

**Purolator Products, Inc. and United Paperworkers International Union, AFL-CIO, Cases 11-CA-8883, 11-CA-8896, 11-CA-8903, 11-CA-8930, 11-CA-9065, 11-CA-9137, 11-CA-9269, and 11-RC-4817**

18 May 1984

**DECISION, ORDER, AND  
CERTIFICATION OF  
REPRESENTATIVE**

**BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS**

On 25 September 1981 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> as modified.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act when Supervisors Vince Mininno and Ray Tityk ordered Receiving Supervisory Assistant Lexie A. Powers to remove union

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In sec. IV,F,2(a),(6), par. 2 of his decision, the judge found that the Respondent violated Sec. 8(a)(1) of the Act when Supervisor James Knox told employee William Whitley, the Union's leading activist, that Whitley "shouldn't be so open" and that "they are watching you." To support his finding, the judge cited *PPG Industries*, 251 NLRB 1146 (1980), in which the Board held that it is unlawful for an employer to question employees about their union sentiments, even when those employees are open and known union adherents and the inquiry is not accompanied by threats or promises. We find that Knox's statements constitute a violation, but find it unnecessary to rely on *PPG Industries*. That case involved simple, noncoercive questioning of avowed union adherents by low-level supervisors about why they were for the Union, what they thought it would accomplish, etc. In contrast, the remarks directed to Whitley tend to suggest that the Respondent was displeased with Whitley's open union activity and might retaliate against him. The remarks are similar to those found to be unlawful in *Magnesium Casting Co.*, 259 NLRB 419, 422-423 (1981) (employer violated Sec. 8(a)(1) by telling union activist to "keep a low profile") and *Overnite Transportation Co.*, 254 NLRB 132, 133 (1981) (employer violated Sec. 8(a)(1) by telling employee to stop wearing a "Teamster T-shirt").

In sec. IV,G,1,(d), par. 17 of his decision, the judge noted, and we agree, that the General Counsel did not seek a finding that the Respondent violated the Act by denying Puckett's requests for a witness, and therefore properly declined to find an unfair labor practice. We therefore find it unnecessary to pass on the judge's dictum that Puckett would have been entitled to an employee witness if "proper conditions," presumably a complaint allegation, were present.

literature that he was storing in one of the Respondent's storage lockers.

We reverse this finding because, elsewhere in his decision, the judge found, and we agree for the reasons stated by him, that Powers is a supervisor as defined by Section 2(11) of the Act. As such, Powers is excluded from the protection of the statute.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when Supervisor George Hyde assigned employee Marilyn Raeford to different jobs beginning in early January 1980.<sup>3</sup> Raeford usually performed the job of "gasket girl."<sup>4</sup> Approximately 1 week after Raeford told Hyde that she was soliciting authorization cards for the Union, Hyde assigned her to work in the "blister pack area."<sup>5</sup> The judge noted that Raeford testified that when she worked as a gasket girl, she was able to do the work while sitting down, but when she worked in the blister pack area, she had to stand. He further noted that work in the blister pack area entails bending down to pick up boxes. The judge concluded that the Respondent assigned Raeford to more onerous work because of her activities on behalf of the Union, rather than because her work performance had deteriorated, as Hyde testified.

Initially, we note that Raeford was a line worker. As such, she could be assigned to do any job on the line. Raeford stated in her testimony that she had been assigned to work in the blister pack area in the past, and that, indeed, she had been required to perform work in the blister pack area or elsewhere in the plant approximately once a week. The judge thus concluded that Raeford was not moved to jobs which she had never performed before, and was not asked to do anything which was not part of her job description. He further found, however, that work as a gasket girl is more desirable than work elsewhere, such as in the blister pack area.

The record does not support such a finding. The judge purported to rest his conclusion regarding the relative desirability of the jobs on "the credited evidence of Raeford." Raeford's testimony, however, did not address the issue of whether other tasks were more onerous than her usual job as gasket girl while sitting, and that when she worked in the blister pack area, she had to stand and bend down to pick up boxes. Although the job in the blister

<sup>3</sup> Unless otherwise noted, all dates are between December 1979 and March 1980.

<sup>4</sup> A gasket girl attaches gaskets to filters.

<sup>5</sup> In this part of the plant, employees package filters. Some employees operate a "blister pack machine." That machine seals a clear plastic bubble (a blister), which contains the product, onto a cardboard card.

pack area is different from work as a gasket girl, we cannot find that it is therefore more onerous. Because the record contains no evidence indicating that the job in the blister pack area is more onerous, and because this type of assignment was a part of Raeford's job classification and she had frequently performed the work in the past, we must conclude that the Respondent did not act unlawfully when it transferred Raeford to the blister pack area.

3. We also reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended Raeford for 3 days on January 3. On that date, Hyde assigned Raeford to work on the "can box."<sup>6</sup> As found by the judge, no line worker is permanently assigned to work on the can box. The Respondent rotates employees among this job and several other jobs. No employee is assigned to work on the can box for more than 2 hours. Further, and as the judge also found, Raeford testified that working on the can box is not as difficult as putting on gaskets, which is the job that Raeford usually performed.

Instead of working on the can box, as directed, Raeford left the line and went to speak with Frank Grady, the Respondent's personnel manager, about the assignment. Raeford discussed the assignment with Grady, who then spoke with Hyde and another supervisor about the matter. Because she refused to work in the can box, and had received a warning for a similar incident in 1979, the Respondent suspended her for 3 days.

In finding that the Respondent violated the Act by suspending Raeford, the judge reasoned that her action in leaving the work area to see Grady was a direct response to the Respondent's unlawful conduct in transferring her from her usual job. The judge added that her action must be judged in light of that "provocation."

We have found above, contrary to the judge, that the Respondent did not act discriminatorily when it assigned her to work in the blister pack area. There is no contention that the assignment to the can box was discriminatory. Indeed, Raeford admitted that the can box job was easier than her usual job. Clearly, therefore, Raeford's failure to perform work in the can box was insubordinate, and not provoked by an illegal act. The Respondent, accordingly, did not violate the Act when it suspended Raeford because she refused to work in the can box.

4. The judge found that the Respondent violated Section 8(a)(1) of the Act when Supervisor Helga Powell told employee Amilcar Picart that under

<sup>6</sup> This job entails taking the empty metal shells of oil filters from a large box and placing them on a conveyor belt.

some collective-bargaining agreements employees cannot take their grievances or problems, except for routine, work-related ones, to their supervisors, but instead must present them to shop stewards. The judge reasoned that Powell's remark was a threat to eliminate the employees' right under Section 9(a) of the Act to present grievances to their employer.

We disagree, and we find that Powell's remark did not constitute a threat. Instead, it was an accurate and realistic description of one of the consequences of unionization, a "fact of industrial life."<sup>7</sup> Powell's statement was so carefully phrased, and so qualified, that it cannot be construed as a threat. Powell noted that collective-bargaining agreements govern the presentation of grievances. Not only is this a correct statement, but it also indicates that this situation is brought about through employee selection of a collective-bargaining representative, thus precluding any inference that the Respondent would take unilateral action against its employees. Powell's remark also indicated that only *some* collective-bargaining agreements might foreclose the presentation of certain grievances to supervisors. Thus, she was not even suggesting that a collective-bargaining agreement negotiated by the Respondent and the Union would definitely, or even probably, contain such a provision. Finally, Powell acknowledged that routine, work-related grievances—the only type which a supervisor is likely to be able to resolve anyway—could nevertheless still be presented to supervisors.

The cases cited by the judge in support of his finding are inapposite. In those cases, the statements that the Board found to be violative conveyed the message that all direct dealings between the employees and their employer would be ended if the employees selected union representation. In *Colony Printing & Labeling*,<sup>8</sup> the employer told its employees that by signing union cards they would "give up the right to talk about your hours, your work, your working conditions, your pay, and everything else concerning your future and continued employment." In *Sacramento Clinical Laboratory*,<sup>9</sup> the employer's business administrator told an employee that, if the union came in, she would not be able to come in and talk to him as she had in the past, but would have to go through channels, and that the union would make the decisions for the

<sup>7</sup> *Bostitch*, 176 NLRB 377, 379 (1969).

Sec. 9(a) of the Act provides that an employer may adjust a grievance only "as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect."

<sup>8</sup> 249 NLRB 223, 224 (1980), *enfd.* 651 F.2d 502 (7th Cir. 1981).

<sup>9</sup> 242 NLRB 944 (1979), *enf. denied* in pertinent part 623 F.2d 110 (9th Cir. 1980).

employees. In *Howard Mfg. Co.*,<sup>10</sup> the employer's president told an employee that, if the union won the representation election, she would not be able to "go to the office and to [her] supervisor with any of [her] problems" but would have to go through the union stewards. Powell's statement is in marked contrast to the statements in those cases. Powell did not say, or even suggest, that Picart or any other employee would lose their right to present their problems to management. Rather, as discussed previously, Powell merely pointed out one of the realities of union representation, and did so in a nonthreatening way.<sup>11</sup> We must therefore reverse the judge's finding that Powell's statement constituted a violation of the Act.

5. The judge concluded that the Respondent violated Section 8(a)(1) of the Act when it discharged Diane Godwin and Lexie Powers. Powers was a receiving supervisory assistant, and Godwin was a manufacturing supervisory assistant. Godwin and Powers were both statutory supervisors, as found by the judge. The Respondent discharged Godwin and Powers assertedly because they were not adequately fulfilling the duties that the Respondent assigned to them in its campaign against the Union. The judge found that the discharges were unlawful on the theory that the Respondent used Godwin and Powers as "pawns" in a scheme to abuse the Board's processes.

The Respondent also discharged Manufacturing Supervisory Assistants Virginia E. Peoples and Betty Roberts allegedly because they too failed to fulfill adequately their responsibilities in opposing the Union. The judge found that Peoples and Roberts were statutory supervisors, but that they had not been manipulated in a scheme to abuse the Board's processes, and that the Respondent lawfully terminated them for the reason asserted.

The General Counsel set forth three theories by which the discharges of Godwin, Powers, Peoples, and Roberts were unlawful. The General Counsel first contended that those four individuals were employees, and that since they were discharged for not vigorously supporting the Respondent's campaign against the Union, their discharges violated Section 8(a)(3) and (1). The judge rejected this

contention, because he found that the four were statutory supervisors. This finding is amply supported by the record, and we agree with it for the reasons stated by the judge.

The General Counsel next contended that even if those four individuals were supervisors, the discharges were an integral part of an overall pattern of conduct designed to deprive unit employees of their Section 7 rights, citing *Brothers Three Cabinets*.<sup>12</sup> The judge rejected this contention. In contrast to the situation existing in *Brothers Three*, he found that the Respondent had not created an atmosphere of coercion in which employees could not be expected to perceive the distinction between the employer's right to prohibit union activity among supervisors, and the employees' right to engage in union activity.

In *Parker-Robb Chevrolet*,<sup>13</sup> the Board overruled *Brothers Three* and other decisions in which it found that discharges of supervisors were unlawful on the ground that those discharges were an "integral part" of the employers' plans to discourage concerted activity by employees. The Board held in *Parker-Robb* that the discharges of supervisors as a result of their participation in union or concerted activity is not unlawful, stating:

The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.<sup>14</sup>

Under the rationale of *Parker-Robb*, therefore, the Respondent's discharge of Godwin, Powers, Peoples, and Roberts was not unlawful.<sup>15</sup>

<sup>12</sup> 248 NLRB 828 (1980).

<sup>13</sup> 262 NLRB 402 (1982).

<sup>14</sup> *Id.* at 404.

<sup>15</sup> In Member Hunter's view, the sole issue presented here is whether the otherwise lawful discharges of the supervisors were rendered unlawful because the Respondent told them that they could be for or against the Union until the Board ruled on their status, and then discharged two of the supervisors, Godwin and Powers, for their union activity prior to the Board's decision. While Member Hunter does not necessarily condone the Respondent's conduct, because the Respondent's activity centered solely on its own supervisors, he finds that it did not interfere with the employees' exercise of their Sec. 7 rights. Therefore, the discharges were lawful. Moreover, since this conduct, as found by the judge, was not done deliberately to forward a litigation strategy, Member Hunter finds it unnecessary to pass on the "abuse of process" theory as a basis for finding the discharges unlawful. In his view, because the Respondent

*Continued*

<sup>10</sup> 180 NLRB 220, 231-233 (1969), *enfd.* 436 F.2d 581 (8th Cir. 1971).

<sup>11</sup> Chairman Dotson and Member Dennis agree that Powell's statement could not be construed as a threat, and therefore that the three cases cited by the judge are distinguishable. They express no opinion, however, with respect to the lawfulness or unlawfulness of the statements at issue in the cited cases.

Member Hunter, agreeing that Powell's remark was nonthreatening, relies on his dissent in *Hahn Property Management Corp.*, 263 NLRB 586 (1982). In that dissent, he reasoned that a statement by the employer's general manager that employees "could no longer talk to me directly about wages, problems, complaints" if the union won the representation election was not objectionable, much less unlawful, conduct.

The General Counsel also asserted that the Respondent permitted or authorized its low-level supervisors, including its receiving supervisory assistants and manufacturing supervisory assistants, to engage in union activities, and then retaliated against them when they did so. The General Counsel in essence argued that this was not fair. The facts that the General Counsel relied on in support of this theory can be briefly summarized. On 14 December the Respondent convened a meeting of its manufacturing supervisory assistants, maintenance supervisory assistants, and receiving supervisory assistants (collectively referred to as MSAs). The MSAs had just completed a training program sponsored by the Respondent and designed to improve the supervisory skills of the MSAs. One of the topics included in the program was "Your Duties and Obligations as a Supervisor Under the National Labor Relations Act." The 14 December meeting was held in order to answer any questions that the MSAs had about their training. MSA Richard Hamel asked Whit Collins, the Respondent's manager of employee relations, what would happen if he were in favor of the Union. (The Union's organizing campaign had begun approximately 2 weeks earlier.) Collins replied that the MSAs "had the right to do whatever they pleased" in support of either the Union or the Respondent until the National Labor Relations Board determined whether the MSAs were supervisors.<sup>16</sup> Collins added that, in his opinion, the MSAs were agents of the Respondent, but that this issue would be resolved by the National Labor Relations Board. Godwin, Powers, Peoples, and Roberts then each supported the Union in various ways.<sup>17</sup>

Following the representation hearing, the Acting Regional Director for Region 11 issued a Decision and Direction of Election on 27 February. In the decision, he found, *inter alia*, that the MSAs were statutory supervisors. On the next day, following receipt of the Decision and Direction of Election, the Respondent convened meetings of its MSAs to inform them of the Acting Regional Director's decision. Subsequently, the Respondent used the

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merely responded to questions from supervisors, there is an insufficient nexus between the litigation strategy which was allegedly an abuse of process and the discharges. He need not review the allegations otherwise, since there is no independent allegation of abuse of process as a violation of the Act. He therefore does not join his colleagues in their discussion of this issue.

