

**Bardcor Corp. and United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, District No. 8, Case 9-CA-17605**

7 June 1984

**DECISION AND ORDER**

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

On 11 February 1983 Administrative Law Judge Martin J. Linskey issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

The dissent would reverse the judge in order to find 8(a)(1) violations in two incidents. The first incident occurred when employee Maxine Dukes asked Supervisor Mike Loreille why the Respondent's president, Freeman, was taking pictures of employees in the plant. Loreille's off-the-cuff answer was that Freeman wanted something to remember the employees by after he fired them for union activities. The dissent does not quarrel with the judge's finding that the picture-taking was itself innocuous. Therefore the burden of a finding of coercion falls entirely on Loreille's remark. For the reasons given by the judge we agree with him that the remark was made in jest and was not attributable to management. All the surrounding circum-

<sup>1</sup> The General Counsel 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.

In agreeing with the judge's conclusion that Freeman's photographing of employees did not violate the Act, Member Hunter finds it unnecessary to rely on the judge's finding that Supervisor Loreille was acting as a private party when he, in jest, suggested to an employee why Freeman might be taking the pictures. Member Hunter also notes that the Board has long held that "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). See also *El Rancho Market*, 235 NLRB 468, 471 (1978), and *National Apartment Leasing Co.*, 263 NLRB 15 (1982). Accordingly, he would not consider the subjective reaction of Dukes here and in agreement with the judge finds that in light of all the relevant circumstances the General Counsel has not established that Loreille's remark can reasonably be considered coercive within the meaning of the Act.

stances confirm that conclusion. Because the statement contains an implied threat if taken at face value, the issue is whether it reasonably could have been taken seriously and attributed to management. The dissent places an unrealistic burden of the Respondent that would not appear to be satisfied by much less than a direct admission by the employee that she did not take it seriously. This improperly relieves the General Counsel of finally sustaining the burden of persuasion that a coercive interpretation of the remark was reasonable.<sup>2</sup>

The second incident is one in which the dissent finds a coercive interrogation. All the evidence before us is that a foreman asked an employee where a union meeting was to be held. This part of the conversation was overheard. The circumstances and even the identity of the employee are unknown. We agree with the judge that there is insufficient basis on which to find a violation. No threats or other affirmative statements regarding the employer's interest in the prospect of employees attending a union meeting have been shown. No other unlawful conduct occurred. Such an isolated question in an atmosphere free of coercive conduct is not per se unlawful. Absent other evidence that would make it coercive it was not unlawful. *Stormor, Inc.*, 268 NLRB 864 (1983); *Kendall Co.*, 267 NLRB 963 (1983).

**ORDER**

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

**MEMBER ZIMMERMAN, dissenting in part.**

I agree with the dismissal of a number of the allegations of the complaint. However, I find merit in the General Counsel's exceptions to my colleagues' and the judge's failure to find that Supervisor Loreille's statement to employee Maxine Dukes that the Respondent was going to fire employees for union activity, and Supervisor Rezack's questioning of an employee as to the location of a scheduled union meeting, violated Section 8(a)(1) of the Act.

On 10 August 1981 two union officials distributed handbills outside the Respondent's plant to begin a union organizing campaign. A meeting between employees and a union organizer was scheduled for 13 August. On 12 August, Respondent President Freeman went through the plant taking

<sup>2</sup> Surely the line of decisions which speaks of a showing that the employees understood the alleged threats were not to be taken seriously permits the use of circumstantial evidence to determine whether or not it would have been reasonable to take them seriously. See *Lundy Packing Co.*, 223 NLRB 139, 147 (1976).

photographs of employees and supervisors. Employee Dukes asked Supervisor Loreille why Freeman was taking pictures. Loreille answered that Freeman wanted the photos as something he could remember the employees by after they were fired for union activity.

The judge found that Loreille's statement was not coercive because it was inaccurate, because it was not reasonable to suppose that Freeman would want a picture for that reason, because Loreille was known as a jester and was speaking as a private party, because Dukes had in the past socialized with Loreille, and because Dukes did not appear to take the comment too seriously. These reasons are insufficient, individually or collectively, to dissipate the naturally chilling impact of such a statement. Certainly they fall short of a showing that Dukes "understood that [they were] not to be taken seriously." *Safeway Cabs*, 146 NLRB 1334, 1335 (1964); *Lundy Packing Co.*, 223 NLRB 139, 147 (1976).

