return to work. Accordingly, I accept the credibly offered testimony of the employees as accurate. I also credit the testimony of employees Jeff Kuehn and Allen Beach, both of whom testified to similar threats being uttered by Reno in October, after they had signed union authorization cards.

[33] Marz' testimony that no specific instructions were given is inconsistent with his statement that Weiler was "probably" instructed not to ask questions about union attitudes. Weiler did not testify.

sheets were on the Respondent's letterhead and became part of the Respondent's personnel files.

The Respondent, citing *Westward Ho Hotel*, 251 NLRB 1199 (1980), argues that "the unlawful interrogations can not be attributed to Respondent because Mr. Weiler was, at best, a special agent who had exceeded the bounds of his delegated authority." *Westward Ho* is distinguishable from the instant situation. In that case, the alleged agent was a commercial employment agency interviewing at its premises without disclosing to the applicants the identity of the employer or employers for whose job openings they were being interviewed. In the instant case, the applicants were interviewed pursuant to an adverstisement seeking employees for Gourmet Foods, at least some of them were interviewed on the Respondent's premises and the interview worksheets wherein their answers were recorded bore the Respondent's name. In *Westward Ho*, the applicants were referred by the employment agency for selection or rejection by the employer. Here, successful applicants proceeded from Weiler's interview to the start of their employment without further review. In *Westward Ho*, it was noted that there was no continuity of employment between the Respondent and Prestige, the employment agency. In the instant case, Marz regularly and continually provided consulting services to the Respondent. In *Westward Ho*, the record contained no evidence that the employer maintained any records revealing the union membership of its employees. In the instant case, the record of the job applicants' union sympathies was entered on the Respondent's own forms and became part of the Respondent's files. And, while the administrative law judge and the Board found that Prestige was a "special rather than a general agent" for *Westward Ho*, I note that Prestige derived its fees from those job applicants whom it successfully referred rather than from the employers to whom they were referred. It may be argued that Prestige was the agent of the job applicants in that case, further distinguishing Prestige from Marz. I therefore conclude that Ben Marz and his employee, Greg Weiler, were agents of the Respondent for the purpose of interviewing job applicants, or at least were held out by the Respondent as possessing apparent authority to act on its behalf, and find the Respondent responsible for the patently unlawful interrogation conducted by Weiler. See *Montgomery Ward & Co.*, 228 NLRB 750 (1977); *Sterling Faucet Co.*, 203 NLRB 1031 (1973).

On February 2, the Union, on behalf of the 17 listed employees (including Krenner), unconditionally offered to return to work. On February 4, the Respondent invited the striking employees to return to work about February 8.

I. *Reinstatement of the Strikers*

The General Counsel contends that the Respondent failed to properly reinstate striking employees Hansen, Pettis, Schoenecker, Kolberg, Ricker, and Gorr to their former positions, work assignments, or shifts, and has thereby violated Section 8(a)(3) and (1) of the Act.

Mike Pettis and Mike Hansen were both day-shift employees prior to the strike. They were reinstated on February 8 to positions on the third shift. Working on the first shift as of that date were Dennis Paskett and Allen Beach, neither of whom had participated in the strike. Paskett, who had more overall company seniority than either Hansen or Pettis, had been employed by the Respondent as a truckdriver until mid-January. In this capacity, he had been a member of Teamsters Local 792 and was covered under the collective-bargaining agreement between that union and the Respondent. Paskett ceased driving on the Respondent's behalf in mid-January as a result of actions taken against him by the Local to which he belonged and certain other incidents, all of which appeared to be related to his continued driving during the strike. As of January 15, Paskett began working on the Respondent's first shift in the warehouse, essentially taking care of the shipping department but occasionally doing other warehouse work including order filling and the unloading of trucks. The Respondent contends that Paskett, having greater seniority than either Pettis or Hansen, was entitled to the first-shift position upon his request under the Respondent's practice of companywide seniority as the basis for shift assignments.[34]

Allen Beach, who had less seniority than either Hansen or Pettis, had been a second-shift employee prior to the strike. He possessed a class A (truck driving) license and, in the period before the strike, had occasionally driven trucks for the Respondent, making special trips during his second-shift hours. During the strike, Beach continued to perform his regular job functions and drove the Respondent's truck "occasionally, a couple of times." At the conclusion of the strike, Fonteyn assigned Beach to full-time driving duties and he worked in that capacity for approximately 1 week. Then, when he complained to the first-shift foreman that he expected driver's wages if he was going to drive, he was told that the truck would be driven by an employee of the contract carrier. At that point, about 1 week after the strike ended, he was assigned to work in the warehouse on the first shift. In the next 2 or 3 weeks, according to Beach's recollection, he only drove on one occasion. In the beginning of March, the Respondent subcontracted its driving to Merchant's Cartage. At that point, Beach was notified that because of his seniority he was being transferred back to his prestrike assignment on the second shift. Pettis was returned to his first-shift assignment.[35]

The Respondent defends its assignment of Paskett to the first shift on the basis of Paskett's greater seniority and its assignment of Beach on the basis of its need for his ability to occasionally drive trucks during that shift. In the absence of any evidence establishing a seniority policy contrary to that claimed by the Respondent, I must conclude that Paskett's assignment to the first shift nondiscriminatorily reduced by one the number of job openings on the first shift. However, as of the end of the

[34] The record does not contain any contradiction of the Respondent's claims regarding its seniority practices.

[35] At least one other driver, Mike Anderson, also transferred back into the warehouse at that time. It appears, although the record is not entirely clear, that he was assigned to the first shift. His seniority status is not disclosed. Another driver, Russell Erickson, similarly transferred into the warehouse on the second shift in the beginning of March 1981.

strike, Beach was not working in the warehouse; he was a full-time truckdriver. He did not return to the warehouse until a week after the strike ended. Thus, the Respondent cannot be heard to argue that its need for Beach on the first shift because he was a licensed truckdriver made a position for one of the returning unfair labor practice strikers unvailable. Indeed, even after that week, the Respondent is hard pressed to argue that Beach's presence was needed on the first shift. In the period prior to the strike, Beach performed occasional driving duties and was able to do so while working on the second shift. The Respondent did not explain why he could not have continued to do so after the strike. Moreover, I note that Beach was called on to drive on only one occasion after he returned to the warehouse following the strike; the Respondent's need for his driving skills was, at best, minimal. Accordingly, I must conclude that by failing to reinstate Mike Pettis (Pettis being more senior than Hansen) to his former position on the first shift, the Respondent has violated Section 8(a)(3) of the Act.[36]

The General Counsel's complaint alleges that the Respondent refused to reinstate unfair labor practice striker Alan Gorr of his former position of employment. It also alleges that at the conclusion of the strike the Respondent discontinued the prior practice of rotating the various warehouse jobs among the third-shift employees. It appears that these allegations are interrelated. The evidence reflects that Gorr was reinstated to the third shift at the conclusion of the strike. Prior to the strike, he had been one of the best, if not the best, order filler. He was also an excellent truckloader. Pursuant to the job rotation system which the Respondent admits was in effect until the strike, Gorr and his fellow third-shift workers generally rotated among the various jobs on that shift. When the third-shift employees returned to work after the strike, Schumacher, pursuant to discussions with Fonteyn, eliminated the rotation system and assigned the employees to the jobs he felt they could do best. Gorr was assigned to truckloading.