<sup>16</sup> The Union filed its representation petition on 27 December, and a preelection hearing was conducted in January. Collins' remark indicates that he believed then that a representation hearing was imminent.

<sup>17</sup> Godwin attended a union meeting in December. Peoples attended several union meetings, and also attended the preelection hearing for 1 day, sitting with others who supported the Union. Roberts attended the hearing with Peoples, and apparently also attended union meetings. Powers wore union insignia, urged employees to attend union meetings, and distributed union literature.

MSAs in its campaign against the Union. The MSAs' role was to talk about the Union to the employees they supervised, and to uncover any problems that were bothering the employees and to report those problems to Steve Thies, the Respondent's plant manager. The Respondent provided each MSA with materials, such as information regarding plant closings and misconduct by union officers, that the MSAs should use in their discussions with employees. On 18 March the Respondent discharged Godwin, Powers, Peoples, and Roberts allegedly because they were not enthusiastic enough in supporting the Respondent's campaign against the Union.

The judge found that the Respondent actually discharged Godwin and Powers because they engaged in union activity as described above, prior to 28 February, the date on which the Respondent informed the MSAs that the Acting Regional Director found that the MSAs were supervisors. He found that it discharged Peoples and Roberts because they were not sufficiently vigorous in supporting the Respondent's campaign against the Union after the 28 February announcement. The judge rejected the General Counsel's "set up" theory.<sup>18</sup> The judge noted that, even if public policy proscribed setting up a supervisor for engaging in union activity and then discharging him for doing so, the discharges of Peoples and Roberts would not be unlawful because they were not fired for their pre-28 February union activities.

The Union also advanced several theories by which the discharges of the four MSAs were unlawful. First, it contended essentially that the MSAs were discharged because they refused to obey the Respondent's instructions to violate the Act in its campaign against the Union.<sup>19</sup> There are two incidents that purportedly could support a finding of a violation under this theory. In one incident, Roberts asked Steve Thies, the Respondent's plant manager, about a rumor in which a supervisor promised to transfer an employee to another job. After investigating the rumor, Thies told Roberts that the rumor was false. Roberts replied that she did not trust Thies. In the other, Peoples asked Steve Shorter, a supervisor, why Roy Wilson, another supervisor, was photographing or taking the names of employees who are wearing union T-shirts. The judge found that neither incident warranted a finding that the Respondent discharged

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<sup>18</sup> In light of our finding, *infra*, that the Respondent did not authorize or induce its supervisors to engage in union activity, we find it unnecessary to pass on whether this is a viable legal theory.

<sup>19</sup> The Charging Party based this argument on the principles expressed in *Talladega Cotton Factory*, 106 NLRB 295 (1953), *enfd.* 213 F.2d 209 (5th Cir. 1954).

Roberts or Peoples because it believed that they would not engage in unlawful activity to defeat the Union, or would expose any unlawful activity on the part of the Respondent.<sup>20</sup> He concluded that the Respondent discharged Roberts "chiefly" because she told Thies that she did not trust him. With respect to the second incident, the judge found that Wilson's actions were not a violation of the Act because there was no specific allegation in the complaint regarding that incident, the Respondent objected to testimony relevant to the incident, and the General Counsel stated that he was eliciting the testimony only to demonstrate the Respondent's union animus. The judge added that the evidence was not sufficient to establish that the Respondent discharged Peoples because she inquired about Wilson's activities. We agree with the judge, for the reasons mentioned by him, that the record, including two incidents described above, does not provide support for the Charging Party's position.

The Union asserted that the Respondent deliberately "tainted" the election when Collins told the MSAs on 14 December that they were free to engage in union activity. The judge stated that this theory virtually "self-destructed," reasoning that since the Respondent was aware of, and did not disavow, the MSAs' union activity, the Respondent was precluded from urging that the representation petition be dismissed, or the election set aside, on the basis of supervisory participation in the Union's organizing campaign, citing *Decatur Transfer & Storage*, 178 NLRB 63 (1969), *enfd.* 430 F.2d 763 (5th Cir. 1970). The judge further found that Collins made his announcement regarding the MSAs in response to an MSA's question, and not at his own initiative. Therefore, the judge concluded that the Respondent did not *deliberately* attempt to "taint" the election process. We agree.

The Charging Party's final theory is that the Respondent abused the Board's processes. Essentially, the theory is that the Respondent "deceptively manipulated" its position regarding the MSAs. The Respondent contended before the Regional Director that the MSAs were supervisors, but did not inform the Regional Director that Collins had told the MSAs at the 14 December meeting that they were free to engage in union activity. Then, in the instant case, the Respondent amended its answer at the hearing to plead affirmatively that the discharged MSAs were supervisors,<sup>21</sup> but maintained

that the other MSAs were nonsupervisory leadpersons. The Respondent did not inform the judge that it had attempted to have the representation petition dismissed on the ground that the MSAs were involved in the Union's organizing campaign. The judge relied on this theory in finding that the discharges of Godwin and Powers were unlawful.

The facts supporting the abuse of process theory can be briefly summarized. On 28 February the Respondent filed a Motion for Collateral Investigation with the Regional Director. In the motion, the Respondent argued that the representation petition should be dismissed on the basis that several of its supervisors, including MSA Powers, participated in the Union's campaign. The motion did not mention Collins' 14 December announcement, and indicated that the Respondent's supervisors had acted without the Respondent's knowledge, consent, or acquiescence. By letter dated 24 March, the Region informed the Respondent that its investigation did not disclose supervisory taint. At the hearing before the judge, Collins testified that he told the MSAs that they had the right to engage in union activities until the NLRB ruled on the issue of whether they were supervisors. The judge concluded that the Respondent "deliberately abused the Board's processes by taking contradictory positions before the Agency, and not advising the different authorities of the Agency of such contradictory positions, all for the purpose of frustrating the orderly election procedure established pursuant to Congressional statute."<sup>22</sup> As noted previously, he found that Godwin and Powers were "pawns" in this scheme because they relied on Collins' announcement that MSAs could engage in union activity, and were discharged when they did so.

We reverse the judge's finding because we conclude that the Respondent did not abuse the Board's processes. Clearly, there is nothing improper when a party adopts one position before a Regional Director and then, based on the findings, changes its position. As in all litigation, each party advances positions that are in accordance with its self-interest. In the instant case, the issue of the MSAs' status as supervisors or employees is a close one. Neither of the positions urged by the Respondent, therefore, is frivolous.

The Respondent concedes that its preelection position, which was the MSAs were statutory super-

<sup>20</sup> He also found that there was not enough evidence to establish that the way in which the Respondent presented its antiunion program constituted unlawful surveillance, or was otherwise unlawful.

<sup>21</sup> The Respondent states that this was done so it would not have waived the defense if the Board eventually found the MSAs to be supervisors. The Respondent notes, however, that it did not actually attempt

to prove their supervisory status, but continued a "wait and see" attitude concerning their status.

<sup>22</sup> The judge cited *St. Francis Hospital*, 249 NLRB 180 (1980), to support his finding that deliberately frustrating the election procedure is an abuse of the Board's processes. In that case, although the Board found that the respondent did not abuse the Board's processes, it stated that its finding did not foreclose the possibility that an abuse of process theory could be successfully asserted.

visors, was based on strategic considerations. It is likely that the Charging Party's preelection position, which was that the MSAs were bargaining unit employees, was also dictated by such considerations. After the election, the Respondent and the Charging Party reversed their positions, again for strategic purposes.<sup>23</sup> At the outset of hearing before the judge, the Respondent even stated that "[o]ur position has changed just as the position of the union has changed . . . . Each of the parties is 'flip-flopping.'" Similarly, in its brief to the judge, the Respondent stated that "[q]uite naturally, as a result of the election vote, the positions of both parties have changed." Therefore, the judge was fully apprised that the Respondent, and the Charging Party, had changed their positions regarding the MSA issue from what they had been in the representation case. In sum, the Respondent, as well as the Charging Party, asserted in good faith the positions that accorded with their self-interest. We find that this is not improper.

The second aspect of the abuse of process theory, as articulated by the judge, seems to be that the Respondent deliberately neglected to inform the Regional Director of Collins' announcement that the MSAs were free to participate in union activity, while the Respondent was urging in its Motion for Collateral Investigation that the representation petition should be dismissed because supervisors participated in the Union's organizing campaign. We find that there is no evidence that the Respondent *deliberately* failed to inform the Regional Director of Collins' statement. Collins' statement was in response to a MSA's question of "what would happen" if he were in favor of the Union. As noted by the judge, there is no evidence that the Respondent "planted" this question. Collins' response, that the MSAs could participate in the Union's campaign unless and until the NLRB found that they were supervisors, is the only prudent answer, and perhaps the only lawful one, that Collins could have given. Collins added that, in his opinion, the MSAs were agents of the Respondent. Thus, Collins clearly did not encourage the MSAs

<sup>23</sup> The tally of ballots was 326 for, and 307 against, the Union; there were 83 determinative challenged ballots, including 73 cast by the MSAs, and no void ballots. If the MSAs are supervisors, the challenged ballots are insufficient in number to change the outcome of the election. A finding of supervisory status is therefore obviously in the Charging Party's interest.

In its brief, the Respondent details the legal problems confronting the Respondent, and its strategic responses, at each stage of the somewhat complicated procedural history of this case. At the time of the hearing, strategic considerations dictated the position that the MSAs were employees. If they were found to be employees, their ballots would be opened and counted, and the Respondent would have a chance of prevailing in the election. (A new election would be directed, of course, if merit were found in the allegations of unfair labor practices which corresponded to objections to the election filed by the Union.)

to support the Union. In light of these circumstances, we are compelled to agree with the Respondent that there is no basis for inferring that the Respondent attached any significance to Collins' remark, or that Collins or anyone else even remembered Collins' remark until it was elicited at the hearing before the judge.

Our finding that the Respondent did not abuse the Board's processes removes the underpinning from the judge's rationale that the two MSA discharges were unlawful.<sup>24</sup> Because we find, in agreement with the judge, that the MSAs were supervisors, the Respondent did not act unlawfully when it discharged Godwin and Powers.

6. The judge found that the Respondent violated Section 8(a)(3) and (1) when it suspended employee Mary Louise Puckett, an open union adherent. On 8 February, Puckett made an apparently snide remark when she saw MSA Sharon Tew wearing a T-shirt bearing the legend: "We Love Purolator Vote No." A little later, Tew approached Puckett and told her that if she had anything to say, she should say it to Tew's face. Puckett replied that since Tew had previously been a union supporter, she could not understand why Tew was now wearing the Purolator T-shirt. Puckett and Tew continued to bicker with each other throughout the shift. The record is unclear with respect to the details of this argument; however, there is no doubt that their quarrel was rooted in their differing views regarding the Union. After an investigation, which Collins testified yielded only "a bunch of gobbly gook," the Respondent suspended Puckett for 3 days for disorderly conduct. There is no evidence in the record that Tew was disciplined. In finding that Puckett's suspension violated Section 8(a)(3) and (1), the judge reasoned that both Puckett and Tew were culpable, and the fact that only Puckett was suspended suggests that the Respondent seized on an opportunity to punish a known union supporter.

We find that the General Counsel has not demonstrated by a preponderance of the evidence that the Respondent was unlawfully motivated in suspending Puckett. Tew, an MSA, is part of the Respondent's management, while Puckett is a rank-and-file employee. Even though both parties may have been at fault, it is not illogical that the Respondent did not discipline Tew because it was supporting one of its supervisors, and not because it was discriminating against a union adherent. It is not particularly unusual for management, in order to maintain plant discipline and to bolster its super-

<sup>24</sup> We do not pass on whether this is a viable legal theory, because we find that the facts that would support such a theory are lacking.

visors' morale, to support a supervisor in a confrontation with an employee. Therefore, we conclude that the General Counsel has failed to prove that the Respondent violated Section 8(a)(3) and (1) when it suspended Puckett.

7. The judge found that the Respondent also violated Section 8(a)(3) and (1) by transferring Puckett to a middle oven job, a less desirable job, when Puckett returned from her 3-day suspension. The Respondent transferred Puckett because she and MSA Kathy Foos worked in the same area, and since Foos was a friend of Tew, with whom Puckett did not get along, the Respondent wished to forestall any friction between Puckett and Foos. The judge concluded that the Puckett transfer was an unfair labor practice prohibited by Section 8(a)(3) and (1), because it was based on a personality conflict that grew out of differences of opinion regarding the Union.

We find that any connection between Puckett's transfer and her support of the Union is too attenuated to support a finding of a violation. As found by the judge, the Respondent was concerned only with avoiding friction between Foos and Puckett because of a personality conflict, and was not concerned about Puckett's union activities, or about Foos' possible reaction to those activities. Any antipathy between Puckett and Foos would be predicated on Foos' friendship with Tew, and only remotely, if at all, on Puckett's support of the Union. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by transferring Puckett.

8. Finally, the judge found that five economic strikers made an unconditional offer to return to work, and that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate four of the strikers.<sup>25</sup> He found that the strike was economic in nature because it was based on the strikers' dissatisfaction with what they perceived to be harassment by Wilson Sellers, a supervisor.<sup>26</sup> During the second shift on Friday, 8 February, MSA James Graham and his wife, Shirley Graham; Lawrence Grenier; John Gearhart; and George Stanbaugh left the plant. All of the strikers except Stanbaugh gathered at the Grahams' house. James Graham, as spokesman for the strikers, telephoned Collins at Collins' house. Crediting the testimony of Graham and other strikers, the judge found that Graham told Collins that he wanted to arrange a meeting to discuss getting the strikers' jobs back, and to dis-

<sup>25</sup> The judge found that one of the strikers, MSA James Graham, was a statutory supervisor, and that, as such, the Respondent had no obligation to reinstate him. We agree with this finding.