Dukes expressly denied that she thought Loreille was kidding. In this connection, the Respondent elicited only the admission that Loreille had a sense of humor. Dukes also testified that Loreille's statement did not seem important enough to her at the time to warrant telling any other employees. Dukes' subjective judgment regarding the decision to keep this information to herself, however, while its effect is relevant in determining the appropriate remedy, does not erase the coercive tendency of the statement. Further, the judge's conclusion that Loreille was speaking as a private party and not as a supervisor attributes to Dukes a capacity, as an employee, for filtering patently coercive messages received from a person normally associated with management that far surpasses what reasonably could be expected of her in such circumstances. No such disclaimer as the judge finds by implication was communicated to Dukes. In short, Loreille's statement was of the type that carries an unmistakable coercive tendency and places the burden on the employer to communicate that which unequivocally would reassure employees of its innocence. This the Respondent has not done. See *Dix-steel Buildings*, 186 NLRB 393, 402 (1970).

Duke is also the source for the evidence of another incident. Dukes overheard Supervisor Rezack ask another employee where the 13 August union meeting was going to be held. On hearing of this inquiry, the Union changed the date of the meeting.

The judge credited Dukes' testimony over Rezack's denial that he asked such a question. Nevertheless, in the absence of evidence of the circumstances in which it was asked, the judge found no

violation. In my view, a supervisor, as a representative of management, has no legitimate interest in the location of a union meeting. The natural tendency of such an interrogation is to create the impression of surveillance of the employees' union activities, especially where, as here, the meeting signals the beginning of an organizational effort. The absence of evidence of the surrounding circumstances leaves that impression intact and, rather than negating the violation, tends to confirm it.

For the foregoing reasons, I would find that the Respondent violated Section 8(a)(1) by threatening to discharge employees for engaging in union activities and by coercively interrogating an employee regarding the employees' union activities.

## DECISION

### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On a charge filed on October 27, 1981, by District No. 8, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (the Union) the National Labor Relations Board by the Regional Director for Region 9 issued a complaint, dated December 7, 1981. The complaint, as amended, alleges that Bardcor Corp. (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by engaging in surveillance of its employees while they were engaged in protected concerted activity, by threatening to close its plant if its employees selected a union, by discharging nine employees in order to discourage employee activity on behalf of the Union, and by refusing to bargain with the Union. Respondent denied in its answer that it violated the Act in any way.

Hearings were held in Hopkinsville, Kentucky, on September 15-17, 21, and 22, 1982.

On the entire record in this case, to include posthearing briefs filed by the General Counsel and Respondent,<sup>1</sup> and on my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all times material herein, Respondent, a Tennessee corporation, has been engaged in the manufacture of corrugated sheets at its Guthrie, Kentucky facility.

During the past 12 months prior to issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations described above, sold and shipped goods, products, and materials valued in excess of \$50,000 from its Guthrie, Kentucky facility directly to points outside the State of Kentucky.

<sup>1</sup> I have considered but have given no significant weight to Respondent's motion to supplement the record. Since I credit the evidence at hearing that Respondent planned on selling the flexo machine, the affidavit of William Freeman that 3 months after the hearing closed Respondent sold the flexo machine is not greatly significant.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, District No. 8, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint, as amended, alleges that Respondent engaged in a number of unfair labor practices the most serious of which was that Respondent discharged nine employees in order to discourage employee activity on behalf of the Union. The other allegations of unfair labor practices were that Respondent engaged in surveillance of union meetings, threatened to close its plant if the employees selected a union, and refused to bargain with the Union. The General Counsel seeks a remedial bargaining order on the grounds that Respondent's unfair labor practices of surveillance, threats, and discriminatory discharges were so pervasive and serious that they preclude the holding of a fair election. I find that Respondent committed no unfair labor practices and recommend that the complaint, as amended, be dismissed in its entirety.<sup>2</sup>

On Monday, August 10, 1981, two union officials distributed handbills outside Respondent's plant in Guthrie, Kentucky, to begin a union organizing campaign. This was the third occasion that an attempt had been made to unionize Respondent's employees, who on August 10, 1981, were 37 in number. The two prior organizational campaigns were conducted by two different Teamsters Locals in 1976 and 1977, respectively. On the two prior occasions an election was held and the employees voted to remain nonunionized. A meeting between Thurston Smith, a union organizer, and employees was scheduled for August 13, 1981.