Job rotation had long been a part of the Respondent's third-shift operation. It enabled all employees to earn a share in the order filling incentive pay and it further enabled them to achieve some variety in the tasks they were required to perform. The value of the rotation system to the employees was recognized by the Respondent's president Stone when he negotiated the rotation system with the warehouse employees in 1976 and when he rejected a suggestion that the employees waive the rotation system in regard to the order checker's job for Jack Rohde's benefit. Thus, job rotation was part and parcel of the third-shift warehouse operation; the returning unfair labor practice strikers were entitled to reinstatement to their former positions and the failure to reinstate them to warehouse positions which included job rotation was a breach of the Respondent's obligation towards them. Accordingly, I find that by eliminating the job rotation system after the strike, the Respondent has failed to reinstate Alan Gorr and other third-shift employees to their former positions, in violation of Section 8(a)(3) of the Act.

The complaint alleges that the Respondent failed to reinstate Wayne Kolberg, James Ricker, and Steve Schoenecker to their former positions at the conclusion of the strike; in a separate subparagraph it also alleges that their hours of employment had been reduced upon their return to work. The General Counsel's brief does not otherwise describe the manner in which he contends that the reinstatement of these three falls short of meeting the Respondent's legal obligations. I conclude that the two complaint references to these three employees are merely redundant.

The record reflects that Kolberg, Ricker, and Schoenecker were employed on the first shift. Although they were considered to be part-time employees (and thus received a lower rate of pay and no fringe benefits), they had been working between 35 and 40 hours per week prior to the strike. Upon their return to work at 8 a.m. on February 8, they were told that their hours were being reduced and that thereafter they would only work until 12:30 p.m. However, from the following day until notified of their layoff on March 12 (discussed infra) they generally worked from 8 a.m. until 2:30 p.m. Occasionally they worked less, occasionally they worked more. For at least some period of time following the end of the strike, persons who had been hired during the strike continued to work on a part-time basis on both the second and third shifts. However, it appears from the record herein that the work they were doing, item checking, truckloading, truckdriving, and price code checking, was not work which any of these three employees had previously done for the Respondent or were capable of doing on the first shift.

The Respondent argues that even if these three employees are deemed to be unfair labor practice strikers, the admitted reduction in their hours would not violate the Act because the Respondent reduced the hours of all of its part-time employees to around 24 hours per week so as to avoid having to consider them full time and pay them wages and benefits as full-time employees and because a decline in inventory reduced the need for their services. As to the former, Stone testified that the Respondent had tried, unsuccessfully, to limit part-time employees to 24 hours per week prior to the strike and has attempted to do so since the end of the strike so as to preclude part-time employees from working so many hours that the Respondent would be required to treat them as full-timers for fringe benefits purposes, particularly the profit-sharing plan.

It is unclear whether the Respondent is arguing that the ERISA (Employment Retirement Income Security Program, 29 U.S.C. Sec. 1001 et seq.) regulations or only the Respondent's "policies" as described in conclusionary

[36] The General Counsel's contention that the Respondent "require" non-striking truckdrivers Erickson, Anderson, and Paskett, "to work in warehouse . . . as part of its scheme to reward those who refused to honor the strike and penalize those who did," must be rejected. Erickson and Anderson were offered warehouse jobs on the Respondent's subcontracting of the driving work in the first week in March, a month after the strike ended. Erickson was assigned to the second shift and there is no contention that any striking second-shift employee had been denied proper reinstatement. The record does not reveal Anderson's seniority or the shift to which he was assigned when his truckdriving job was subcontracted.

terms by Stone would have required that the part-timers be so treated. The Respondent does not argue in its brief that there was any statutory mandate requiring the granting of fringe benefits to "part-time" employees once they averaged more than a set number of hours per week. The Respondent's employee manual provides that part-time employees working a minimum of 1400 hours per year are entitled to pro rata vacation benefits. The same paragraph further provides that "only full-time employees, those working a minimum of 2000 hours a year, are entitled to company paid hospitalization." The profit-sharing plan, according to the employee manual, includes all full-time employees and all part-time employees who work a minimum of 1000 hours. Employees earn a share in the amount contributed by the Respondent to the profit-sharing fund in the proportion that that employee's salary bears to the overall payroll. The manual thus contradicts Stone's testimony to the effect that the Respondent would be obligated to make additional profit-sharing contributions for part-time employees who averaged 35 or more hours per week.

As noted, the Respondent also contends that the reduction of inventory reduced the need for the part-time employees' services. The record establishes that the Respondent had an inventory consisting of approximately 670,000 cases of merchandise as of December 24, 1980, which inventory was reduced by slightly more than 100,000 cases, between 15 and 20 percent, by February 6. This reduction in inventory would correspondingly reduce the amount of work available for warehouse employees.

Ricker and Kolberg both testified that when they first returned to work after the strike there were still some employees working who had been hired during the strike. They were not sure how long these employees continued to work. The Respondent acknowledged that some strike replacements were retained following the strike but denied that they were doing any work which had normally been performed by Ricker, Kolberg, or Schoenecker. Two were retained for about 2 weeks to work on the third shift doing item checking and truck loading, a third worked as a full-time truckdriver and a fourth worked part time for several weeks checking the unit pricing codes. That work entailed opening each case, reading the UPC numbers off the product and recording them next to the Respondent's code number, reinserting the item back in the case and reshelving it. According to Fonteyn, there was a certain way this work had to be done and difficulties might be caused for the keypunch employees if there was a change in the manner it was being done resulting from a change in the person doing it.

As unfair labor practice strikers who had made an unconditional offer to return to work, Ricker, Kolberg, and Schoenecker were "entitled to immediate reinstatement to their former jobs or, if such jobs no longer exist[ed], to substantially equivalent positions . . . . [T]he burden is upon the employer to offer immediate and unconditional reinstatement, even if striker replacement must be terminated to make room for the returning strikers." *Atlas Metal Parts Co.*, 252 NLRB 205 (1980). The Respondent's reinstatement of these three employees falls short of meeting that burden. Each of these employees was working a 35-to-40-hour week prior to the strike; that was the job to which they were entitled to return. The Respondent's explanation, that it reduced the hours of all of the part-time employees in order to avoid having to pay them fringe benefits as full-timers, is unconvincing. Even as part-time employees working only 1000 hours per year, they were entitled to profit sharing and their participation in the profit-sharing plan would not cost the Respondent anything additional as the Respondent's contribution to that plan was based on its earnings, not on the number of employees participating. Similarly, these employees would not receive hospitalization benefits unless they were considered full time, reaching a minimum of 2000 hours per year. It is only the vacation benefits, which become applicable for employees working over 1400 hours per year, that these employees might receive if they continue to work more than 24 hours per week.