<sup>26</sup> The judge found Sellers did not harass the employees because of their union activity.

cuss what could be done about Supervisor Sellers.<sup>27</sup> Collins replied that he would have to check his schedule in his office, and that he would call Graham back on Monday, 11 February, to set up a meeting. Collins telephoned Graham on Monday, and they arranged to meet on Thursday, 14 February. Collins and Graham met on 14 February, and Collins told Graham that the strikers had been replaced.<sup>28</sup> The judge found that Graham, acting on behalf of all of the strikers, had made an unconditional offer to return to work when Graham spoke to Collins on the telephone on 8 February, shortly after the walkout. The judge added that "[t]he request to talk about Sellers was merely incidental to the request to return to work." The judge further stated that if Collins believed that Graham's offer to return to work was ambiguous, Collins had a duty to request clarification.

We reverse the judge because we do not believe that Graham made an offer to return to work, even an ambiguous one. Graham told Collins that he wanted to set up a meeting to discuss reinstatement of the strikers. This is clearly a request for a meeting, not an offer to return to work. That Graham was not making such an offer is further evidenced by the second portion of his statement, in which he indicated that a purpose of the meeting would be to discuss what could be done about Supervisor Sellers. In fact, it appears that the discussion of Sellers was to be interdependent with the discussion of possible reinstatement for the strikers.<sup>29</sup> Accordingly, since the strikers did not make an unconditional offer to return to work on 8 February, the Respondent did not violate Section 8(a)(3) and (1) when it failed to reinstate the strikers.

9. The Union filed objections to the representation election conducted on 27 March.<sup>30</sup> The complaint contained allegations that corresponded to each objection. Based on his findings of unfair labor practices, the judge recommended that 10 of those objections be sustained. We adopt the judge's

<sup>27</sup> Graham's testimony on cross-examination included the following:

Q. In other words, you wanted to get Mr. Collins or somebody to give you all some relief, isn't that right?

A. This is right.

Q. You wanted some relief before you went back to work, is that true?

A. That is a fact.

<sup>28</sup> The strikers' jobs had been filled by replacements when the second shift resumed on Monday, 11 February.

<sup>29</sup> Thus, even if we were to find that Graham's request for a meeting was tantamount to an offer to return to work, that offer was conditioned on something being done regarding Supervisor Sellers. The Respondent had no obligation to honor such an offer. *Atlanta Daily World*, 192 NLRB 159 (1971).

<sup>30</sup> The election was held pursuant to a Stipulation for Certification Upon Consent Election. Of approximately 663 eligible voters, 326 cast valid ballots for, and 307 against, the Union; there were 83 determinative challenged ballots, and no void ballots.

findings with respect to eight of the underlying unfair labor practices, and we therefore adopt his recommendation that the corresponding objections be sustained. Two objections, Objections 10 and 16, are coextensive with findings of unfair labor practices that we reverse, and therefore we overrule those objections.<sup>31</sup> Although there is merit in eight of the union objections, the revised tally of ballots shows that the Petitioner has prevailed in the representation election.<sup>32</sup> Accordingly, we will issue a Certification of Representative.

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. We shall order, *inter alia*, that the Respondent offer to reinstate Mary Katherine Naylor

<sup>31</sup> Objection 10 and complaint par. 8(1) allege that supervisors interfered with employees' organizational rights by ordering employees to remove union literature from lockers. Objection 16 and complaint paragraphs 11 through 18 allege that the Respondent replaced and refused to reinstate unfair labor practice strikers.

<sup>32</sup> We adopt the judge's recommendation that the challenges to the ballots of 68 MSAs and 3 discharged employees, Katie M. Chavis, Marilyn A. Raeford, and William Whitley, be sustained.

There were 12 additional challenged ballots. The parties stipulated that challenges to six of those ballots, those cast by Glenys Hovermale, Helen B. McCoy, Paek Won Myong, Chong Sun Smith, Linda Snedaker, and Charlie White, should be overruled on the basis that those individuals were employees and eligible to vote. (The judge noted that the stipulation with respect to Hovermale was unnecessary because the Regional Director had overruled the challenge to her ballot in his 4 June 1980 Supplemental Decision.) The parties also stipulated that the challenge to the ballot of Ronnie L. Baskett should be sustained on the basis that he had been terminated at the time of the election. Ballots cast by Yongok (Richardson) Choi, Larry Johnson, Leroy McCoy, Clark Russ, and Jacqueline Shew were challenged on the basis that those individuals were supervisors. The judge found that each was an employee. The judge recommended that the challenge to the ballot of Ronnie L. Baskett be sustained inasmuch as the parties stipulated that the challenge should be sustained. Although the judge recommended that the challenges to the remaining 11 ballots be overruled, he further recommended that the ballots not be opened and counted since they are not determinative of the outcome of the election. Absent exceptions, we adopt, *pro forma*, the judge's recommendations regarding these 12 challenged ballots.

The Respondent also filed objections to the representation election. The judge recommended that each of the objections be overruled, and we adopt his recommendations. Three objections, however, warrant some discussion. Objection 7 alleged essentially that the Union was responsible for statements suggesting that the Board found that the Respondent had committed unfair labor practices; Objection 27 alleged that the Union misrepresented the law regarding an employer's right to replace economic strikers; and Objection 28 alleged essentially that the Union misrepresented the legal significance of the Board's decision to issue a complaint against the Respondent. The judge discussed these objections together, and recommended that they be overruled. He found that the unit employees received enough accurate information during the campaign to correct any misimpression and to assure that the Board's neutrality was not compromised. We agree that these objections should be overruled, but we rely on *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), and *Riveredge Hospital*, 264 NLRB 1094 (1982), which issued after the judge rendered his decision. In *Midland*, the Board held that it will no longer probe into the truthfulness or falsity of campaign statements, or set elections aside on the basis of allegedly misleading campaign statements. In *Riveredge*, the Board extended the *Midland* rationale to mischaracterizations of Board actions, holding that they should be treated in the same manner as other misrepresentations.

to the cutter-clipper position she occupied when she was unlawfully transferred on 12 February 1980 without prejudice to her seniority or any other rights or privileges previously enjoyed; pay her backpay, with interest, for her 3-day suspension beginning 30 January 1980; grant her a 5-cent-per-hour raise retroactive to when it would have been made effective and pay her interest on that raise; expunge the 30 January 1980 suspension notice from her personnel records; and remove from its files the 14 February 1980 unsatisfactory wage review given to her, and expunge any reference to that review from its files. With respect to Sin Ung Yu, we shall order that the Respondent offer him 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 pay him backpay with interest; and expunge from its files any reference to his discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>33</sup>

#### CONCLUSIONS OF LAW

1. By interrogating employees about their union activities; by creating the impression that employees' union activities were under surveillance; by telling employees not to be so open about their union activity; by confiscating an employee's notes that pertained to union activity; and by threatening employees with layoff if they selected union representation, the Respondent has violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Sin Ung Yu because he engaged in union activities, and by suspending Mary Katherine Naylor, transferring her, and giving her an unsatisfactory wage review because she engaged in union activities, the Respondent has violated Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By virtue of the acts described above in Conclusions of Law 1 and 2, the Respondent has engaged in objectionable conduct.

#### ORDER

The National Labor Relations Board orders that the Respondent, Purolator Products, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Coercively interrogating any employee about union support or union activities.

<sup>33</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(b) Creating the impression that employees' union activities are under surveillance.

(c) Telling employees not to be so open about their union activities.

(d) Confiscating employees' notes pertaining to union activity.

(e) Threatening employees with layoff if they select union representation.

(f) Issuing unsatisfactory wage reviews to employees, suspending employees, transferring employees to more onerous jobs, discharging employees, or otherwise discriminating against employees for supporting United Paperworkers International Union, AFL-CIO, or any other union.

(g) 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 necessary to effectuate the policies of the Act.

(a) Offer to reinstate Mary Katherine Naylor to the cutter-clipper position she occupied when she was unlawfully transferred on 12 February 1980, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Mary Katherine Naylor whole for any loss of earnings or other benefits suffered as a result of her unlawful suspension beginning on 30 January 1980, and grant her a 5-cent-per-hour raise, retroactive to when it would have been effective, in the manner set forth in the Amended Remedy.

(c) Remove from its files any reference to the suspension of Mary Katherine Naylor on 30 January 1980, and to the 14 February 1980 unsatisfactory wage review given to her, and notify her in writing that this has been done and that the suspension and wage review will not be used against her in any way.

(d) Offer Sin Ung Yu immediate and full reinstatement to his former position 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.

(e) Make Sin Ung Yu whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, in the manner set forth in the Amended Remedy.

(f) Remove from its files any reference to the discharge of Sin Ung Yu, on 13 February 1980, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(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 analyze the amount of backpay due under the terms of this Order.

(h) Post at its Fayetteville, North Carolina plant copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, 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.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Paperworkers International Union, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed at the Employer's Fayetteville, North Carolina plant, including warehouse distribution center employees, truckdrivers, time keepers, roving inspectors and floor inspectors assigned to the quality control department, excluding all office clerical employees, material planners, production schedulers, laboratory technicians, print clerk, layout and gauge inspector, receiving clerk, guards and supervisors as defined in the Act.

<sup>34</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."

#### APPENDIX

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

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT tell employees not to be open about their union activities.

WE WILL NOT confiscate employees' notes pertaining to union activity.

WE WILL NOT threaten employees with layoff if they select union representation.

WE WILL NOT issue unsatisfactory wage reviews to you, suspend you, transfer you to more onerous jobs, discharge you, or otherwise discriminate against any of you for supporting United Paperworkers International Union, AFL-CIO, or any other union.

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

WE WILL offer to reinstate Mary Katherine Naylor to the cutter-clipper position she occupied when she was unlawfully transferred on 12 February 1980, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Mary Katherine Naylor whole, with interest, for any loss of earnings or other benefits suffered as a result of her unlawful suspension beginning on 30 January 1980, plus interest, and grant her a 5-cent-per-hour raise, retroactive to when it would have been effective.

WE WILL notify Mary Katherine Naylor that we have removed from our files any reference to her suspension on 30 January 1980 and her 14 February 1980 unsatisfactory wage review and that they will not be used against her in any way.

WE WILL offer Sin Ung Yu immediate and full reinstatement to his former position 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.

WE WILL make Sin Ung Yu whole for any loss of earnings and other benefits resulting from his discharge, plus interest.

WE WILL notify Sin Ung Yu that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

PUROLATOR PRODUCTS, INC.

## DECISION

### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This consolidated case was tried before me in Fayetteville, North Carolina, pursuant to a fourth consolidated complaint, dated July 2, 1980, issued by the General Counsel of the National Labor Relations Board through the Re-

gional Director for Region 11 of the Board.<sup>1</sup> The fourth consolidated complaint (complaint herein) is based on charges filed by United Paperworkers International Union, AFL-CIO (the Union, Paperworkers, or the Petitioner herein) against Purolator Products, Inc. (Respondent, Purolator, or Employer herein).

In the complaint, as amended at the trial, the General Counsel alleges that Respondent has violated: Section 8(a)(1) of the Act by, among other conduct, interrogating and threatening employees; Section 8(a)(3) of the Act principally by warning employees, suspending them, assigning them more onerous work, discharging 10 employees, and by failing to reinstate 5 employees who engaged in an alleged unfair labor practice strike; and Section 8(a)(4) of the Act by discriminating against two employees because they gave affidavits to Board agents in this case.<sup>2</sup>

By its answer, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

On June 4, 1980,<sup>3</sup> the Regional Director for Region 11 issued his supplemental decision in Case 11-RC-4817 in which he directed and ordered that certain challenged ballots and objections be consolidated with the captioned cases for the purpose of a hearing before an administrative law judge. These matters are outlined below in the section on "Background."

On the entire record, including my observation of the demeanor of the witnesses,<sup>4</sup> and after due consideration of the briefs<sup>5</sup> filed by the parties, I make the following

<sup>1</sup> Beginning August 18, 1980, the hearing covered 45 trial dates before me closing on March 3, 1981. The record includes 9398 transcript pages and nearly 300 exhibits. It also includes, as discussed below, the record compiled at the January 1980 preelection hearing in Case 11-RC-4817. That proceeding consists of a five-volume transcript of 682 pages plus many exhibits. The preelection hearing opened on January 16 and closed January 22, 1980.

<sup>2</sup> After the General Counsel and the Union rested, the 8(a)(4) allegation, complaint par. 20, was dismissed on Respondent's unopposed motion on the basis that no evidence had been adduced in support of the allegation (Tr. 1826).

<sup>3</sup> All dates shown are for 1980 unless otherwise indicated.

<sup>4</sup> Of the 14 witnesses who testified at the January 1980 preelection hearing, 8 did not testify before me here. Of course, my credibility resolutions herein are not based on witness demeanor exhibited at the January preelection hearing. *Cooper-Hewitt Electric Co.*, 162 NLRB 1634 (1967).

<sup>5</sup> By mutual accord, it was agreed that the parties could file separate briefs for the "C" and "R" case portions of the case with the "C" case briefs due first and the "R" case brief due later. Extensions of time were granted for that purpose.

The Union's opposition to a final date beyond June 16, 1981, on all briefs was overruled. Final date for receipt of briefs in the "C" case was set for June 2, 1981. Counsel for the General Counsel (usually CGC herein) did not file a brief for the "C" case portion, but did argue orally at conclusion of the trial. (By mutual agreement, such argument was submitted in writing as G.C. Exh. 17, an eight-page document, in lieu of an oral presentation.) The Union filed a seven-page brief relating to the discharge of the MSAs in the "C" case portion. Respondent filed a comprehensive and helpful 284-page brief in the "C" case portion, and an equally thorough 425-page brief in the "R" case portion. Respondent's briefs will be distinguished herein by "I" for its "C" case brief and "II" for brief of the postelection issues. Where necessary for clarity, the same designation will be used for the Union's briefs. Over the Union's objection, the final due date for receipt of briefs in the "R" case portion was extended to August 3, 1981. The Union filed a 23-page brief in the "R" case portion (the challenges-objections).