On Wednesday, August 12, 1981, the day before the scheduled meeting, William Freeman, president of Respondent, went through the plant taking photographs of employees and supervisors. When one of the employees, Maxine Dukes, inquired of Supervisor Mike Loreille why Freeman was taking photographs of people Loreille replied that Freeman was taking pictures of employees so that he would have something to remember them by after they were fired for union activity.

Supervisor Tom Rezac was overheard asking one of the employees where the union meeting was to be held and plans were made to change the union meeting to that very night, August 12, 1981. The employees were to meet with the union organizer right after work in the parking lot of the Cracker Barrel Restaurant in Clarksville, Tennessee.

The union meeting was held in the Cracker Barrel parking lot and 15 authorization cards were signed by

employees. Sometime around 6 p.m., while the meeting was in progress, William Freeman, president of Respondent, drove past the Cracker Barrel Restaurant on his way home and looked in the direction of the parking lot. Earlier that evening one of Respondent's employees, who did not attend the union meeting, had told Freeman that a union meeting was scheduled to be held in the Cracker Barrel parking lot right after work.

At noon on August 13, 1981, Freeman called a meeting of all employees at the plant. At the meeting Freeman mentioned the union meeting of the prior evening at the Cracker Barrel, presented to the employees a financial picture of Respondent's business, and told them what their rights were regarding unionization and what a union could and could not do for them.

On August 14, 1981, a second union meeting was held. It is alleged that Respondent, acting through Supervisor Mike Loreille, engaged in surveillance of this meeting.

On August 17, 1981, following a meeting of Respondent's top management officials on August 16, 1981, eight employees were discharged by Respondent.

On August 21, 1981, the Union wrote a letter to Respondent requesting that Respondent bargain with it as the authorized representative of a majority of the employees in the appropriate unit. An election petition was thereafter filed but the election was blocked by the filing of the unfair labor practice charges in this case. I will discuss each unfair labor practice allegation separately.

### A. *Taking Photographs of Employees on August 12, 1981*

William Freeman, president of Respondent, admitted that he did take pictures of employees at the plant although he could not remember the date that he did so. I find based on other testimony that this picture taking occurred on August 12, 1981. It is clear from the evidence however that Freeman took pictures both of employees and supervisors. Further, the plant was sufficiently small that Freeman knew all the people who worked there and could identify his employees on sight. I credit Freeman's denial that he took the pictures in order to have something to remember those employees by who would be fired for union activity. Taking pictures of employees is not a violation of the Act per se. Freeman took pictures of both supervisors and employees and I credit his testimony that he did so because he was trying out a new camera.

The only evidence to suggest that the photographing of employees was violative of the Act is the statement attributed to Supervisor Mike Loreille when he said to employee Maxine Dukes that Freeman was taking pictures in order to have something to remember those employees by who were going to be fired for union activity. Although Loreille denied that he said this I do not believe him. I credit the testimony of Dukes that Loreille said this to her when she asked why Freeman was taking pictures. Loreille's statement was overheard by another employee, Truman Johnson.

I conclude, however, that Loreille's statement to Dukes was made in jest. Loreille's statement was inaccurate since I credit Freeman's testimony that he was

<sup>2</sup> I find that the General Counsel, however, was substantially justified in prosecuting this case even though I find in Respondent's favor. The General Counsel did present a prima facie case. Only an analysis of all the evidence and the making of critical credibility findings lead me to the conclusion that the complaint, as amended, should be dismissed.

simply trying out a new camera when he randomly took pictures of both supervisors and employees. Further, it is not reasonable to suppose that Freeman would really want a picture of employees he was discharging for union activity. Loreille, who was known in the plant as a jester, was speaking as a private party and not in his capacity as a supervisor when he answered Dukes' question in the manner he did. I note that Dukes had in the past socialized with Loreille. Furthermore, Dukes did not take it too seriously as evidenced by the fact that she did not mention it to anyone until some time after her discharge as distinguished from her reaction to a question she heard Supervisor Tom Rezack ask an unidentified employee. This is discussed below.