The Respondent's evidence of diminution of inventory in the warehouse might establish that there was a lessened need for the services of these three employees on the first shift since prior to the strike. However, if in fact their former jobs no longer existed, the Respondent was obligated to offer them substantially equivalent employment, terminating if necessary any strike replacements. The Respondent, at least, was obligated to offer them the jobs of the two strike replacements who were working on item checking and truck loading on the third shift and, I believe, the job of the strike replacement who was checking unit pricing codes on the first shift. Fonteyn's description of that job fails to convince me that another employee could not have been substituted for the one who began that work. And, considering the recollections of these three employees concerning strike replacements who were working with them on the first shift when they returned, I am not convinced that there were not other strike replacements who had been retained at least for some period of time.

Accordingly, I find that the Respondent has failed to properly reinstate unfair labor practice strikers Ricker, Kolberg, and Schoenecker and has thus violated Section 8(a)(3) of the Act.[37]

J. *The March 13 Layoffs and Reductions of Hours*

The complaint alleges that about March 13 the Respondent laid off James Ricker and Wayne Kolberg and reduced the hours and rates of pay of Steve Schoenecker, Alan Raush, John Roesler, and Jasper Messina "notwithstanding that the employees . . . were unfair labor practice strikers . . . and because said employees had engaged in activities for and on behalf of the Union." The General Counsel's brief, which treats these issues in essentially conclusionary terms, does not further explain whether it is the government's contention that these actions constituted a failure to properly reinstate

[37] The cases cited by the Respondent, *Jack LaLanne Management Corp.*, 218 NLRB 900 (1975), and *P.Q. Beef Processors*, 231 NLRB 1076 (1977), did not involve the reinstatement of unfair labor practice strikers and are inapposite.

these employees (who had returned to work more than a month earlier) or were independently discriminatory.

The record establishes that between March 10 and 13, part-time employees Raush, Kolberg, Ricker, and Roesler received letters from the Respondent stating that they were being laid off as of March 13 because of economic considerations. Each was offered a part-time position in the nonfood area (the sewing room) at $4 per hour, $1 or $2 per hour less than they had been making, beginning on March 16. They were also told that they would be eligible to bid on Saturday maintenance shifts at their original rate of pay. Kolberg rejected the offer of the lower paying job and was laid off. Thereafter, until July 1, he worked only an occasional Saturday. On July 1, the Respondent offered, and Kolberg accepted, a part-time job in the warehouse. Ricker initially accepted the Respondent's offer of the sewing room job and then, after a few days, took the layoff instead. Thereafter, he worked on a couple of Saturdays. The Respondent offered, and Ricker accepted, a part-time warehouse job beginning July 13. On his return, Fonteyn told Ricker that as a part-timer he would be limited to 24 hours per week. However, he worked as much as 42 hours per week thereafter. The 24-hour limit was reasserted, he testified, a week prior to his testimony herein. John Roesler and Alfred Rausch accepted the offers of employment in the sewing room. Rausch quit in June but returned in mid-July to his former job. On his return, Reno informed him that he would be limited to 24 hours per week. Roesler worked in the sewing room until the beginning of the summer when he was similarly returned to his earlier warehouse position and original rate of pay. For some period of time he worked 40 hours per week; subsequently his hours, too, were reduced to 24 hours per week.[38]

Part-time employees Steven Schoenecker and Jasper Messina, it appears, were laid off on March 13. Messina was the only one among these six part-time employees who had not participated in the strike.

The Respondent contends, and I agree, that the layoffs and transfers to lower paying jobs were economically and not discriminatorily motivated. At the time that these actions were being taken, the Respondent had subcontracted its driving work to an outside contractor. Two of the Respondent's full-time drivers, Anderson and Erickson, assumed full-time positions in the warehouse (as they had done on one prior occasion, in preference to assuming union membership as truckdrivers), thus reducing the need for part-time warehouse employees Respondent also adduced evidence indicating that it was losing money during the period of time encompassed by these personnel actions. That evidence, while not conclusive, provides some justification for the Respondent's actions. Most significant, however, was the fact that the alleged discriminatory motivation is essentially negated by the fact that the Respondent offered these part-time employees employment in the nonfoods or sewing room section of its warehouse, a section staffed to that time by employees who did not participate in the strike. Acceptance of those offers by the part-time employees who had participated in the strike would have necessitated the layoff of employees who did not participate.

The General Counsel also contends that the Respondent's use of temporary employees from various labor service agencies to unload railroad cars during the period following March 13 established that there was work available for the laid-off part-time warehouse workers. The Respondent credibly explained that such temporary employees had been used routinely since the beginning of 1980 to unload incoming containers quickly and on short notice so as to avoid demurrage. The Respondent did not increase its use of these temporary employees to any noticeable extent from March 13 through the end of June.

Accordingly, I find that the General Counsel has failed to sustain his burden of establishing that the layoffs or the reductions in hours and rates of pay of the six named part-time employees were discriminatorily motivated. Accordingly, I shall recommend that these allegations be dismissed.

K. *Suspension and Discharge of Schmotter*

Lloyd Schmotter began working for the Respondent as a third-shift order filler in July 1980. He signed a union authorization card and participated in the strike.[39] His shift and job assignment were unchanged upon his poststrike reinstatement.

Orders are filled in the Respondent's warehouse by following computer produced sheets bearing a sticker for each case ordered and a final sticker which identifies the customer, the date the order was received, and the total number of cases in the order. The order fillers place stickers on each case as it is pulled from stock and put the final sticker on their sticker sheets, which are turned in at the end of each shift.

According to the Respondent, the order fillers' sticker sheets are used to determine each employees' production per shift. It is also used, they testified, as a means of final control to determine that an order has been pulled and shipped in the event that a truckdriver, in picking up an order, inadvertently removes all copies of the invoice and bill of lading. This, Stone testified, happens as many as 15 to 25 times per month and can result in the Respondent having to reship an entire order, at its own expense, in the event that a customer claims that no delivery was made. According to Stone and Fonteyn, the Respondent can determine, by reference to the final sticker

[38] According to Rausch, Reno explained that the part-time employees were being limited to 24 hours per week because the Respondent was running the warehouse as it would a unionized operation and said that the employees should consider themselves fortunate because in some union shops there were no part-time employees at all. Reno testified that Rausch raised the question of whether the 24-hour limitation was being imposed because of the union activity. He denied acknowledging that such was the motivation and denied saying that the warehouse would be run as a union shop. Noting that Reno's testimony is consistent with the answer attributed to him in response to a similar question by Roesler, and further noting that there had been no mention of the union activity for 3 or 4 months prior to this alleged statement, I credit Reno.