In his oral argument (G.C. Exh. 17), CGC observes that the complaint alleges over 30 violations of Sec. 8(a)(1). There are numerous 8(a)(3) alle-

*Continued*

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a Delaware corporation with a plant in Fayetteville, North Carolina, is engaged in the manufacture and distribution of automotive air, gas, and oil filters. During the past 12 months, Respondent manufactured, sold, and shipped directly from its Fayetteville, North Carolina plant to points outside the State of North Carolina goods and materials valued in excess of \$50,000. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

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

## III. PROCEDURAL MATTERS

## A. Background

The Union filed a petition for representation on December 27, 1979, seeking to represent the production and maintenance employees at Respondent's Fayetteville plant. A 5-day preelection representation hearing was held on January 16, 17, 18, 21, and 22, 1980. At the hearing Respondent took the position that some 73 supervisory assistants (MSAs herein)<sup>6</sup> were supervisors within the meaning of the Act, and the Union contended they were employees. On February 27, the Acting Regional Director issued his Decision and Direction of Election in which he found that the MSAs were statutory supervisors. The Union, through previous counsel, filed a request for review. On March 26, the Board denied this request for review as follows:

Having duly considered Petitioner's Request for Review of Acting Regional Director's Decision and Direction of Election the Board concluded that a substantial issue is raised concerning the supervisory status of the supervisory assistants. However, the Board is of the opinion that such issue can best be resolved through the challenge procedure. Accordingly, Petitioner's Request for Review is denied and the decision is amended to permit the supervisory

gations. To the extent I have not expressly analyzed evidence which CGC might contend, but has not, supports the allegations, it is sufficient to observe that the General Counsel is not a favored litigant in unfair labor practice proceedings. *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961). An administrative law judge is not required to assist the General Counsel by piecing evidence together, from the 3956 pages of the record which are devoted specifically to the "C" case, in a fashion which fits his theory. Nor is an administrative law judge required to search for evidence which supports allegations of a complaint. *Medical Mutual of Cleveland*, 248 NLRB 441, 444 fn. 3 (1980).

<sup>6</sup> For convenience, all supervisory assistants are referred to herein as MSAs. More correctly, they are DSAs (distribution supervisory assistant); MSAs (manufacturing, or maintenance, supervisory assistant); and RSAs (receiving supervisory assistant). Where it becomes important to distinguish between a manufacturing supervisory assistant (MSA) and a maintenance supervisory assistant, I shall utilize the acronym MNSA for the latter.

assistants to vote under challenge. The request for oral argument and stay of election is also denied.

The March 27 secret-ballot election resulted in 326 votes cast for the Petitioner and 307 votes cast against it, with 83 challenged ballots.<sup>7</sup> Thus the MSA challenged ballots are dispositive of the election. Both parties filed objections and the Union filed numerous unfair labor practice charges. The Petitioner withdrew four objections and the Regional Director overruled one and declared that the evidence in support of the others is identical to that supporting the complaint. Of the 30 objections filed by Respondent, some were withdrawn, others were dismissed, numbers 7 and 17 were found meritorious, and a hearing was directed on the remaining 4. On August 14, 1980, the Board denied Purolator's request for review in its entirety and, granting the Petitioner's in part, ordered that the Company's Objections 7 and 17 be consolidated with the other objections set for a hearing. The initial consolidated complaint issued on March 12. As earlier noted, on June 4 the Regional Director for Region 11 consolidated the representation case with the "C" cases for hearing.

At the instant trial, the parties reversed their preelection positions, with the Union contending that the MSAs are statutory supervisors and Respondent arguing that, with certain exceptions (named below in fn. 9), they are rank-and-file employees. In the candid words of Respondent's counsel, the parties, because of the results of the election, are "flip-flopping." (Tr. 96.) As Respondent phrases it at page 129 of its brief I, "Quite naturally, as a result of the election vote, the positions of both parties have changed."<sup>8</sup> [Emphasis added.]

As is discussed in more detail below, Respondent held a meeting with its MSAs at the Bordeaux Motel and Convention Center in Fayetteville on December 14, 1979. At the meeting, officials of Respondent, including Stephen M. Thies, plant manager, and Whit Collins, manager of employee relations and racing director, spoke to the MSAs concerning the union campaign. In response to a question by an MSA, Collins informed the MSAs that the issue of their supervisory status was pending before the Regional Director for Region 11, and that pending that decision they could take sides as they pleased. He expressed the view that he thought they were supervisors and agents of Respondent, but that the matter would not be resolved until the Board's Regional

<sup>7</sup> Appendix "A" to this decision is a chart which reflects the various categories of the 83 persons who cast challenged ballots. In his June 4 supplemental decision, the Regional Director resolved 1 (Glenys Hovermale) of the challenges and ordered that evidence be presented on the remaining 82. At the consolidated hearing, the parties resolved 6 challenges and 3 of the remaining 76 challenges are 2 ballots of alleged discriminates who were not MSAs. This leaves 73 MSA challenges to be resolved herein.

<sup>8</sup> Respecting the MSA status issue, I am constrained to observe that there is a serious question whether any of the testimony, either preelection or postelection, is reliable. Statements in the preelection record and supporting briefs appear to be rather exaggerated in terms of the MSAs' authority and responsibility. Many of the witnesses in the postelection portion testified so defensively as to give me the impression that they were measuring each answer (essentially that the line supervisors made every decision of any significance) in terms of its impact on Purolator's postelection position.

Director issued his decision on the Union's petition for an election (Tr. 3605, 3674).

In his February 27 Decision and Direction of Election, the Acting Regional Director found the MSAs to be statutory supervisors. Respondent, as noted above, filed its request for review. Pending the Board's action Respondent brought the MSAs into its admittedly antiunion campaign by instructing each MSA to present Respondent's position to the employees on her line. Respondent provided the MSAs with a position package contained in a black binder, and the usual procedure followed was for each MSA to speak privately and individually to her workers in an office or room off the factory floor. When it appeared to Respondent that four of its MSAs were not exhibiting the desired enthusiasm in carrying out their assigned functions in the antiunion program, Respondent fired them.<sup>9</sup>

At pages 129-130 of its brief I, Respondent takes a multioption position regarding the status of the MSAs. It states that in view of the Board's Order of March 26 denying the request for review and directing that the MSA issue be handled through the challenge procedure, and in light of the "extremely detailed testimony elicited" during this consolidated proceeding:

Respondent now contends that the status of each MSA must be resolved individually. Having heard the evidence, Respondent now believes that each of the MSAs is at most a nonsupervisory leadperson. Nevertheless, Respondent realizes that the issue is not one free from doubt and that some MSAs may be found to be supervisors while others are found to be employees. With this in mind, Respondent contends that the four discharged MSAs possessed and exercised at least as much supervisory authority as did the other MSAs in their respective departments. Thus, a finding that any of the Manufacturing Supervisory Assistants are supervisors would dictate that Betty Roberts, Virginia Peoples and Diane Godwin also be found to be supervisors. Similarly, a finding that any of the Receiving Supervisory Assistants are supervisors would dictate a like finding with regard to Lexie Powers.

Respondent also argues that if the four MSAs were non-supervisory employees and were unlawfully discharged, the equities warrant a tolling of backpay until my decision herein.

<sup>9</sup> The four are: Dorothy Diane Godwin, Virginia Elaine Peoples, Lexie A. Powers, and Betty Roberts. Respondent fired these four MSAs on March 18, 1980—9 days before the election. The General Counsel contends they were 8(a)(3) discharges or, alternatively, 8(a)(1) discharges of statutory supervisors. The Union contends they were 8(a)(1) discharges of supervisors. Respondent defends on the basis it lawfully discharged the four MSAs because they were not performing, to Respondent's satisfaction, their assigned campaign duties in Respondent's lawful antiunion campaign. The event triggering Godwin's discharge was her appearance at the site of a union meeting 2 days earlier. At trial, Respondent amended its answer to reflect its position regarding the fired MSAs by affirmatively pleading that the four are statutory supervisors. Additionally, in such amendment (R. Exh. 163) Respondent pleads that MSA James Graham (one of the strikers) is likewise a supervisor within the meaning of Sec. 2(11) of the Act.

### B. Division of "C" and "R" Case Evidence

Although this is a consolidated case (the "R" case with several "C" cases), the parties agreed at the beginning of the hearing that the "C" case evidence should be presented first (including rebuttal and closing) and then the "R" case evidence (with its rebuttal and closing). This generally was the procedure followed. The parties anticipated that some of the 80 witnesses who testified during the "C" case portion also would need to testify during the "R" case half (and some of the 121 witnesses called in the postelection portion had in fact testified in the "C" case portion). Nevertheless, the parties felt that the agreed procedure would be easier to follow and also would avoid emeshing CGC directly in the postelection evidence.

### C. Sequestration

Early in the trial Respondent moved that the witnesses be sequestered (under FRE 615). Respondent opposed CGC's position that the alleged discriminatees, after testifying during the General Counsel's case-in-chief, could remain in the courtroom during Respondent's case and still be called by CGC during the rebuttal stage (Tr. 30). In *Unga Painting Corp.*, 237 NLRB 1306 (1978), the Board merely modified the prior practice whereby alleged discriminatees could remain throughout the entire trial. Under the *Unga* modification, the sequestration rule is applied in two stages—during the General Counsel's (and a charging party's) case-in-chief, and again during the rebuttal stage. *Unga* does not preclude alleged discriminatees from returning to the courtroom during Respondent's case, and I so ruled (Tr. 30, 79). The issue was not raised thereafter. (CGC called no rebuttal witnesses, and the Union called only one alleged discriminatee, Lexie Powers, as a rebuttal witness.)

### D. Special Appeals

#### 1. During the "C" case

During its direct examination of some of the General Counsel's<sup>10</sup> witnesses (i.e., some discharged MSAs), the Union attempted to elicit greater details concerning statements made by Respondent to the MSAs between the Acting Regional Director's February 27, 1980 Decision and Direction of Election finding the MSAs to be statutory supervisors, and the March 27, 1980 election. These statements included, for example, instructions by Respondent that the MSAs conduct meetings with employees under their direction and explain to them Respondent's position regarding the union campaign. When Respondent objected to the Union going beyond complaint allegations, the Union asserted that it would seek findings of "massive" 8(a)(1) violations if the MSAs were found to be nonsupervisory employees (Tr. 887, 940). Sustaining Respondent's objection, I admitted such evidence solely for background, motivation, animus, and

<sup>10</sup> As noted above, counsel for the General Counsel usually will be referred to herein as CGC, and such designation also applies to his capacity as counsel for the Regional Office during the postelection representation case.

context purposes in relation to the complaint allegations, and I ruled that I would make no findings of independent 8(a)(1) violations regarding such evidence (Tr. 888, 943).

On August 29, 1980, the Union mailed to the Board its request, under Section 102.26 of the Board's Rules and Regulations, for permission to specially appeal my ruling. By its Order of September 12, 1980, the Board denied the request without prejudice to the Union's "right to renew its contention through the filing of an appropriate exception."

## 2. During the "R" (postelection) case

### a. Presentation of evidence—preelection record not hearsay—method of calling the MSAs

Early in the hearing, I ruled that the party asserting that an employee was a statutory supervisor would have the burden of proving such contention (Tr. 77, 299).<sup>11</sup> "The burden of proving supervisory status rests on the party alleging its existence." *Thayer Dairy Co.*, 233 NLRB 1383, 1387 (1977); *A-1 Bus Lines*, 232 NLRB 665, 667 (1977). This meant that the Union would need to proceed first in the postelection portion. As noted earlier, Respondent affirmatively pleaded that certain MSAs are statutory supervisors and were therefore lawfully discharged. Such a defense must be pleaded affirmatively. *Williamsport Plumbing Co.*, 253 NLRB 883 fn. 2 (1980); *California Pacific Signs*, 233 NLRB 450-451 (1977).

At the trial, CGC<sup>12</sup> offered the preelection representation case record (transcript of 5 days' testimony and exhibits) from Case 11-RC-4817 in evidence in the instant proceeding not only as background but also as substantive evidence. Respondent objected on the basis that while the prior record would be admissible as background under Section 102.69(g) of the Board's Rules and Regulations, it would be hearsay as to the truth of the matter asserted. Overruling Respondent's objection, I received<sup>13</sup> the prior record as substantive evidence on the basis that the "R" case portion was but a continuation of the preelection hearing. Section 102.69(g), Board's Rules and Regulations (Tr. 403, 405, 635, 638, 834, 3976). Even if the record were hearsay, it is clear that testimony of Respondent's management officials could be received as admissions. As this is a consolidated case, the entire record, including the preelection portion, is before me for all purposes in both the "C" and "R" cases here.<sup>14</sup>

<sup>11</sup> This came in the context of my overruling Respondent's motion (R. Exh. 1) that CGC had the burden of establishing the status of the MSAs since they were challenged by the Board agent at the election.

<sup>12</sup> In his capacity of impartially assisting all parties as counsel for the Regional Office.

<sup>13</sup> Strictly speaking, I took administrative notice, for the prior record is part of this record by operation of the Board's rule. Physically the prior record has been delivered to me, and it will be forwarded to the Board with this decision and the other 45 transcript volumes and exhibits. In addition to the preelection transcript of testimony and exhibits accorded substantive standing here, the parties designated various pleadings and briefs as part of the prior record (Tr. 204-205, 834). A list of the documents received is in evidence here as G.C. Exh. 16 (Tr. 3891).

<sup>14</sup> Because this is a consolidated case, it is unlike the situation in either *Helena Laboratories Corp.*, 225 NLRB 257 (1976), or *Shop Rite Foods*, 216 NLRB 256, 261 (1975). *Helena* and *Shop Rite* were unfair labor practice trials where the respective administrative law judge was requested to

Of course, as noted above, I make no credibility findings based on the demeanor the witnesses exhibited at the preelection hearing.