*B. Supervisor Tom Rezack's question to Employees as to Where the Union Meeting was to be Held*

The General Counsel contends that the Act was violated when Supervisor Tom Rezack asked one of the employees where the union meeting scheduled for August 13, 1981, was to be held. Maxine Dukes testified that she overheard Rezack ask this question of an employee but she could not remember who the employee was. There was no evidence as to what the unidentified employee answered in response to Rezack's question or what statements, if any, preceded Rezack's question. Dukes told Walter Henderson, a fellow employee, what she had overheard and the meeting scheduled for August 13 was moved up to August 12. Rezack denied that he asked any employee where any union meeting was to be held. I credit Dukes' testimony over Rezack's denial. I do not find that Rezack necessarily lied since it is quite possible he forgot that he asked this question of an employee. Likewise, I do not find that Dukes was lying when she said she could not remember who the employee was. In the absence of any evidence to suggest that Rezack did not merely ask a followup question with regards to a subject matter brought up by the unidentified employee it is difficult to find a violation of the Act. I will not find a violation of the Act where this question is asked by a supervisor without a shred of evidence to reflect the circumstances in which it was asked. I credit Dukes testimony because of her general demeanor and because she was corroborated by Henderson, who credibly testified that Dukes told him what she had overheard and the meeting was rescheduled as a result thereof.

*C. Surveillance of Meeting at Cracker Barrell Restaurant on August 12, 1981*

Right after work on August 12, 1981, 16 of Respondent's employees met with union organizer Thurston Smith in the parking lot of the Cracker Barrell Restaurant. I find that the meeting took place at this site not with the intention of holding a meeting where the union official or some of the employees or both knew that the meeting would necessarily be observed by management officials of Respondent as counsel for Respondent implies but rather the meeting was held at this site because it was a location well known to all the employees and the meeting was held on the parking lot rather than inside the restaurant because the employees had just gotten off

from work, were hot and dirty, and were not interested in entering the restaurant because of that.

The Cracker Barrell Restaurant does, however, sit right on Highway 79, which is the main road between Guthrie, Kentucky, where the plant is located, and Clarksville, Tennessee, where Respondent's president William Freeman resides.

Having considered all the testimony from both sides as well as my own personal viewing of the Cracker Barrell Restaurant and environs which viewing I undertook at the express request of both the General Counsel and Respondent, I find that Freeman drove past the Cracker Barrell Restaurant on his way home, slowed down somewhat as he passed the parking lot of the Cracker Barrell but did not come to a stop or near-stop, looked in the direction of the Cracker Barrell Restaurant, and observed people in the parking lot who he could not identify as employees of Respondent but whom he suspected of being his employees since he had been told by employee William Campbell that a union meeting was being held at the Cracker Barrell Restaurant that evening.

Counsel have cited no case law which requires an employer to go home by a different route than he normally does in order to avoid the possibility of observing some of his employees who are attending a union meeting. Freeman's decision to go home when he did and how he did (his normal way home was to go right down Highway 79 past the Cracker Barrell Restaurant) was not prompted by any intention to surveil a union meeting of his employees. Freeman simply went home his normal way and, while he did look in the direction of the Cracker Barrell Restaurant, this was not the type of activity that would constitute a surveillance in violation of the Act. See *Porta Systems Corp.*, 238 NLRB 192 (1978), and *Larand Industries*, 213 NLRB 197 (1974), where the Board has taken the position that if employees are observed doing something such as handbilling in public where they can expect to be observed it is not surveillance if they are observed. I do not credit the testimony of employee Carl Forbes who testified that Freeman, after driving past the Cracker Barrell in the direction of his home in Clarksville, later returned driving his daughter's car.<sup>9</sup> I credit Freeman's denial that he returned to the area of the Cracker Barrell Restaurant later that evening driving another vehicle. There was testimony that Supervisor Mike Loreille and Supervisor Tom Rezack separately drove past the Cracker Barrell Restaurant shortly after Freeman did. I do not find that these two supervisors drove past the Restaurant that evening. I conclude that the witnesses who said Loreille and Rezack drove past were mistaken but not lying. This was not alleged as a violation of the Act in any event.

*D. Management's Meeting with Employees on August 13, 1981*

At approximately 12 noon on August 13, 1981, William Freeman, president of Respondent, called a meeting

<sup>9</sup> I also do not credit Forbes' testimony that Freeman asked employee Teddy Wheeler to spy on the union meeting of August 14, 1981, or Forbes' testimony that Supervisor Bennie Bailey told Forbes that he was being fired for union activity.

of employees. At this meeting it is alleged by the General Counsel that the Act was violated in two ways:

(1) By Freeman advising the employees that the union meeting the evening before at the Cracker Barrell Restaurant was known to management.

(2) By Freeman threatening to close the plant if the Union was voted in by the employees.