[39] While Schmotter's support for the Union was clear, the record contains no warrant for the General Counsel's claims, on brief, that Schmotter "was an outspoken advocate of the Union . . . a vocal union adherent."

and its computerized records, which shipper received an order and recover the shipping documents in that way.

Former employee Jack Rohde testified without contradiction that a master file containing copies of all invoices is retained in the office where it is not subject to inadvertent removal by a truckdriver. From the file copy of the invoice, one could similarly determine which shipper handled the freight and recover the shipping documents. That file copy, however, would not, of itself, necessarily indicate that the goods had been pulled from stock.

On February 27, Schmotter turned in a sticker sheet indicating that he had pulled somewhat in excess of 1200 cases. All of the stickers but one were for orders received on and after February 23; one was for an 89 case order received on February 18. Schmotter did not deny that he had retained that sticker from an earlier time and has used it on February 27; he did not deny that he engaged in the practice of "banking" stickers. He testified that he saved stickers to be used by himself and others in the event that they had difficulty in making the 1200 case quota.

On March 3, Fonteyn and Schumacher gave Schmotter a letter stating that he was being suspended for 2 days for his failure to hand in stickers on the night that an order was filled and for his "persistent failure to meet production standards." His suspension was timed to coincide with a 2-day leave of absence which he had previously requested and been granted. The letter contained a warning that similar conduct in the future would result in further discipline, possibly discharge.

Schmotter recalled that in this meeting he accused Fonteyn and Schumacher of taking this disciplinary action because of his union activities and received no response. Both Fonteyn and Schumacher denied that Schmotter made any such accusation.[40]

While Schmotter denied having been told that the banking of stickers was contrary to the Respondent's policy, and none of the employees recalled being instructed not to bank their stickers, several employees did acknowledge an awareness that the banking of stickers would be considered contrary to company policy and frowned upon. Others testified that on Saturday order filling, they observed supervisors sometimes throwing away completed stickers sheets or otherwise not enforcing the policy regarding retention of stickers. The record reflects that as early as January 29, 1979, Mike Pettis had received a written warning for failing to meet his quota and for "taking and using someone else's incentive total sticker for an order filled by another employee."

About May 13, Schmotter was again called into the office. Schumacher showed Schmotter his sticker sheet from May 11; contained thereon were 16 stickers, each one placed immediately below another. All of the stickers were for orders received on May 8 or 10 except the fifth sticker, which was for a 44-case order received on May 7. According to the Respondent, all orders through May 7 had been picked and shipped prior to May 11 because of the Respondent's inventory procedures; this particular sticker represented an order which had been picked on the day shifty by Russell Erickson. Schmotter was accused of using someone else's sticker and, notwithstanding his denials, was discharged.

Schmotter marked his sticker sheets so as to indicate his production prior to the lunch hour. The disputed order was the fifth sticker, of nine, placed on the sheet prior to lunch. In all, the sticker sheet showed a total of 1340 cases. There was no evidence to indicate that the order fillers did not retain the sticker sheets in their own possession throughout the course of their shift; neither was there any evidence to demonstrate that, once stuck on the sheet, a sticker could be removed and another substituted without damaging the underlying sheet of paper.

Fonteyn testified, without contradiction, to the existence of a policy whereby employees receiving a second written warning within a year for any offense other than tardiness would be discharged. An exception, he testified, was made for Schmotter when Schmotter received the March 3 written warning because his November warning had followed the institution of the new and increased quota.[41]

The General Counsel contends that Schmotter's March 3 suspension and his May 13 discharge "were occasioned by his continuing outspokeness in his favor of the Union and his susceptibility to not making quota, which made him easier prey than the more experienced employees." The Respondent, on the other hand, argues that Schmotter was validly disciplined for breach of a known company policy regarding the banking of stickers and was discharged for his second similar violation within a relatively short period of time. While these issues are somewhat beclouded, I am inclined, under all the circumstances herein, to agree with the Respondent. In reaching this conclusion, I have noted that the March 3 warning was, in part, occasioned by Schmotter's failure to meet the unlawfully imposed 1200 case quota and to that extent was invalid. However, it was also partly motivated by Schmotter's admitted banking of stickers, an act generally known to be contrary to company policy and one which warranted disciplinary action. I note, too, that the Respondent did not discharge Schmotter on receipt of what it deemed to be a second valid warning in March, and while it suspended him for 2 days, it tempered that penalty by allowing his 2-day suspension to coincide with a 2-day leave of absence already scheduled. In regard to the discharge, I find it difficult to believe that Schmotter did not place the disputed sticker upon his sheet; the order and placement of those stickers makes it highly unlikely that anyone else could have done so. Therefore, while I have some question as to how that sticker could have fallen into Schmotter's possession when it should have been turned in by Erickson upon completion of his order filling duties prior to the

[40] Even assuming that Schmotter so accused them, I would not, under all the circumstances, find that their failure to deny the accusation establishes, without more, that they were so motivated.

[41] The Respondent's employee manual provides, under "Termination," that an employee "will receive at least one notice in writing, advising of the specific complaint, before termination will be considered." The working agreement proposed by Stone to the warehouse employees in October 1980 provided for written warning notices and for dismissal upon "a second violation within 90 days. . . ."

inventory, I must conclude that Respondent had reason to believe that Schmotter had engaged in a second, albeit slightly different, violation of its sticker practices.[42]

Accordingly, I must conclude that the General Counsel has failed to sustain its burden of proving that the Respondent warned, suspended, and discharged Lloyd Schmotter in March and May 1981 because of his union activities. I shall recommend that these allegations be dismissed.

L. *A Bargaining Order Remedy*

The General Counsel argues that the Respondent's "pervasive and numerous unfair labor practices . . . rendered slight the possibility of erasing [their] effect and decreased the chances of a fair election." Therefore, the General Counsel asserts, a bargaining order remedy is warranted, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969). In so arguing, the General Counsel does not assert that the Respondent's conduct would bring it within what is generally known as the first category of *Gissel*, where a bargaining order remedy *might* be warranted on the basis of "outrageous" and "pervasive" unfair labor practices "without need of inquiring into majority status on the basis of cards or otherwise. . . ." Rather, the General Counsel asserts that the Union has demonstrated its majority support in an appropriate unit. I turn to those questions.