Proceeding first in the challenged ballot portion of the "R" case on October 16, the Petitioner called only two witnesses, announced that it relied on the preelection case record and the relevant evidence adduced in the unfair labor practice portion, and rested (Tr. 3966). Respondent then moved to dismiss the Union's case regarding the challenged ballots (except as to five MSAs who testified in the "C" case) on the basis that the preelection case record was hearsay and, therefore, there was no competent evidence showing the MSAs to be statutory supervisors. Alternatively, Respondent moved to dismiss on the basis that the Board already had ruled, in denying the request for review on March 26, 1980, that the preelection record is not sufficient to resolve the "substantial issue" of the MSAs' status.

Following my October 16, 1980 denial of these motions to dismiss (Tr. 3972), Respondent, on October 20, submitted its request to the Board for permission to file a special appeal from these rulings. By its Order dated November 10, 1980, the Board denied the request as "lacking in merit."

On October 21, 1980, the Union mailed its request for permission to file a special appeal regarding the method of calling the MSAs as witnesses. It notified the Board as follows, in part:

After the Union rested its case, the Company said they felt the Board telegram of March 26, 1980 required additional testimony from each supervisory assistant. The Company also said they did not feel any obligation to call the supervisory assistants as witnesses since the Board challenged their vote. The counsel for the Regional Director, acting pursuant to instructions from the Acting Regional Director, stated that if the Company did not present the supervisory assistants, he would call each supervisory assistant as his witness since the Board telegram required that all of the supervisory assistants testify. The Union objected to this procedure and the Judge overruled the Petitioner's objection on the grounds that this procedure would expedite the hearing. This procedure is currently being used on this case.

In its special appeal, the Union-Petitioner argued that the foregoing procedure would compromise the impartiality appearance of counsel for the Regional Office, impair the Union's right to cross-examine, and erroneously interpret the Board's March 26, 1980 telegram denying the request for review as requiring the testimony of each MSA.<sup>15</sup>

make findings where the sole evidence in support of the relevant complaint allegations was testimony, or Board findings, in a prior representation case.

<sup>15</sup> When the Union elected not to call the MSAs, on the basis that their testimony was neither required nor necessary, CGC, asserting it to be his duty to see that the MSAs testified, called the MSAs and asked them three or four preliminary questions. Respondent then questioned the

*Continued*

By its telegraphic Order of November 10, 1980, the Board denied the Union's foregoing request as "lacking in merit."

b. *Calling of additional witnesses*

After 64 of the 73 MSAs in dispute had testified in the postelection portion,<sup>16</sup> and after Respondent had called 22 supervisory witnesses (not counting Collins and Thies called on March 2) and 32 rank-and-file employee witnesses on the MSA issue, I granted the motion of CGC (Tr. 9161) and the Union (Tr. 9217) to cut off further testimony as being cumulative, except that I would permit additional witnesses to be called to cover prior conflicting testimony on material matters (Tr. 9222). Respondent had indicated that it intended to call an additional 41 employees—one for each remaining MSA not already covered by the 32 employee witnesses (Tr. 9059; p. 3 of special appeal).

On January 28, 1981, Respondent filed its request to specially appeal my ruling. By its Order of February 4, 1981, the Board denied the request "without prejudice to Respondent's right to renew its contentions through the filing of appropriate exceptions."<sup>17</sup>

E. *Decision Format*

To expedite the decision process on this case in the event of exceptions and appeals, I have included many references to the exhibit numbers and transcript page numbers. Such references merely are intended to be helpful to those who read the record. No attempt was made to list all of the references which might have a bearing on the issues, and I have considered, and not ignored, evidence which conflicts with my findings.

Because delay is an enemy of justice, I have endeavored to confine the express analyses to the material issues.<sup>18</sup> It is well settled that the refusal of an administrative law judge to detail completely all conflicts in the evidence does not mean that the conflicting evidence was not considered. Moreover, it is equally settled that the absence of a statement of resolution of a conflict in specific testimony, or of an analysis of such testimony,

MSAs as if on cross but (in accordance with my procedural rulings) more closely resembling direct examination. The Union then questioned the witnesses with its examination more closely resembling cross. I directed this diversity on the basis that the MSAs would tend to be more closely identified with Respondent. See FRE 611(c).

<sup>16</sup> Although none of the five MSAs who testified in the preelection hearing appeared before me, I treat their testimony as substantive evidence in this consolidated case. Of course, the demeanor factor is not available to me regarding their testimony. These five are: Gloria Caulder, Ernestine Grisson, Larry Johnson, Henry Sports, and Sharon Tew. A sixth MSA, Elizabeth Smith, did not testify at either the preelection hearing or at the trial before me. I denied Respondent's motion that I instruct CGC to subpoena Smith's attendance from New Mexico (Tr. 9320). The final three MSAs in this accounting are among the alleged discriminatees and testified in the "C" case portion but not the postelection portion. See Appendix A.

<sup>17</sup> The telegraphic Order reflects that "Member Jenkins would grant Respondent's request."

<sup>18</sup> I have sought to render a concise decision so as to avoid any contention by a party that he was denied procedural due process by virtue of a too lengthy decision. Such an exception was lodged in *Harowe Servo Controls*, 250 NLRB 958 (1980). The hearing in *Harowe* required 46 days, and the administrative law judge's slip opinion decision covered 373 pages.

does not mean that such did not occur. *Capital Bakers*, 242 NLRB 77, 78 (1979); *Treadway Inn of Princeton*, 236 NLRB 530 fn. 1 (1978); *ABC Specialty Foods*, 234 NLRB 475 fn. 2 (1978).

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Summary of the Allegations*

The complaint lists over 30 independent 8(a)(1) allegations of interrogations, threats, and the like. Most of those which involve alleged discriminatees are covered in the treatment of the discriminatees' cases. The remaining ones are covered separately.

Complaint paragraph 10 names 10 employees as having been unlawfully discharged. The chronological sequence is:

12/6/79	Katie Chavis
1/3/80	William D. Whitley
1/28/80	Marilyn A. Raeford
2/13/80	Sin Ung Yu
3/18/80	Dorothy Diane Godwin
	Virginia Elaine Peoples
	Lexie A. Powers
	Betty Roberts
4/28/80	Amilcar Picart
7/1/80	Elsie Edwards

The four discharged on March 18 are MSAs.

Other allegations of discriminatory conduct assert that Respondent violated Section 8(a)(3) of the Act during December 1979 and January-February 1980 by issuing an unsatisfactory wage review; warning employees; suspending them; assigning them to more onerous duties and by timing their breaks. The complaint also alleges that Respondent's unfair labor practices caused and prolonged a strike on February 8, 1980, and that Respondent has violated Section 8(a)(3) of the Act by not reinstating the strikers after their unconditional offer to return to work. The strikers are MSA James H. Graham Jr., his wife, Shirley Graham, and maintenance mechanics Lawrence W. Grenier and John Henry Gearhart Jr., and mold puller George Edward Stanbaugh.

As earlier noted, as Respondent was about to open its case-in-chief, I sustained its unopposed motion to dismiss complaint paragraph 20 on the ground that there was no evidence to support it (Tr. 1825). That paragraph alleged that Respondent violated Section 8(a)(4) of the Act by discriminating against Mary Katherine Naylor and Sin Ung Yu because they gave affidavits in connection with this case.

B. *Preview of MSA Finding*

As discussed below in part VI, "The Post Election Issues," I find, substantially as did the Acting Regional Director, that all supervisory assistants (MSAs), with a few exceptions, are statutory supervisors.

### C. Origin of Organizational Campaign

William D. Whitley, a warehouseman<sup>19</sup> and alleged discriminatee, explained that the genesis of the organizing campaign actually began in early 1979, perhaps as early as January, when he wrote a five-page "To Whom It May Concern" letter and gave it to an employee committee member for delivery to Purolator (Tr. 51).<sup>20</sup> In his letter, Whitley complained in highly critical terms about wages and working conditions of Purolator. Thereafter, Whitley was summoned to the office of Employee Relations Manager Whit Collins where a meeting ensued between Whitley, Collins, Personnel Manager Frank Grady Jr., Plant Manager Stephen M. Thies, and one other person whose name Whitley could not recall (Tr. 53). It is undisputed that during the course of the meeting Whitley expressed the position that a union was needed at Purolator (Tr. 54, 102). Estimates on the length of the meeting range from over 2 hours by Whitley to 45 minutes to an hour by Grady (Tr. 3337). Management appears to have commented on the issues raised by Whitley, told him big changes are planned, and that the plant did not need a union because Purolator could do more for the employees than could a union.

The next union activity took place in June or July when Whitley telephoned Union Representative E. A. Britt in Raleigh, North Carolina. Britt referred Whitley to Henry Garner, another representative, who came to Whitley's home in either June or July. Thereafter, Garner turned the matter over to Arnold Price, International representative of the Union, who, it seems, actually got the organizing campaign underway through Whitley (Tr. 43, 1822). Although Whitley placed his initial contact with Price as about September 1, 1979, Price dated the event as mid-October 1979 (Tr. 1822). As Price placed the event later, as Grady did with the early 1979 conference on the five-page letter, I find that Whitley placed events farther back than they actually were, and that Price and Whitley made initial contact in mid-October 1979.

The first union meeting, scheduled for (late) October 1979 at the Ramada Inn in Fayetteville, North Carolina, was a failure because "nobody showed up." (Tr. 45.) After Price told Whitley he had to redouble his efforts, the latter urged the 20 to 25 employees he had invited to the first meeting to attend a second meeting. This time, apparently no earlier than November 1,<sup>21</sup> some 22 to 25 employees attended, and the organizing campaign was launched. On December 27, 1979, the Union filed its petition for a representation election in Case 11-RC-4817. On February 27 the Acting Regional Director issued his

<sup>19</sup> This is the common term although Supervisor Walter James Knox testified that the precise job classification is "Distribution Operator" (Tr. 2117) and the warnings issued to Whitley so reflect (R. Exhs. 2, 3, 70, and 71).

<sup>20</sup> The committee is described only vaguely in the record, but it apparently served as a communications committee on working conditions at Purolator in meetings between employees and the Employer (Tr. 51, Whitley; Tr. 399-39, M. Katherine Naylor; Tr. 3337, Frank Grady).

<sup>21</sup> Whitley placed the date first in late October, then changed his estimate to mid-October 1979 (Tr. 48). On cross-examination, he said it came 2 or 3 weeks after the initial meeting which he placed (erroneously, I find) in "early" October (Tr. 134).

Decision and Direction of Election, and the election was conducted 1 month later on March 27, 1980.

So far as the record shows, Purolator officials did not learn of the organizing campaign until the third shift of Sunday, December 2, 1979.<sup>22</sup> The third shift begins generally at 11 p.m. and runs to 7 a.m. the following morning (Tr. 58). There are variations for some employees. Moments before that shift started, Whitley announced to Distribution Supervisor Walter James Knox, in the presence of Knox's crew, that he was organizing on behalf of the Union (Tr. 49). At such time, Whitley pulled back his coat and revealed that the T-shirt (G.C. Exh. 2) he was wearing, and would frequently wear thereafter, bore the following legend in 1-1/2-inch to 2-inch high letters (Tr. 50):

CHAMP  
THE  
UNION  
MAN

Whitley's nickname is "Champ" (Tr. 46). It is undisputed that Knox thereafter telephoned his superior, Distribution Manager William E. McKibben, at home and reported the foregoing news. McKibben allegedly told Knox not to do or say anything about the union matter and he would alert the personnel office the following morning (Tr. 2046-2047).

Employee Relations Manager Whit Collins confirmed that he learned of the union activity around the "first of December" and thereafter observed employees begin to wear prounion and procompany insignia (Tr. 3603). He thereafter observed as many as 100 of Purolator's 750 employees wearing prounion materials (Tr. 3604). Including those who cast challenged ballots, 716 employees cast ballots in the March 27, 1980 election.

Although there is record evidence that employees supporting the Union began distributing leaflets in early January, Mike Krivosh, staff representative for the AFL-CIO's industrial union department, testified that he arrived in Fayetteville to assist in the campaign around March 6. His assistance included making home visitations and preparing about 7 to 10 leaflets which he, with employee support, distributed at the plant gate (Tr. 9335, 9338).

### D. Respondent's Counter Offensive—Role of the MSAs

As we shall see, Respondent did not assume a neutral posture, but thereafter initiated its own vigorous counter-attack. Purolator contends that its opposition program was completely legal.

Stephen M. Thies, after serving in various capacities at Fayetteville, was promoted to plant manager in May 1979. He testified that he was in charge of Respondent's

<sup>22</sup> Discharged MSA Virginia Elaine Peoples testified that in October 1979 a lawyer explained TIPS to about 60 MSAs assembled in the plant conference room (Tr. 740-29). Discharged MSA Betty Roberts gave like testimony (Tr. 872, 929). However, there is no other evidence suggesting that the October conference was connected to the campaign which had just been launched by Union Representative Price and Whitley.

campaign opposing the Union, serving as the "quarter-back," and that the MSAs (beginning after the February 27, 1980 Decision and Direction of Election) were "my first line of defense." (Tr. 3750.)

Although Thies, as the top plant official, no doubt was in charge of Purolator's campaign, the record reflects that Whit Collins, Purolator's manager of employee relations, did much, if not most, of the directing of Respondent's campaign. In any event, before the Union filed its petition for representation on December 27, 1979, Collins, Thies, and certain other management officials met with the MSAs on December 14 at the Bordeaux Convention Center (a motel-convention center complex) in Fayetteville. Collins testified that as Purolator had just completed a training program,<sup>23</sup> he asked the MSAs if there were any questions (Tr. 3604). MSA Richard Hamel inquired as to "what would happen" if he were in favor of the Union. Collins replied that until the National Labor Relations Board decided whether the MSAs, RSAs, and DSAs were in fact supervisors, "they had the right to do whatever they pleased," either "pronoun or procompany." (Tr. 3605, 3674.) Collins further stated that while it was his opinion that they were agents of the Company, that question would not be settled until the NLRB decided the matter at the hearing (Tr. 3605). Although Collins testified he referred to "hearings that we were holding with the" NLRB, in light of the fact the Union did not file its representation petition for another 2 weeks, he probably referred to a future hearing rather than a current one. The preelection hearing, as earlier noted, was conducted for 5 days beginning January 16, 1980, and concluding on January 22.