I credit Freeman's testimony that he never said or threatened plant closure if the employees selected a union. Freeman did tell the employees that he knew about the union meeting at the Cracker Barrell Restaurant and joked that the Union was too cheap to take the employees into the restaurant and buy them a cup of coffee. Freeman then told the employees that he was joking and that he did not know who had been at the union meeting outside the Cracker Barrell Restaurant. I do not find that Freeman's comments about the union meeting the day before violated the Act in any way. Freeman, in driving home his normal route, did drive past the Cracker Barrell and he did look over but could not make out individual faces.<sup>4</sup> The employees saw Freeman drive by and several so testified. Since I find that Freeman did not violate the Act in driving past the Cracker Barrell Restaurant and looking over at it as he did so I conclude it is not a violation of the Act for him to tell the employees that he did something which the employees already knew he did since they had seen him drive past. The impression of surveillance in violation of the Act can be given to employees if an employer tells the employees the names of employees who attended a union meeting or who are leading the union movement. *C & J Mfg. Co.*, 238 NLRB 1388, 1391 (1978). Freeman did make it clear to the employees that he could not identify who of the employees had attended the Union meeting.

#### *E. Surveillance of Union Meeting of August 14, 1981*

It is alleged that Supervisor Mike Loreille surveilled the union meeting of August 14, 1981. Maxine Dukes testified that she saw Loreille sitting in his car on a service station lot approximately 1 block or less from the union hall where a union meeting was to take place. She believed that Loreille's wife and two others were in the car with him. I do not believe that Dukes lied about seeing Loreille but I find that she was mistaken.

The August 14 union meeting was initially scheduled to be held at a union hall on Golf Club Lane in Clarksville but was changed to a union Hall on Red River Street in Clarksville when the union organizer and employees arrived at the union hall on Golf Club Lane and learned that another meeting was already in progress. Loreille could not have known about the change in the location of the meeting in order to set up at the service station near the Union Hall on Red River Street where the meeting was eventually held. I credit Loreille's denial and conclude, as stated earlier, that Dukes was

<sup>4</sup> While Freeman may not have specifically recognized any faces he certainly suspected that these were his employees because how else was he able to tell the employees at the August 13 meeting that the union organizer had not invited them inside the restaurant for a cup of coffee.

mistaken. Accordingly, there was no surveillance and no violation of the Act.

#### *F. Employee Discharges on August 17, 1981*

It is alleged in the complaint that nine employees were discharged by Respondent on August 17, 1981, in order to discourage employee activity on behalf of the Union. Two of the allegedly discharged employees, I find, were not discharged at all. Walter Henderson, an active union supporter, was not discharged but accepted another job paying more money at the Thun Corporation and quit his job with Respondent. After accepting a new job at Thun Corporation where he was to start the very next day Henderson came to work at Respondent's plant and was telling fellow employees at Respondent's plant what his benefits would be at Thun. When Supervisor Bennie Bailey found out that Henderson was quitting at the end of the day he told him he should leave right then rather than go around telling the other employees what a good deal he was getting at Thun Corporation. Henderson's leaving the employ of Respondent was not related in any way to union activity. Keith Burch, another alleged discriminatee, was also not discharged. Burch voluntarily quit several days after August 17. He was later rehired by Respondent. Burch quit in part because of working conditions (he was working too hard) which working conditions the General Counsel maintains were the result of the discriminatory discharges and therefore Burch's quit was really a constructive discharge. I do not agree with the General Counsel because I find that the other discharges were not motivated by union animus but rather were motivated by legitimate economic considerations. The employees were not discharged to discourage employee activity on behalf of the Union.

I credit Freeman's testimony that it was during the week of August 10, 1981, that his analysis of Respondent's financial position was completed. This analysis resulted in Freeman concluding that the flexo machine (box maker) should be sold, new equipment purchased, and eight employees laid off. A meeting was held on Sunday, August 16, 1981. In attendance at this meeting were Freeman, Supervisors Tom Rezack and Mike Loreille, and Plant Superintendent Bennie Bailey. The flexo crew foreman, Paul McCaleb, a supervisor, was not present since he was being let go along with eight employees. There is credible evidence in the record to support Respondent's assertion that there was insufficient work for the flexo machine to keep its crew busy and this had been the case for some time. The flexo machine was put up for sale immediately following the terminations but not sold by the time of the hearing.<sup>5</sup> The subject matter of the meeting was to decide which eight employees to terminate. The initial determination made at the meeting was to keep those skilled employees who were essential to Respondent's operation and with regard to the remaining unskilled employees to keep the top seven and discharge the remaining eight. In deciding

<sup>5</sup> As alluded to above in fn. 1, Respondent's motion to supplement the record contains an affidavit from Freeman that the flexo machine was sold in December 1982.

who to retain and who to discharge the factors considered were work performance (to include attendance), versatility, and potential for advancement (i.e., ability to learn new skills). I credit Freeman's testimony that the discharges were motivated by economic concerns and not because of the union organizing campaign and I credit the testimony of Freeman further that the individuals selected for discharge were not selected because of their prounion sympathy. The eight employees selected for discharge on August 16 and discharged on August 17 were John English, Charles Sullivan, Charles Unkel, Carl Forbes, Truman Johnson, Maxine Dukes, Jeannie Hernandez, and Jerry Lee Morrow.