1. The appropriate unit

The General Counsel contends that "all full-time and regular part-time warehouse employees, excluding the sales trainees/cooler employees, sewing room employees, and drivers constitute an appropriate collective-bargaining unit." The Respondent, agreeing that a warehouse unit is appropriate, submitted a list of 44 alleged warehouse employees to the Board on October 21 for use in the representation case. Subsequently, four names were removed.[43] One, Paul Cain, described as a warehouseman, was added at the Respondent's request. From the 41 names remaining on the employer's payroll list, the General Counsel would exclude five sales trainees, nine sewing room employees, and two drivers. The General Counsel would also exclude two individual as casuals. The unit as thus envisioned by the General Counsel would include on 23 employees, 24 if Rohde were included.[44]

The sales trainee/cooler employees —Within the Respondent's warehouse is an 8000 or 9000 square foot cooler where perishable food items are stocked. The Respondent staffed this area with full-time employees who carried the title "sales trainees." They worked in the cooler and performed functions essentially equivalent to those performed by the Respondent's other warehouse employees. That is, they received, stocked, and removed merchandise from stock for shipping. They were supervised in these tasks by the warehouse foremen. They sometimes worked in the warehouse, outside the cooler, when work in the cooler was slack, doing the same work as other warehouse employees. Order fillers went into the coolers as part of their regular duties to pick up items for virtually every order that was filled. The cooler employees received, pursuant to their individual contracts, discussed infra, the same fringe benefits including vacations and health insurance, as the Respondent's other employees but their rate of pay was approximately half that paid to the other full-time warehouse employees. They were hourly paid, and they punched the same timeclock and used the same lunchroom facilities as the other warehouse employees.

The sales trainee/cooler employees were hired when they responded to advertisements offering sales trainee positions. In the course of their interviews with the Respondent's sales manager they were told that they would have to work for 3 to 6 months in the cooler to learn the business, after which sales routes would be assigned to them on the basis of seniority. They signed detailed contracts entitled "Employment Agreement Sales Trainee" which provided, inter alia, that they were being employed "to work in various capacities which will serve the purpose of training you to be a salesperson with the company." In addition to working in the cooler, the sales trainees attended monthly sales meetings and weekly or biweekly sales training meetings. Occasionally, depending on how long they had been employed, these employees would travel to the retail stores with a salesperson and/or would go to the stores to reset merchandise on the shelves. They did no selling and were not exposed to other aspects of the Respondent's business. The Respondent gave them business cards identifying them as employees of Gourmet; other employees in the warehouse received no such cards.

Stone denied that the sales trainees' contract gave them any rights to sales positions; such positions, he testified, were posted and might be filled by anyone from within or without the Company. Stone admitted that the sales trainee agreement was used as a inducement to secure employees for low paying, generally undesirable work by holding out a little hope of careeer advancement. Two of the sales trainees testified. Both had terminated their employment as result of their dissatisfaction with the job and with the probability that they would become salesmen. One, however, had been offered a sales route but had turned it down because it would have required that he move.[45]

[42] While the Respondent's explanation of why the stickers had to be properly maintained and recorded raises some doubts in my mind in view of the evidence of duplicate copies of the invoices, I cannot say, based on this record, that its explanation is so unreasonable or patently false as to demonstrate pretextual motivation.

[43] Joel Stone, Gary Lowenthal, Steven Lowenthal, and Dan Honoroff. The inclusion of the first three-named employees on the list submitted on October 21 has previously been discussed. The fourth, Honoroff, was removed at the request of the Respondent's counsel. The payroll record establishes that he worked 12 hours in the period ending October 4, 1980, had not worked prior to that date, and did not work thereafter.

[44] The General Counsel inadvertently failed to include Rohde as one of the unit employees although he argued that Rohde's card should be counted for majority purposes.

[45] The Respondent's payroll record, J. Exh. 8, *beginning with the payroll period ending October 18, 1980*, listed the sales trainees among the warehouse employees, department 600. They were not so listed prior to that payroll period and it is not possible, from this exhibit, to determine under what other department they may have been listed. J. Exh. 8 was

Continued

Contrary to the contentions of the General Counsel, I would include the category of employees known as "sales trainees" or "cooler employees" within the warehouse unit. It is the present duties and interests of the employees which are determinative of their unit placement, not whatever future assignments they may hope or expect to receive. *Heckett Engineering Co.*, 117 NLRB 1395, 1398 (1957). Here, while these employees had some modicum of connection to the sales department, their basic duties and functions were within the warehouse. They performed the same work, albeit generally with other lines of merchandise, as other warehouse employees, and they worked under the same immediate supervision as the other warehouse employees. They were hourly paid, though at a rate substantially below that of those employees whom all parties agree to be within the warehouse unit but above those wages paid to the sewing room employees, discussed infra. They worked on a full-time basis and received the same fringe benefits, including vacations and health insurance, as Respondent's other full-time employees. The area in which they worked was encompassed within the warehouse and other warehouse employees regularly entered that area in the normal course of their duties. Finally, I note that the prospect of promotion of these employees to sales positions was, at best, speculative. See *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963).

Accordingly, I find that William Bickel, Jeffrey Brower, Peter Johnson, and Dean Swanson, all of whom were sales trainee/cooler employees as of October 14, 1980, must be included within the warehouse unit.[46]

The sewing room employees—Within the Respondent's warehouse is another area, partially walled off, known as the sewing room where non-food items, including sewing supplies, are stocked. Working within this area, as part-time employees, are a number of students from a local college. The General Counsel would exclude the sewing room employees from the warehouse unit, contending that they share no community of interest with the other warehouse employees and are casual, oncall employees with no reasonable expectation of continued employment beyond completion of their schooling.

The record establishes that the sewing room employees work under the same immediate supervision as the rest of the warehouse. Their pay, at $3.50 per hour (except for Sue Ann Malm, discussed infra, who received approximately 50 cents per hour more), is approximately one-third of the rate paid the full-time warehouse employees, is somewhat more than one-half the rate of the acknowledged regular part-time warehouse employees, and is $1.50 per hour less than that paid to the cooler employees. In the sewing room they stock, mark, pull from stock, and pack merchandise for shipping. On occasion, when there is not sufficient work in the sewing room, they work in other areas of the warehouse, repackaging merchandise. Some of them also work occasionally in the Respondent's office, filing.

The General Counsel pointed out that the sewing room employees (and those working in the cooler) did not participate in the contractual arrangements which the Respondent had with its full-time warehouse employees. I note, however, that those working agreements had not been extended to the part-time warehouse employees whom the General Counsel would include within the unit and therefore deem this factor to be immaterial.