Testimony of alleged discriminatee MSAs are corroborative. At trial, CGC and the Union argued that this remark is the basis for their joint theory that the discharge of four MSAs was illegal in part because Respondent, after giving the MSAs a green light to participate in union activities, then *zapped* them shortly before the election largely because of their (authorized) support of the Union *before* the February 27, 1980 Decision and Direction of Election (Tr. 783, 787, 3809, 3812).

The Charging Party adds an additional twist to the theory by arguing that Respondent, deliberately using the MSAs as pawns, enticed the MSAs into union activity in order to lay the legal groundwork for arguing that any representation petition should be dismissed, or election set aside, because the showing of interest (authorization cards) or election itself was *tainted* by the participation of supervisory personnel (Tr. 784, 786). Vigorously denying all aspects of the Union's additional theory (as

<sup>23</sup> Purolator's plant news sheet, "The News Filter," for December 14, 1979 (C.P. Exh. 13), distributed to employees by Respondent on Friday, December 14 (Tr. 3966), carried the following item on the front side:

**ALL MSA'S ATTEND SUPERVISORY COURSE**

In case you missed your MSA's today they were out of the plant attending a one day seminar to improve *their supervisory skills*. This is an ongoing program designed to better train our *supervision* in handling production techniques and employee relations. Additional training sessions are scheduled in the future for MSA's and *other* supervisors. [Emphasis added.]

Attendees at the seminar received a completion certificate suitable for framing (Emp. Exh. 25 in the preelection hearing exhibits file).

well as the others), Respondent describes it as being James Bondish in nature (Tr. 791, 3806).

Discharged MSA Virginia Elaine Peoples testified that in February before the Decision and Direction of Election, Respondent showed the film "And Women Must Weep" to the MSAs (Tr. 748).

About February 28, 1980, following receipt of the Decision and Direction of Election in Case 11-RC-4817, wherein the Acting Regional Director found all MSAs to be supervisors within the meaning of Section 2(11) of the Act, Purolator assembled all the MSAs<sup>24</sup> and Thies reviewed that decision for the day-shift MSAs (Tr. 3740). Thies' testimony that the great majority of the MSAs gave a round of applause and cheering at his announcement of the decision is undisputed (Tr. 3741). Discharged MSA Virginia Elaine Peoples testified that most of the MSAs "jumped for joy" at the announcement, but that she just sat there (Tr. 751).

During the next few weeks Respondent conducted "roundtable" training sessions with the MSAs bringing them up to date on their rights and obligations as supervisors generally and as members of management in an election campaign (Tr. 3742). A manual of such training material (C.P. Exh. 1)<sup>25</sup> was provided to the MSAs (Tr. 3742; R. 263). Collins testified that the sessions were held once a week (Tr. 2688). The MSAs were told to keep in mind the TIPS rule of no: threats, interrogation, promises, or spying. Additionally, they were told not to discriminate (TIPS + D).

Thies testified that Respondent provided a black binder containing photos of materials which were being presented to employees (apparently in group meetings with management) in the form of visual aids so that the employees could see the materials up close in one-to-one meetings with their MSAs (Tr. 3744, 3749). It was the duty of the MSAs to use these materials "to present the Company's side during the campaign." (Tr. 3742.) As Thies described the MSA's role (Tr. 3743):

The MSAs were the direct connection to the floor people, the hourly people in the Plant and it was their responsibility as conveyed by myself to them, to work very closely with the employees, to talk with them about the union campaign, to determine the problems that existed in the Plant for me, and report that back to me so that corrective actions could be taken.

Discharged MSA Betty Roberts testified that she received her black book from one of Respondent's attorneys who gave instructions on what could be said to employees about the Union (Tr. 914). Roberts testified that the MSAs were given schedules to speak to the employees beginning about the first week in March (Tr. 915). These one-on-one conferences would take place after the

<sup>24</sup> Different meetings for the different shifts.

<sup>25</sup> C.P. Exh. 1, identified but not offered, is Emp. Exh. 6 in the preelection hearing exhibits and consists of some 25 letter-size pages of instructions, directions, and other training information. Personnel Manager Frank Grady Jr. testified in the preelection hearing that he formulated that training material (R. 263). (The symbol R before a page reference is used herein to refer to the transcript of the preelection hearing.)

employees had attended meetings with management representatives. Roberts, for example, would ask her employees whether they had any questions about the presentation they had just seen by management. She testified that the black book material included information about unionized plant closings, misconduct by union officers, and the like (Tr. 915-917). Discharged MSA Dorothy Diane Godwin testified likewise (Tr. 972).<sup>26</sup>

#### E. *Some Independent Allegations of Interference*

##### 1. Supervisor George Hyde—paragraph 8(a)

###### a. *Introduction*

Paragraph 8(a), as amended, contains three different allegations of interrogation by Supervisor George Hyde. The first two, "First part of January 1980" and "Latter part of January 1980 on (2) occasions" are covered by the testimony of Brenda Young. The third allegation of interrogation is for the date of "March 1980 (exact date unknown)" and is covered by the testimony of Barbara Taylor. Supervisor Hyde testified about the Brenda Young allegations, but offered no rebuttal to the testimony of Barbara Taylor.

###### b. *Brenda Young interrogated*

Brenda Young testified that in the first week of January 1980, Supervisor George Hyde summoned her to the supervisor's office upstairs. At that time he was taking different employees upstairs and this was her turn. He asked her whether she was aware that the Union was trying to get in and she told him yes. He told her that Purolator could do more for her than the Union could. He asked her if she knew anything about the Union and she told him that her ex-husband did. *He then asked whether she had signed a union card and she did not respond.* He said that if he came by her table and did not smile at her that she should not feel that he was not talking to her, but that there were certain people there at the table he did not like such as Marilyn Raeford and Louise Puckett (Tr. 507).

Young testified that in late January 1980, MSA Kathy L. Foos came to the gasket table where five employees were working. Four were putting on gaskets and one was seaming. Young said that MSA Foos told them they could not talk (Tr. 512). Thereafter, Young and Lynn McNeill, one of the gasket girls at the table, went to Supervisor Hyde's office, reported the matter to Hyde, and asked why they could not talk. He said that the two of them could but there were just certain people who could not talk at the table. He did not identify the others by name. *He then asked whether Young had secured her card back from the Union and she asked him what card.* He said that he knew she was for the Union and she asked him how he knew. He said because Marilyn Raeford and Louise Puckett were for it. He said he knew they were her friends and he felt as if she would do what a friend would do. She told him she did not know what her friends did and she had her own mind.

<sup>26</sup> Additional insight into the flavor of the opposing campaigns may be gained by referring to the objections portion of this decision, *infra*.

On cross-examination, Young testified that she signed a union card around the first of the year. She testified that there were two definite times that she had these conversations with Supervisor Hyde (Tr. 519). One conversation occurred in the first or middle of January and the other occurred between January and February (Tr. 519). She admitted on cross-examination that Hyde said that the problem is that some people cannot talk and put on gaskets at the same time (Tr. 522). However, he said certain people could talk and that the reason the others could not talk is that they could not put on gaskets and talk at the same time (Tr. 523). That was the first time she had ever discussed that with him (Tr. 523). He said he would like to explain to her that the Union was no good (Tr. 524).

Hyde testified that in a December conversation he had with Brenda Young about her work performance that the names of Marilyn Raeford and Louise Puckett were mentioned. This occurred when Hyde told her that she was normally very fast but she had dropped down to where the line was stopping. She said she did not feel that she was dropping but that it was some of the other employees, and she named Marilyn Raeford and Louise Puckett. Hyde responded that he was not concerned about Raeford and Puckett because he could not please them trying to move them to a different job and in fact had given up on trying to please them (Tr. 3273). On cross-examination, he said this conversation occurred in late December and added that Young said the line was stopping because Raeford for one thing was talking and not working (Tr. 3286). Moreover, he said that Young named two other gasket girls who were not working hard, Lynn McNeill and Sharon Lee (Tr. 3287).

Concerning the early January conversation, Supervisor Hyde testified that he talked to Brenda Young in his office and reviewed some literature that he had concerning the Union. He told her that he thought the Company could do more for her than the Union could and asked her whether she had ever worked under a union. Young replied that her ex-husband had worked at Kelly-Springfield (a unionized plant nearby). Hyde admits he asked Young *if she saw any benefits that a union could provide for people that a nonunion company could not provide* (Tr. 3270). Whatever Young answered, Hyde did not report it at trial. He further testified that nothing was said about union cards (Tr. 3271).

Under cross-examination by counsel for the General Counsel, Hyde testified that in presenting Purolator's position to the employees he brought into his office, he asked each whether she "had been affiliated with a union or had worked with a union." If the employee replied no, "I would ask them if they knew anybody who worked for a union, to see if they had views of the benefits that they could get from that." (Tr. 3291.) He testified that "my whole purpose" was "to have the employees speak freely to me, to tell me what is on their mind." (Tr. 3292.)

Testifying about the late January 1980 conversation, Hyde explained that Brenda Young and Lynn McNeill approached him on the production floor and asked if they could speak to him. He told them that after work

he would talk to them. After work in his office, they asked why they could not talk. Hyde told them that they could talk if they could keep up with their work but if they could not keep up their work while talking they should not talk. Hyde testified that nothing was said about union cards (Tr. 3272).

I do not credit Hyde's version of his conversations with Brenda Young. Thus, I find that his reference to Marilyn Raeford and Louise Puckett was as Young described it.

A careful reading of the record reveals that the testimony of Brenda Young was consistent regarding the early January and late January conversations she had with Supervisor Hyde. In the first conversation, Hyde asked her at one point whether she had signed a union card. She made no response. It is obvious from this that Hyde could well have concluded that in fact she had signed one. Indeed, Young gave testimony that she had signed a card in early January. In the late January conversation, Hyde asked whether she had gotten her card back. This testimony is both consistent and logical. In light of the questions Hyde admittedly was asking about unions of the employees he called into his office, it would be wholly consistent for him to ask Young whether she had signed a card. Moreover, based on demeanor, I credit Young.

I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(a) concerning the conduct of Supervisor George Hyde regarding the first part of January 1980 and the latter part of January 1980. As there is evidence only as to one occasion during the latter part of January 1980, I shall dismiss paragraph 8(a) with respect to the second alleged occasion in late January 1980.

#### *c. Barbara Taylor interrogated*

As stated above, the testimony of Barbara Taylor is undisputed by George Hyde. Resolution of this complaint allegation will be simply a matter of determining whether the testimony which Taylor gave amounts to the violation alleged.

Taylor testified that she is a roving inspector at the plant. She further testified that in March 1980 she was performing some paperwork at a desk when Supervisor Hyde came up and said, "Can I ask you a question?" She told him "Shoot." He then asked why she was not on his side. When she told him she did not understand what he meant, he said, "Well, what I mean is, you have one hell of a pull on the line." She responded, "To each his own." (Tr. 194.) Taylor said that Hyde picked up his paperwork and left and she continued doing hers. For some days prior to that conversation, Taylor testified that she had been wearing her union button although she does not know whether she was wearing it the day of this conversation (Tr. 199-1). Taylor was evasive on cross-examination in declining to estimate the number of employees on her shift who wore union pins or union T-shirts at various times.

At page 252 of its brief I, Respondent contends that nothing coercive is shown by the conversation because Hyde neither interrogated Taylor about her union role nor threatened her, and that "Hyde was simply curious

as to why she was supporting the Union." Respondent moves that this allegation of the complaint be dismissed.

As the record reflects, by March a substantial number of employees were wearing both prounion and pro-Purolator insignia. The election was held at the end of that month. It is clear that feelings were running high. The campaigns of both sides were at full swing and Hyde revealed in his statement to Taylor that he was of the opinion that she held a very strong influence on the employees on the line. Taylor had been wearing a union button visibly on her clothing for some time. In this context, and in the absence of any followup remarks by Hyde that the conversation related in some way to business, I find that his inquiry of why Taylor was not on his side, in conjunction with his remark that she had influence on the line, was a double question as to why she was not supporting Purolator in opposing the Union and a further question as to why she was not using her influence to persuade the line employees to oppose the Union. I therefore find that General Counsel established a prima facie violation of Section 8(a)(1) of the Act as alleged in paragraph 8(a) of the complaint, and that Respondent has not rebutted it.

## 2. Supervisor Helga Powell

### *a. Rodolfo Rivera—paragraphs 8(b) and 8(f) dismissed*

In the first of two allegations involving employee Rodolfo Rivera, it is alleged in paragraph 8(b) that Respondent violated Section 8(a)(1) of the Act by Supervisor Helga Powell threatening "employees with loss of benefits in an attempt to discourage their support for the Union" on January 7, 1980. Paragraph 8(b) alleges that Powell solicited employees to withdraw their union cards on January 7, 1980.

In support of this allegation, Rodolfo Rivera, a former employee of Purolator, testified that he had worked for Respondent approximately 4 months as a palletizer and in the blister pack area for Supervisor Helga Powell (Tr. 307). On January 7, 1980, Rivera had a conversation with Supervisor Powell in her office for some 10 to 15 minutes. During this conversation, Powell began by giving her job history at Purolator and how she had progressed to be a supervisor. She then spoke about the Union and the upcoming election. Rivera claims that Powell said that if the Union came in the employees would have to pay fees to the Union every month and that they *were going to lose all* the "goodies" such as Christmas turkeys which they received from the Company (Tr. 308). She asked him what would happen if the Union and Purolator came to a disagreement (in negotiations). He told her that "We would negotiate." (Tr. 309.) She asked what about, for they would not get an agreement. Rivera said he guessed they would then go on strike. She said that he would not be paid during a strike; would just receive \$25 (perhaps a reference to unemployment benefits); and that the Company would replace him in order to keep up production (Tr. 309). She also told him that if he had signed a union card he could, if he wished, go to Winston-Salem and get it back (Tr. 309).

During cross-examination, Rivera confirmed that he is of Puerto Rican origin and that Spanish is his principal language. He said that he had lived in the Fayetteville area 4 years while he was in the U.S. Army, and for an additional year since that time. On cross-examination, he answered "yes" in response to a question as to whether Powell told him he could possibly lose the "goodies" such as Christmas turkeys if the Union came in (Tr. 313, 315). But again when he used his own words he testified Powell said *we was going to lose* the benefits. He confirmed that Powell said "if" he wanted the union card back he could write for it (Tr. 316).