The evidence reflects that the discharged employees were not replaced by new employees. Of the eight employees selected for discharge one of them, i.e., Charles Sullivan, had not signed a union authorization card or attended either of the two union meetings. The remaining seven discharged employees had all shown interest in the Union but Respondent had articulated reasons for selecting them for discharge. These reasons are spelled out in detail in Respondent Exhibit 7.<sup>6</sup> It is noted that all seven unskilled employees selected for retention had signed an authorization card<sup>7</sup> and most had also attended the August 14, 1981 union meeting.<sup>8</sup> In addition, many of the skilled employees retained had signed authorization cards.<sup>9</sup>

Documentary evidence, which I credit, discloses that no new employees have been hired by Respondent and at the time of the hearing in this case Respondent had less employees than it did immediately after the discharges of August 17, 1981, and Respondent had a better rate of production than it did prior to the discharges of August 17, 1981.

<sup>6</sup> John English, although considered a good employee, had quit once before and had only been back on the job for 10 days as of August 16. English was later rehired by Respondent. Charles Sullivan was also considered a good employee but was the least experienced mechanic on the payroll. Sullivan was also later rehired. Charles Unkel had only been working for Respondent for 10 days and was interested in returning to school. Carl Forbes could not accurately count sheets, which was a job requirement, nor had he demonstrated an ability to advance. Forbes was rated as only a fair employee. Truman Johnson was perceived by Respondent's management as not being a good sheet catcher (another job requirement) and his work performance was thought to be unsatisfactory. Maxine Dukes could not count sheets accurately and was not thought to have much potential for advancement. Jeannie Hernandez would not catch sheets and had personal problems that interfered with her work performance, e.g., a lot of personal telephone calls during the workday. Jerry Lee Morrow had a heart condition and had advised management that he was looking for another job. Morrow's physical condition limited what he could do. The selection of employees to be discharged because they have personal problems or a physical disability may be a "mean" thing to do but it is not a violation of the Act.

<sup>7</sup> South, Wheeler, Whitlock, Shackelford, Sherrod, Henderson, and Brian Face. Shackelford, Sherrod, Henderson, and Brian Face were also at the union meeting at the Cracker Barrel Restaurant.

<sup>8</sup> South, Whitlock, Shackelford, Sherrod, and Brian Face.

<sup>9</sup> Mimms, Mallory, Ronnie Face, Sammie Keatts, Mosley, and Burch.

As noted above Respondent was the subject of union organizing campaigns twice before and in both instances a majority of the employees voted to remain nonunionized. Respondent has been in operation since 1975 and William Freeman has been its president for the entire time. I credit the testimony of employee Doyle Knight, a truckdriver for Respondent who was a union advocate in the past and whose prounion sympathies were well known to Freeman. Knight's testimony was that he never experienced any discrimination from Respondent because of Knight's prounion support. Orman Smith's testimony is also credited. Smith was an active union supporter during a prior organizing campaign and he was not discriminated against by Respondent in any way.

I conclude that Respondent has shown that the eight discharges were not motivated by union animus but rather for legitimate economic reasons only.

#### IV. REFUSAL TO BARGAIN

As of August 16, 1981, prior to the discharges, a clear majority 20 of Respondent's approximately 37 employees had signed union authorization cards. On August 21, 1981, 4 days after the economically motivated discharges 13 of Respondent's 30 employees had signed cards. The Union's written request of August 21, 1981, that Respondent bargain with it was turned over to Respondent's counsel by Freeman. A scheduled election was blocked due to the filing of these unfair labor practice charges on October 27, 1981. Since I have concluded that Respondent committed no unfair labor practices a remedial bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 393 U.S. 575 (1969), would be highly inappropriate.

#### CONCLUSIONS OF LAW

1. Bardcor Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, District No. 8, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in any unfair labor practices as alleged in the complaint, as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The complaint, as amended, is dismissed in its entirety.

<sup>10</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."