There are nine sewing room employees whom the Respondent would include within the unit. All are listed in the Respondent's payroll records as being within department 600, the warehouse, from the commencement of their employment. The payroll records and the Respondent's compilation thereof establishes the following: Sue Ann Malm has been working for the Respondent since October 1978. She worked throughout the year 1980 and averaged nearly 30 hours per week. She was still employed by the Respondent in September 1981. Melanye Stookesbury worked for the Respondent throughout 1980, except during the summer months, and averaged for the entire year 10 or more hours per week. From September through the end of October 1980 she averaged more than 18 hours per week and she still was employed as of August 1981. Mary Booker began working for the Respondent in the pay period ending September 29, 1980, and averaged 16 or more hours per week through the end of the year. Debbie Hieronymous similarly began on September 20; she was still employed by the Respondent in July 1981, and averaged 23 or more hours per week through the end of 1980. Herschel Foster began working for the Respondent in the pay period ending October 18, 1980, worked 15 hours in that pay period and averaged 5 or more hours per week through the end of the year. He continued working for the Respondent thereafter. Debbi Ross was also hired in the payroll period ending October 18, 1980; she worked 42 hours in that payroll period and averaged 22 hours per week through the end of the year. Heather Schneider, Margayla Smith, and Janet Walker similarly commenced their employment in the payroll period ending September 20, 1980. Schneider averaged more than 10 hours, while Walker and Smith averaged more than 20 hours per week through the end of the year. Schneider was still employed by the Respondent in September 1981.

From the foregoing it is clear that while the sewing room employees might not work the same hours every week, they work a substantial number of hours on a reg-

offered as the computerized payroll record for the warehouse employees and drivers; the Respondent did not represent it to be a complete payroll. The agreements executed by the sales trainee/cooler employees upon their initial hiring were, as noted above, entitled "Employment Agreement/Sales Trainees." Sometime subsequent to December 29, 1980, each of these employees executed a new contract, dated and purportedly effective on December 29, 1980, wherein the caption was changed to read "Employment Agreement Cooler Employee" and the title of the position was changed from "sales trainee" to "cooler employee." There was also a change in the method of compensation for these employees. The new agreements, notwithstanding their December 29 effective dates, were executed by the employees between late January and April 1981. The Respondent's counsel did not rely on either J. Exh. 8 or on the newly entitled agreements in arguing for the inclusion of these employees in the warehouse unit. I similarly find reliance on these exhibits unwarranted.

[46] The employment agreement and the payroll records establish that Paul Cain was not hired until on or after October 20, 1980. He would, therefore, be excluded as he was not an employee on October 14, 1980, the date of the Union's demand for recognition. *Motz Poultry Co.*, 244 NLRB 573, 578 (1979).

ular basis in virtually each and every payroll period, and average 5 or more hours per week. And, while some of them only work during the school year, others continue to work throughout the year and from one year through the next. This record does not support a conclusion that they were casual or oncall employees such as might warrant their exclusion from the collective-bargaining unit. Even assuming that they were "oncall" employees, the Board includes within collective-bargaining units and deems eligible to vote those "oncall" employees who averaged 4 or more hours of work per week. See *Riverside Community Memorial Hospital*, 250 NLRB 1355, 1356 (1980), and cases cited therein. Neither may the sewing room employees be excluded on the basis that they were students or possibly scheduled their work around their class schedules. The record establishes that at least some of them continued to work for the Respondent when school was not in session, others worked for the Respondent during succeeding school years, and no evidence was offered to establish that these employees were told that they were only being hired for the school year. See *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978); *Medline Industries*, 233 NLRB 627, 655 (1977).

Even if, as I have found, the sewing room employees are included within the unit, the General Counsel would exclude Sue Ann Malm as their supervisor. Fonteyn testified that he had hired Malm and considered her the lead person in the sewing room. He testified that he interviewed and hired the sewing room employees and denied that Malm had the authority to hire or fire employees or to recommend or grant wage increases. Malm testified that, as additional employees were needed, either Fonteyn would tell her or she would suggest to him that more were needed. She would then bring in fellow students or others. She claimed that she had terminated some employees, only notifying Fonteyn after the fact. To grant raises, she testified, she first had to go to Fonteyn. She did not identify anyone whom she had discharged and the record establishes that all of the sewing room employees except for Malm received an identical wage. I therefore find her rather general testimony insufficient to rebut Fonteyn's denials that she possessed the authority to hire, fire, or recommend wage increases.[47]

Malm was hourly paid, punched the timeclock, did not attend supervisory meetings, and spent virtually all of her time in production work. Accordingly, I find that as of October 14, 1980, Sue Ann Malm was no more than a lead person, did not exercise or possess the indicia of supervisory status, and was, like the other sewing room employees, an employee within the warehouse unit.

The truckdrivers—As of October 14, 1980, the Respondent employed four local truckdrivers. Two, Dennis Paskett and Herb Birdsall, were members of different Teamsters locals, Local 792 and Local 120 respectively, and the Respondent had collective-bargaining agreements with each of these unions. The agreement with Local 120, at least, provided for recognition of that union as the representative of the Respondent's drivers, driver-helpers, and helpers. It also contained a 30-day union-security clause.[48] Although they were covered by one or both of the drivers' collective-bargaining agreements, neither of the Respondent's two other local truckdrivers, Russell Erickson and Mike Anderson, were members of either of those local unions.

The Respondent had received a letter from Local 120, dated October 23, 1980, demanding that all of the Respondent's drivers become members pursuant to that contract's union-security clause, except for the one employee who was a member of Local 792. In November, the Respondent offered Erickson and Anderson the opportunity to work in the warehouse, which they accepted, and their driving duties were contracted out. However, Anderson and Erickson returned to their driving duties within about 2 weeks.

The record establishes that Erickson and Anderson received the wages and other benefits as provided in the union agreements except for the union pension plans. Their work essentially consisted of making deliveries from the warehouse to grocery stores in the Twin Cities area. They picked up their trucks, already loaded, at the warehouse and made their deliveries along a fixed route, unloading merchandise at each stop. Occasionally, if they completed their routes prior to their 3:30 p.m. quitting time, they would complete their day by helping out in the warehouse. According to Erickson, this was not a common occurrence after August 1980.