Helga Powell testified that she had been a supervisor for 8 years, that she is currently a supervisor in the component section on the second shift, and that in early January 1980 she had a conversation with Rodolfo Rivera who worked for her as an assembler. Powell described the conversation in these words (Tr. 3299-49):

I talked to Rodolfo at that time primarily about bargaining and strikes. I explained to Rodolfo that during collective bargaining, it could go one of three ways; an employee could receive more; he could keep the same; or he could get less; and I also pointed out the current benefits that Purolator is giving, and I explained to Rodolfo that if it is an economic strike that the company has the right to permanently replace employees.

At page 256 of its brief, Respondent argues that under either version of the conversation, no violation occurred. Contending that Powell's version should be credited, Respondent observes that Rivera is of Puerto Rican origin and that Spanish is his principal language. Respondent reasons that it is likely Rivera's recall of the words used by Powell was less than perfect. "It is also significant that although the subject of collective bargaining and strikes was an important subject in Respondent's campaign, no other employee testified that Powell or any other supervisor made similar statements to them." Respondent argues that Powell's explanation of the collective-bargaining process was entirely correct, that she made no prediction as to what could occur if Respondent became unionized, and there was no unlawful threat to bargain from scratch. "In these circumstances, Powell's statements were clearly protected by Section 8(c) of the Act." Even if Rivera's version of the conversation is credited, Respondent argues, no violation of the Act is established. Under this argument, Respondent points to Rivera's testimony on cross-examination when he answered "yes" to questions which employed the use of the word "could" rather than "would."

In one sense, I credit both versions given on direct examination by the two witnesses. Since the word "could" was included in the question on cross-examination, rather than utilized by the witness himself in his answer, I reject the "could" version. I find that Rivera understood Powell to say that the benefits *were going to be lost* if the Union came in. As Respondent's campaign was well organized and well advised by counsel, I am persuaded that Powell followed her instructions and training and

presented to Rivera in early January 1980 the same version she described in court.

On the other hand, Powell's presentation is a heavy subject and involves complicated niceties of labor law to deliver orally to an employee who, Respondent knew, had Spanish as his principal and native tongue. In these circumstances, the argument could be made<sup>27</sup> that Respondent, through Supervisor Powell, should at least have provided Rivera with a sheet of paper containing the essential points of her presentation—similar to the testimony she gave in court. By failing to do so, and by ignoring the likelihood that Rivera would garble the complicated message she was delivering, it could be argued that Respondent should be held responsible not for what was actually said, but for what Rivera understood her to say.

Under Rivera's understood version, loss of benefits was predicted and therefore would constitute a violation under Section 8(a)(1) of the Act. But to adopt this argument would mean that an employer would be required to furnish a written version of its oral presentation to employees who not only had language difficulties, but to most employees inasmuch as the intricacies of labor law fall into a specialized field even within the legal profession. Section 8(c) recognizes that an employer has a right to speak—not a duty to make the listener understand. Accordingly, I find that no violation occurred and I shall dismiss paragraph 8(b).

As Powell provided Rivera little more than information about withdrawing his authorization card, did not instruct him to do so, and did not thereafter ask him if he had done so, I also shall dismiss paragraph 8(f) of the complaint. *Aircraft Hydro-Forming*, 221 NLRB 581, 583 (1975).

*b. Shawn Beatty—paragraphs 8(c) and 8(d) dismissed*

Shawn Beatty testified in support of complaint paragraphs 8(c) and 8(d). The former alleges that Respondent, through Helga Powell on or about February 15, 1980, threatened its employees with harassment for engaging in union activity. The latter alleges that Respondent, also through Helga Powell on February 15, 1980, threatened an employee with harassment for associating with employees who engaged in union activity. Only one conversation is involved.

It is undisputed that about mid-February 1980, Supervisor Helga Powell conducted a presentation with her employee Shawn Beatty. Beatty testified that she was openly wearing a union pin on her clothing. Powell's initial statement to her was that she knew she should not be talking to Beatty because supervisors had been instructed that if employees had indicated that they were openly for the Union, such as by wearing some union insignia, that such employee should be left alone. Nevertheless, Powell stated she did not think Beatty clearly understood the Union.

Powell expressed the thought that perhaps Beatty's husband was having an undue influence on her since he

<sup>27</sup> Counsel for the General Counsel did not address this allegation or testimony in his oral argument.

worked in the warehouse where the employees were strongly prounion. Beatty told Powell that she had her own mind and made her own decisions. Powell then went over some literature, including newspaper clippings reporting stories of financial misdealings by officials of the Union.

Following Powell's presentation, Beatty asked her why she and two other girls she worked with on the line, Bernadette and Elaine, were being harassed on the job (apparently by employees opposed to the Union). Powell replied that when Beatty put a union pin on her clothing that she was putting herself "in the position to be harassed" by her fellow workers (Tr. 497). Beatty asked why her two friends, Bernadette and Elaine, were being harassed since neither was wearing any kind of union insignia and neither exhibited any support for the Union. Powell replied that in some cases the harassment was based on "association." Beatty testified that she and two other employees associated during working hours, took their breaks together, and sat together in the cafeteria (Tr. 505).

Supervisor Powell's version is only slightly different. She testified that when Beatty said other employees were harassing her because she was wearing a union shirt and asked why, Powell responded, "Well, there are a lot of employees who also don't want a union, maybe they are not too pleased, or unhappy with you with what you want." When Beatty then asked about the harassment directed toward Bernadette Farmer, Powell replied, "I don't know, maybe because she is for the union; her brother is for the union; and maybe she thinks the same way." Powell testified that Irvin Farmer, Bernadette's brother, was sympathetic to the Union and she thought this was well known (Tr. 3299-50). I credit Beatty's testimony to the extent the two versions differ.

At page 258 of its brief, Respondent argues that under either version no violation of the Act occurred because the focus was on harassment by fellow workers. Counsel for the General Counsel did not address these allegations or this testimony in his oral argument and therefore has not explained the theory underlying the allegations. While the question could be raised as to whether Respondent would have reacted in the same fashion had an employee wearing a "We love Purolator Vote No" shirt come to Supervisor Powell and complained of harassment by union supporters, there is no evidence here of disparity and indeed no description of the "harassment" which Beatty claimed that she and her two friends were being subjected to.<sup>28</sup> Accordingly, I find that the evidence does not support the allegation that Respondent violated Section 8(a)(1) of the Act, and I shall dismiss complaint paragraphs 8(c) and 8(d).

<sup>28</sup> It seems that the Mary Louise Puckett suspension, discussed *infra*, does not show disparity of treatment by Respondent. In Puckett's situation, she was accused of having uttered a threat of violence to MSA Sharon Tew. Although I find elsewhere in this decision that the suspension given Puckett for that alleged threat was unlawful, because Respondent had immediate evidence that the threat did not occur, the incident at least involved a description of specific conduct. Here there is no such description and the "harassment" could be nothing more than pro-company employees giving Beatty and her two friends the cold shoulder in the cafeteria during breaks and lunchtime.

### 3. Supervisor Ken Engler—paragraph 8(k) dismissed

Paragraph 8(k) of the complaint alleges that Respondent, through Supervisor Ken Engler on or about February 7, 1980, on two occasions, violated Section 8(a)(1) of the Act by telling employees to remove union badges from personal clothing. Counsel for the General Counsel does not address this allegation in his oral argument, but at trial, when calling witness Ricky Cordrey and Lexie A. Powers, he announced that they would give testimony in support of paragraph 8(k).

Cordrey testified that as he was operating a tow motor on February 7, 1980, Supervisor Ken Engler stopped him and told him to remove the union button from his hat. Cordrey inquired as to whether that was company policy, and Engler responded no, that it was his own policy. As Cordrey prepared to remove the button, Lexie Powers drove up and asked what was going on (Tr. 1581-1582).

Powers testified that when he drove up and inquired as to what was going on, Supervisor Engler pointed his finger at Powers' hat and said "Take that button off the front of your hat." The union button was affixed over a Purolator emblem on Powers' hat. Powers responded that he would not do so. Engler then stated, "Well, you don't have any respect for this Company." Powers said he did. Engler then stated, "If you're going to wear the button put it on the back of your hat because your mind is twisted." (Tr. 621.) Powers did not remove the button. He admitted on cross-examination that he laughed at Engler when he suggested that Powers put the button on the back of his hat (Tr. 700).

It is undisputed that neither Cordrey nor Powers was disciplined for this. Both Cordrey and Powers testified that after this episode they immediately went to the personnel department where they spoke with Personnel Manager Frank Grady. Cordrey testified that they did not discuss the matter with any other employees while on their way to see Grady (Tr. 1595). Grady told them that they could wear their buttons and to go on back to work. Powers concedes Grady told them they could wear the buttons (Tr. 701). About 30 minutes later Leonard Gibbs, an assistant to Grady, came to Cordrey and told him that he had gotten Supervisor Engler "straightened out on the matter" regarding wearing of the union buttons (Tr. 1594).

At trial, Personnel Administrator Leonard D. Gibbs confirmed that he did tell Engler that it is permissible for employees to wear union buttons and that he did notify Cordrey that he had so informed Engler (Tr. 3485-3486).

Assuming that a potential violation occurred by Supervisor Engler's instructions to Cordrey and Powers, it is clear that no other employees were informed of the instructions before Personnel Manager Grady countermanded the instructions. Moreover, Cordrey was personally informed (and presumably Powers became aware) by Personnel Administrator Gibbs that Supervisor Engler had "been straightened out on the matter wearing Union buttons." In these circumstances, I shall dismiss paragraph 8(k) of the complaint.

4. Supervisors Vince Mininno and Ray Tityk—  
paragraph 8(1) a violation

Paragraph 8(1) of the complaint alleges that Respondent, through Supervisors Vince Mininno and Ray Tityk on February 11, 1980, violated Section 8(a)(1) of the Act by ordering its employees to remove union literature from their *personal* lockers. In support of this allegation, the General Counsel offered the testimony of Lexie A. Powers, and Respondent offered the testimony of Supervisor Mininno. The facts are undisputed.

Second-Shift Receiving Supervisor Mininno testified that Purolator maintains a locker, a metal cabinet, by the front desk in the receiving department. Only a handful of supervisors and MSAs had keys to the cabinet, which was kept locked, although the contents (spray cans, different types of cans, some order forms, and tags) do not appear to have been of any substantial value. MSA Lexie A. Powers was one of the two MSAs who had keys to the lockers. Mininno testified that he and Day-Shift Supervisor Ray Tityk observed Powers putting some pamphlets or literature, which they suspected to be union literature, inside the cabinet. They went to the office of Whit Collins and asked whether employees could store union literature inside Purolator's lockers. Collins told them that as long as it was not a personal locker they could ask the employee to remove the literature and take it to his vehicle. Mininno and Tityk went back to the locker, opened it, and found that Powers had in fact stored union literature inside the locker. Mininno then called Powers over and told him to put the literature in the trunk of his vehicle. Powers asked Mininno if he had to relinquish the materials and Mininno said no he just had to remove it and store it off the premises. Mininno told him he could bring it back at breaktime and distribute it, but he was not supposed to store it in Purolator's property (Tr. 3299-38).

On cross-examination, Mininno admitted that Powers, who was authorized to use the locker for company business, had kept his personal football in the locker and had been doing so since Mininno came to the second shift. Mininno never told Powers that he could not keep his football there. He testified that on Saturdays during breaktime Powers and others would take the football out in the back and play during lunchtime (Tr. 3299-40). Mininno never told Powers he could not keep the football there nor did he say he could. The locker, owned by Purolator, is metal, about 6-feet tall, 4-feet wide, and a padlock is kept on it. Collins testified that he was not aware that Powers was storing a football in the locker until Powers was terminated and asked to go back and get his football from the locker (Tr. 3624).

Powers testified that the incident occurred on February 11, 1980. He had been distributing union pamphlets on that day before work and about 10 minutes before his shift started he put them in the locker (Tr. 618).

Respondent argues extensively in its brief that no violation occurred. At page 275 of its brief it states, "Thus, when Powers placed the literature inside the company locker, possession passed from him to the Company." It further states, "Respondent merely exercised its right not to aid the Union by stowing union literature on its behalf."

It seems clear that Respondent was not at all concerned whether the union literature was cluttering the locked cabinet, nor is there any evidence that such literature did clutter the locker, fell on the floor, or in any other way interfered with production or the maintenance of order in the area. Power's personal football had never disturbed Supervisor Mininno, yet the union literature, personal property of Powers, immediately disturbed him. Moreover, what actually disturbed Mininno was not the fact that it was personal property of Powers being stored in the Purolator cabinet, but that such personal property was union literature.

Of course, employers have legitimate property rights just as employees have organizational rights. "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Respondent itself had done the balancing here by recognizing that personal property could be stored in the cabinet. By failing to demonstrate that the union literature in some manner created a production problem or cluttered the locker or the nearby area, Respondent has disturbed the balance between the coequal rights cited in *Babcock & Wilcox* by unlawfully interfering with the privilege it had granted employee Powers to store personal property in the cabinet. This disruption in turn interfered with Powers' Section 7 rights, for the sole purpose of such interference was to eliminate union literature, not personal property, from the premises. There is no showing that such union literature was in any way hampering the property rights of Respondent. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(1) of the complaint.