The General Counsel would exclude the drivers from the warehouse unit on the basis of their lack of a community of interest with the warehouse employees and their representation by another labor organization. The Respondent would include the two drivers who were not union members, contending that no union had sought their inclusion within the unit as of October 14, 1980, and that they shared a community of interest with the other warehouse employees. The Respondent's contentions must be rejected. The Respondent recognized two local unions as the collective-bargaining representatives of its local drivers. Michael Anderson and Russell Erickson were unquestionably within that separate unit and the Union herein did not seek the inclusion of truckdrivers in the warehouse unit. Accordingly, as the truckdrivers were already represented by other collective-bargaining agents, were not sought for inclusion in the warehouse unit by the Union when it demanded recognition and petitioned for representation, and as the evidence indicates that the drivers had little community of interest with the warehouse workers, I must conclude that they are properly excluded from the warehouse unit. See

[47] I also note that Malm's testimony concerning the number of hours and lengths of time that her fellow students worked in the sewing room is contradicted by the payroll records. Particularly, Malm testified that Booker and Schneider only worked when she called them in and that Walker had only worked a couple of days before she secured other employment. The payroll records, as previously discussed, establish a pattern of regular and substantial employment by all three of these individuals; they further establish that Walker continued in the Respondent's employ until the beginning of February 1981. Thus, the accuracy of Malm's recollections is placed in question.

[48] That contract was executed by the St. Paul Employers Association and the Union and was effective from September 1, 1979, until August 31, 1982. The record does not contain any contract between or on behalf of the Respondent and Local 792.

Nuturn Corp., 235 NLRB 1139 (1978); *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1962).

Other alleged casual employees—The General Counsel would exclude John Mansun and Michael Sain, whose names appear on the Respondent's October 21, 1980 list of warehouse employees, on the basis that Mansun was a student who had essentially terminated his employment prior to the critical date and Sain worked only sporadically. The issue was not addressed at hearing and the Respondent asserts no positions specifically in regard to these employees.

The payroll record carries Mansun's name as a warehouse employee at $6 per hour, the rate paid other part-time warehouse employees, throughout 1980. However, his first hours worked and earnings came in the payroll period ending June 14, 1980. Between that period and the payroll period ending September 6, he worked in each payroll period, a total of approximately 433 hours. Mike Pettis recalled that Mansun returned to school at the end of the summer. Mansun apparently worked slightly over 1 hour sometime during the October 18 pay period and 6 more hours during the pay period which ended November 1, 1980, and that was his last employment by the Respondent. It thus appears that Mansun was a summer employee who worked, at most, sporadically as an oncall employee thereafter, averaging less than 4 hours per pay period in the periods preceding and following the Union's demand for recognition.

In *Shady Oaks*, 229 NLRB 54, 55 (1977), the Board stated the following:

> . . . In determining whether students have the requisite community of interest with other unit employees, the Board conducts an analysis along the same lines that it normally employs when determining "regular part-time" status. Under this analysis, the Board takes into consideration such things as: (1) regularity and continuity of employment; (2) tenure of employment; (3) similarity of work duties; and (4) similarity of wages, benefits, and other working conditions.
>
> Where students' employment is shown to be sporadic, temporary, or seasonal in nature . . . the Board excludes them from the regular full-time unit.

See also *Crest Wine & Spirits, Ltd.*, 168 NLRB 754 (1967). Applying these tests, it is clear that Mansun had no community of interest with the full-time and regular part-time warehouse employees. He was a summer employee whose employment thereafter was both sporadic and minimal. I shall therefore exclude him from the unit.

The payroll records show that Michael Sain began working for the Respondent in the payroll period ending September 6, 1980. He is listed among the warehouse employees at an hourly rate of $4.50. There is no explanation of what his duties were, when he worked, or why he was receiving a rate different from all other warehouse employees. He worked between 40 and 68 hours in each pay period between September 6 and October 4, 1980, 15 hours in the pay period of October 20, 1980, and only 6 and 4 hours respectively in the November 1 and 15, 1980 pay periods. He did not work thereafter.

While the General Counsel contends that Sain only worked on an erratic and casual basis during the critical period, the payroll record would seem to establish that he was a regular part-time employee at least through the payroll period wherein the Union made its demand. I can find no basis, upon the limited evidence in the record, to exclude him from the collective-bargaining unit.

Based on the foregoing, I conclude that the following is an appropriate unit for the purposes of collective bargaining.

> All full-time and regular part-time warehouse employees employed by Gourmet Foods, Inc., at its St. Paul, Minnesota facility, including sewing room employees and cooler employees, but excluding truck drivers, office clerical employees, sales employees, guards and supervisors as defined in the Act.

As of October 14, 1980, there were 37 employees in this unit.

2. The Union's evidence of majority support

The General Counsel submitted 17 signed authorization cards. The Respondent concedes the validity of 14 and contests only 3, those signed by John Rohde, Harold Beckjorden, and Duane Schwerha.

The record establishes that Rohde sustained a work-related injury in December 1979, after which a special warehouse job, order and item checking, was created for him as part of a rehabilitation program managed (and partly compensated) by the Respondent's workmen's compensation insurance carrier. Rohde occupied that position from April until July 3, 1980, when, pursuant to medical documentation establishing that he was physically unable to continue in the warehouse, he was given an office job. Rohde continued to work in the office until November 10, 1980, when the job he had been performing was abolished and he was terminated.[49]

The Respondent would exclude Rohde from the unit and would discount his card on the basis that he was an office clerical employee possessing no community of interest with the warehouse employees. The issue is whether he had a reasonable expectancy of returning to a warehouse job from his clerical position. See *American Motors Corp.*, 206 NLRB 287 (1973); *Components, Inc.*, 197 NLRB 163 (1972). Based on this record, including Rohde's testimony to the effect that his own doctor had certified that he was "disabled and unable to do item checking because of the stooping required," and the absence of any evidence that his disability was a temporary condition, I must conclude that there is insufficient evidence to establish that John Rodhe had a reasonable expectancy that he would ever return as an employee to

[49] It appears that Rohde was taken off compensation sometime in August. There continues to be litigation concerning his compensation claims. There is, however, no support in this record for the General Counsel's contention in brief that Rohde's "termination and his right to return to a form of warehouse work is still being contested through workmen's compensation proceedings."

the Respondent's warehouse. Accordingly, he was not a unit employee and his authorization card may not be counted in determination of the Union's majority status.

The General Counsel introduced an authorization card signed by Harold Beckjorden. His card is dated October 9, 1980, but, unlike the other cards introduced into evidence, is not stamped as received by the Board on October 15, 1980. Moreover, his signature was written in a different pen from the remainder of the card. Beckjorden testified that he went to the union hall on October 10 with the other employees intending to join the Union, sign an authorization card, and secure job protection. He filled out the body of the card, including that portion showing his name, but apparently forgot to sign it. He signed it sometime later in the week. Union business agent Darby Peterson testified that Beckjorden's card was misfiled and for that reason had not been submitted along with the other 16 filed as the showing of interest in support for the October 15 representation petition.

The Respondent's contention that Beckjorden's card should not be counted because there was no evidence establishing that it was signed prior to the date on which recognition was demanded is rejected. The evidence reveals that Beckjorden went to the Union's office on October 10 with his fellow employees and filled out his card, including his name, with the intention of authorizing the Union to be his representative.[50] I deem it to be irrelevant that Beckjorden placed his name on the card with printed rather cursive lettering or that he placed his name in the descriptive portion of the card and not on the signature line. His intent was clear and his card is valid. *Skyline Transport*, 228 NLRB 352, 356 fn. 11 (1977).

The General Counsel introduced an authorization card purportedly signed by Duane Schwerha. Schwerha did not testify[51] but other employees testified that he had accompanied them to the union hall on October 10 when the cards were signed. His card bears the date of October 10. No employees testified to seeing Schwerha sign his card and none authenticated his signature. No employee signed any other employees' card. Peterson testified that he distributed the cards at the meeting and collected the signed cards at its conclusion. These facts are sufficient to establish the validity of Schwerha's card. It was convincingly established that Schwerha was at the meeting where the cards were signed; a card was turned in bearing his name and signature and there was no evidence that anyone else signed that card for him. The Board accepts as authentic authorization cards which are returned by the signatory to the solicitor without requiring evidence that the solicitor witnessed the actual act of signing. *Stride Rite Corp.*, 228 NLRB 224, 234–235 (1977), and cases cited therein.

Accordingly, I conclude that the Union possessed valid authorization cards from 16 employees in the warehouse unit as of the time it presented its demand for recognition.

As I have found that there were 37 employees in the appropriate collective-bargaining unit, the Union was not, at any relevant time, a majority representative and the General Counsel's request for a bargaining order remedy must fall. No resolution is thus required of the merits of the General Counsel's argument that the Respondent's misconduct rendered slight the possibility of erasing the effect of its unfair labor practices and decreased the opportunities for a free and fair election.[52]

Further Conclusions of Law

1. By interrogating prospective employees as to their union sympathies and activities, by falsifying payroll records so as to prevent its employees from voting for a collective-bargaining representative, by threatening to take any measures necessary to prevent its employees from becoming represented by a union, by threatening employees with loss of profit sharing, stricter work conditions, higher quotas, fines for misperformance of their duties and with shorter working hours, by threatening to discharge employees who did not agree to abide by or failed to comply with increased production quotas, by threatening employees with plant closure and by threatening unfair labor practice strikers with replacement if they failed to return to work, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The strike which commenced about December 29, 1980, was caused or prolonged by the Respondent's unfair labor practices.

3. By increasing production quotas and instituting and imposing monetary fines for misperformance of job duties, by issuing written warnings for failure to meet the unlawfully increased production quotas, by issuing written warnings to and discharging Richard Krenner, by discontinuing its sick pay/floating holiday benefit previously instituted and deducting previously paid benefits from its employees' paychecks, by discontinuing the job rotation system previously followed on the third shift and by failing to reinstate unfair labor practice strikers to their former positions of employment, Respondent has discriminated against employees on the basis of their union activities and has thus violated Section 8(a)(3) and (1) of the Act.

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

5. The following is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse employees employed by Gourmet Foods, Inc., at its St. Paul, Minnesota facility, including sewing room employees and cooler employees, but excluding truck drivers, office clerical employees, sales employees, guards and supervisors as defined in the Act.

[50] Several employees recorded the date as October 9 rather than October 10, a simple mistake.

[51] His absence was unexplained.

[52] Having rejected the General Counsel's request for a bargaining order remedy, it follows that the complaint allegation asserting that the Respondent violated Sec. 8(a)(5) of the Act by unilaterally changing attendance policies about May 29, 1981, must similarly be dismissed.

6. The Respondent did not engage in any unfair labor practices not specifically found herein.

THE REMEDY

It having been found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, my recommended order will require that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. Having found that the Respondent discriminatorily increased production quotas, issued written warnings, and discontinued previously granted benefits and job practices, I shall recommend that the Respondent be required to reestablish the status quo ante in all these regards. Having found that the Respondent discriminatorily discharged Richard Krenner, imposed fines, prevented employees from earning incentive by eliminating the job rotation system and deducted previously granted pay from employees' wages, the Respondent shall be required to offer Richard Krenner immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges and shall make him and all of the other employees whole for any loss of pay or other earnings that they may have suffered as a result of the discrimination against them. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *Florida Steel Corp.*, 231 NLRB 651 (1977).[53]

The Respondent's unfair labor practices were widespread, touched all of the employees, and spanned virtually the entire period from the commencement of the union activity until after the conclusion of the unfair labor practice strike. They demonstrate a general disregard for the employees' fundamental statutory rights and therefore warrant the imposition of a broad injunctive order precluding the Respondent, its officers, agents, successors, and assigns from engaging in unfair labor practices "in any other manner." See *Mid-Continent Refrigerated Service Co.*, 228 NLRB 917 (1977); *Federal Alarm*, 230 NLRB 518 (1977).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

ORDER

The Respondent, Gourmet Foods, Inc., St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to take any measures necessary to prevent its employees from becoming represented by a union.

(b) Falsifying payroll records so as to prevent employees from voting for a collective-bargaining representative.

(c) Threatening employees with loss of their profit sharing, stricter working conditions, higher production quotas, the imposition of fines for misperformance of job duties and with shorter working hours, threatening to discharge employees who do not agree to comply with increased production quotas, threatening employees with plant closure, all in order to discourage employees from engaging in union activities, and threatening unfair labor practice strikers with replacement if they fail to return to work.

(d) Interrogating prospective employees as to their union sympathies and activities.

(e) Discriminatorily increasing production quotas, instituting and imposing monetary fines for misperformance of job duties, issuing written warnings for failure to meet unlawfully increased production quotas or because employees had engaged in union activities, discontinuing established job practices and benefits and deducting previously paid earnings from employees' wages, discriminatorily discharging employees and failing to properly reinstate unfair labor practice strikers to their former positions.

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

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer Richard Krenner immediate and full reinstatement to his former job or, if that is not possible, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make employees whole for any loss of earnings they may have suffered as a result of the elimination of the floating holiday benefits, the imposition of fines for mispicks, and the loss of incentive earnings resulting from the elimination of job rotation on the third shift, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Make unfair labor practice strikers Wayne Kolberg, James Ricker, and Steven Schoencker whole for any loss of earnings they may have suffered as a result of the Respondent's failure to reinstate them at the conclusion of the strike to their former positions, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Reestablish the job rotation system, the 1100 case quota for order fillers on the third shift, and the two floating holidays previously granted warehouse employees, and revoke and cease enforcing the policy of fining employees for mispicks.

(e) Revoke and remove the warning given to Lloyd Schmotter and Richard Krenner about November 10 or 12, 1980, from their personnel files.

[53] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[54] 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.

(f) Post at its place of business in St. Paul, Minnesota, copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 18, 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.

(g) 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 determine the amount of backpay due under the terms of this Order.

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

[55] 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."