5. Supervisor Babs Cordrey—notepad removal a  
violation

Paragraph 8(j) of the complaint alleges that on or about February 14, 1980, Respondent, through Supervisor Babs Cordrey, interfered with rights of employees to freely engage in union activity by physically removing an employee's notes from the employee. In support of this allegation, the General Counsel presented the testimony of Tad Cordrey, the brother of Supervisor Babs Cordrey. Supervisor Cordrey testified on behalf of Respondent concerning the matter. In short, testimony regarding this allegation involves a credibility conflict between brother and sister.<sup>29</sup>

The record reflects that on February 14, 1980, Babs Cordrey was a supervisor on the first shift from 7 a.m. to 4:30 p.m. and that Tad Cordrey operated the Thiele machine on the second shift from 4 to 11:30 p.m. On this day, Supervisor Cordrey and MSA Sharon Tew were

<sup>29</sup> In addition to these two members of the family, witnesses in the case also included Ricky Cordrey, another brother of Tad and Babs. Tad and Ricky were supporting the Union whereas Supervisor Babs was opposed to the Union. Tad explained that Ricky told him that he and Babs had a conversation in which they agreed that they would not discuss the Union and neither would try to convince the other. However, Tad testified that this is not how it worked out (Tr. 1738). Tad Cordrey testified that his sister is about 10 years older than he is and that he has gone to her from time to time for advice.

taking a regularly scheduled housekeeping tour. It was breaktime for the second shift. During the tour, they noticed a small notepad lying on top of the Thiele machine.<sup>30</sup> According to Supervisor Cordrey, when she picked up the notepad some letters and loose sheets of paper fell out. She then observed that the papers were some magazine photographs and that the letters were from her brother Tad Cordrey to his girlfriend, that the photographs contained a picture of a nude woman or women with notations by her brother Tad addressed to his girlfriend. She considered the matter vulgar and decided she wanted to talk with her brother about it to ascertain whether he had done this on company time.

During cross-examination by the Charging Party, Supervisor Cordrey stated that although the notepad had a cover on it she wound up reading a note on the first page of the pad because as she pulled the pad to her the pages "came down."<sup>31</sup> Supervisor Cordrey concedes that the first page contained one note and it related to Supervisor George Hyde driving a forklift with safety glasses. She allegedly did not turn the page (Tr. 2536-2545). She then set the notepad back on top of the Thiele machine, with the sheet containing the note about Supervisor Hyde still intact and included in the notepad, and took the letters and pages from magazines with photographs of nude women to the front office for the purpose of obtaining permission to take her brother off the line and talk with him regarding this subject. On discovering that all management personnel were in a conference, she interrupted long enough to obtain permission from Manufacturing Manager John Semmes to interview her brother. She then told MSA Linda New to send her brother to see her in the personnel office.

At this same time, MSA Sharon Tew was picking up paychecks (Tr. 2539). Supervisor Cordrey asked MSA Tew to remain and listen to the conversation Cordrey had with her brother Tad. MSA Tew was behind a partition working with the checks at the time of the request. It appears that that is where she remained during the conversation between Supervisor Cordrey and her brother. Supervisor Cordrey admitted that she did not tell her brother that MSA Tew was listening behind the partition.<sup>32</sup>

Supervisor Cordrey testified that when her brother came in she stood up and handed him the letters and magazine pictures and told him that she wanted to talk to him about them. She told Tad she hoped he was not writing these on company time. He responded that he

was doing it during lunch. She stated that even if he were doing it during lunch, "there are a lot of things you can be doing to help Purolator as well as yourself." Supervisor Babs Cordrey then stated that there were a lot of improvements that could be done with oil line 3 and she pointed out that there was a glue gun that was messed up that he could work on (Tr. 2540).<sup>33</sup> In short, she testified that she told him that he could use his time more wisely and be more productive and think about something else besides these love letters and to leave those thoughts at home (Tr. 2541). She also told him that there were a lot of people in the streets that needed jobs and that he could improve himself there and by doing so he would have a job from now on (Tr. 2541).<sup>34</sup> Supervisor Cordrey testified that she knew her brother was for the Union, but that no mention was made in the conversation about the Union. She told him she would not talk to him anymore. He got up and said goodbye (Tr. 2542, 2554). Babs Cordrey denied that during the conversation she told her brother Tad that someone had told her he was keeping notes (Tr. 2555).

Tad Cordrey's version of the conversation is substantially different. Tad testified that when he went for break he left the notepad in the chair at the Thiele machine, and that when he returned the notepad was there but the letters and loose paper were gone, and the first page from the notepad had been torn out (Tr. 1741, 1746, 1754). Initially on direct examination, he testified that the entire notebook was gone (Tr. 1717). However, it is clear that such testimony was erroneous and it was corrected later in credible fashion. Moreover, his pretrial affidavit of February 20, 1980 (G.C. Exh. 21), executed only a week after the event in question, is consistent with his testimony and was introduced after extensive reference to it during cross-examination (Tr. 1744, 1762).

It seems that Tad Cordrey began keeping the notes about 2 weeks before the February 14 conversation with Supervisor Cordrey as a result of being told by Supervisor Leonard Barber that employees should not be talking about the Union during company time but could do so during breaks and lunchtime. Tad Cordrey observed that the MSAs were free to roam from line to line and they would speak with employees on the various lines. He began making notations of this. He testified that he had made notes on the first page and on the back of the first page concerning these events. The notepad itself he describes as being about 12 inches long, about 6 inches wide, and similar to a legal pad only smaller and with a cover.

In the conversation with his sister, conducted in Personnel Manager Grady's office (Grady was attending a conference with other management officials), Tad testified that his sister, referring to the notes, told him he should not be doing these things on company time. Su-

<sup>30</sup> Tad Cordrey testified that he left the notepad on the chair (Tr. 1717). I find this difference to be immaterial.

<sup>31</sup> Supervisor Cordrey was not persuasive in this testimony and I do not credit her. In short, I find that she deliberately flipped open the cover of the pad to ascertain what was written thereon. Moreover, as will be discussed shortly, she had a motive to do so.

<sup>32</sup> Supervisor Cordrey was evasive in so admitting and attempted to say that Tew was working on her checks during this time. There are two problems with that. First, if she were going to listen to what was being said she would have to concentrate on that and not work on the checks. Second, thumbing through checks no doubt would make a certain amount of noise which would disclose her presence and thereby expose her status as a secret witness. Supervisor Cordrey testified that she requested MSA Tew to remain and listen to protect her from any unfounded allegation that anything "out of the ordinary" or illegal was said (Tr. 2539, 2552).

<sup>33</sup> It is unclear why Supervisor Cordrey thought that her brother, an hourly paid worker, who no doubt would have to be paid time and a half under the Federal wage hour law, should be expected to work during his lunchtime.

<sup>34</sup> Babs Cordrey testified that she had trained her brother when he first came to work and that she was eager for him to learn well. He finally complained that she was working him too hard. To avoid that problem, Tad moved to the second shift.

pervisor Cordrey told her brother that he could find better things to do to improve things. He responded that he was fighting for what he believed in and she should fight for what she believed in. They discussed the matter for about 10 minutes and at the very end she said she would not talk to him anymore. He asked if it were because he was for the Union, or wearing the union button, and she said yes (Tr. 1718).

Tad Cordrey also testified that in the conversation in Grady's office his sister told him that someone had told her that he had been writing things down (Tr. 1756). This statement is also confirmed on page 1 of Tad Cordrey's pretrial affidavit (G.C. Exh. 12). Indeed, the pretrial affidavit contains a more coherent version than that given by either witness and therefore I set it forth here:

When I got there Babs Cordrey was already there. She had my letters and some notes she had torn from my notebook. Babs told me that I should find better things to do while I'm working. I asked her why she had gotten in my notebook; she said someone had told her I had been writing things down and she wanted to find out for herself. I said I'm fighting for things I believe in just like you are, and she said that I wasn't to do it on company time. I told her that I did it only on breaks and my lunch time. She told me that she wasn't going to talk to me anymore. I asked her if it was because of my union button that you're not going to talk to me. She said yes—and then she didn't have anything else to say and left. I've been trying to talk to Whit Collins about this all week but I still can't reach him. I have been told that he was in a meeting. On Feb. 19, 1980, Kenny Engler approached me and said he knew that I had been trying to reach Collins and asked if he could help. I explained what had happened. He told me that anything that was found on Babs' line was considered to be her property. A few other words were said, but that's about the extent of it. I just said thank you and went back to my machine.

On cross-examination Tad Cordrey responded "no" to a question whether his sister had said anything to him about the Union (Tr. 1743). Strictly speaking, that may have been a correct answer inasmuch as *he* referred to the Union as part of a question to her, and he did not quote his sister as using the word "union." I noticed that Tad Cordrey had a tendency to contradict himself while responding to leading questions.

In light of Tad Cordrey's testimony, as corroborated by his affidavit (G.C. Exh. 12), I find that Supervisor Babs Cordrey intentionally inspected the notepad to ascertain whether Tad was in fact keeping notes, that she tore off the page when she observed the references to Supervisor George Hyde and the MSAs, and that she was holding the notes and referring to them while speaking to her brother. I further find that he did ask her if the reason she was not going to speak to him was be-

cause of the Union or his union button, as she replied yes.<sup>35</sup>

With respect to whether the notes were never returned, counsel for the General Counsel sought to ask Tad Cordrey on redirect examination about a conversation he had with Supervisor Ken Engler for the purpose of supporting the credibility of his witness (Tr. 1760-1761). I sustained an objection to this on the basis it was outside the scope of examination. Counsel for the General Counsel was permitted to make an offer of proof which was that the witness would testify that on February 19, 1980, Supervisor Kenny Engler approached Tad Cordrey and said he knew that the witness had been trying to reach Collins and asked if he could help. Tad Cordrey explained what had happened about his sister taking the notes and was told by Supervisor Engler that anything that was found on his sister's line was considered to be her property, that there were a few other words passed and the witness told Engler that he just wanted to get his notes back. That ended the offer of proof which I rejected (Tr. 1762). Thereafter CGC offered the affidavit (G.C. Exh. 12) of Tad Cordrey. Respondent said he had no objection and I received the affidavit (Tr. 1762). It is obvious that my ruling, preventing CGC from asking Tad Cordrey about his conversation with Supervisor Engler, was in error. However, the error was overcome with receipt of Cordrey's affidavit which gives essentially the same information.

Respondent argues in its brief that even if I find that Supervisor Cordrey took her brother's notes that there still is not a violation established because it is not shown that the notes had anything to do with the Union. I do not accept this argument, for it overlooks the reason why Tad Cordrey was taking the notes in the first place. The notes were related to Supervisor Barber's instructions regarding no union talk during working time. Respondent's argument disregards the fact that the credited version of the conversation between Tad Cordrey and his sister reveals that there was a direct question by Tad about the Union; and it ignores the reality of the atmosphere in the plant which involved two factions in vigorous and open debate on the union subject. Nor does Respondent's argument explain why Respondent would keep the page (front and back) of notes rather than return it to Cordrey after having returned pages which Supervisor Cordrey consider "vulgar" and inappropriate in the plant. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(j) of the complaint.

#### 6. Whit Collins—paragraphs 8(e) and 9(b) dismissed

Complaint paragraph 9(b) alleges that Respondent violated Section 8(a)(3) by issuing a written warning to Lexie A. Powers on January 11, 1980. Paragraph 8(e) alleges that Respondent further violated Section 8(a)(1) of the Act by the January 11, 1980 conduct of Employee Relations Manager Whit Collins threatening employees

<sup>35</sup> Tad Cordrey credibly testified that, although his sister returned his letters and the pages of magazine photos, she did not return the one page from the notepad she had torn out, and that such notes were never returned to him (Tr. 1760, 1779).

with discharge because of their union activities. Although these two allegations involve two separate events, the events merge and therefore I shall consider them together.

Lexie A. Powers, an MSA (RSA) at the time of his March 18, 1980 discharge, was not asked about the warning described in paragraph 9(b) of the complaint during his direct examination by the General Counsel. However, the Charging Party asked Powers if he received a warning on January 11, 1980. Powers testified that on the occasion in question he took hourly employee Ricky Cordrey to show him the cardex area, which is in the general office area, and that Manufacturing Manager John Semmes asked him whether he knew he was not supposed to bring an hourly employee into that area. Powers said he did not know that. Subsequently, apparently the next day when Supervisor Mininno returned, Powers received a warning for this conduct (Tr. 659). Although Powers described it as a written warning (Tr. 625), neither CGC nor the Charging Party offered the copy presumably given to Powers in evidence. On cross-examination Powers admitted that a sign had been placed at the door leading into the cardex area saying something to the effect that no hourly employees were permitted in that room, and that the sign had been posted just a short time before the incident in question (Tr. 698).

Powers went to Employee Relations Manager Whit Collins to discuss the warning. According to Powers, Collins said that the sign had been placed there because there were some "devious" people in the plant who had tried to break into the personnel office (Tr. 699). At this point Powers was asked whether the incident occurred at a time that he had been wearing his union button. Powers stated, "No, sir, it was not." And (Tr. 699):

Q. You had not worn a Union button?

A. Not at that time I had not.

Q. When did this event occur?

A. Before we went to our December 14 session at Bordeaux Motor Inn.

During his direct examination, Powers testified that when he asked Collins why he had been written up, Collins said it was just a written verbal warning and not to worry about it. At that time, Powers asked Collins that if Purolator was saying that MSAs were management, and that Powers had been going in and out of the cardex area all this time, why did he get the warning. Collins supposedly said (Tr. 626, 663):

Lexie, we're not saying you're management, we're going to take it to the hearing January 16 and we're going to prove that you are management, and those of you who are proven not to be management will take a mile-long hike.

Powers testified that Collins did not explain what he meant by those who were found *not* to be management would take a mile-long hike.

Collins testified that Powers had received a handwritten "matter of record"<sup>36</sup> from his supervisor instructing him not to go into the main office area with hourly employees without prior approval. Powers was upset and asked Collins why he was getting a written warning if he were in fact a supervisor. Collins testified that he explained to Powers that at the time it was not a written warning, that it was not a company document, that it was just a matter of record letting him know that he should not be doing that without getting prior approval. Collins also told him that no matter what the person's position with Purolator, if he violated the rules or regulations he could be written up whether he was a supervisor or an hourly employee. Because Powers was concerned about the document hurting his record, "I informed him at that time that it would not even be placed in his record." (Tr. 3622.)

Collins stated they then started talking about the supervisory issue and Powers asked what the situation was as far as his being a supervisor. Collins told him at the time that he did not know whether he was a supervisor, that Purolator had to await the results of the representation hearing before the National Labor Relations Board, and until those hearings were finalized, they (the MSAs) could be for or against the Union, they could do anything they wanted to (Tr. 3623):

... but as far as I was concerned, "they could take a mile-long hike."

In response to a question as to what happened to the matter-of-record written up on Lexie Powers, Collins testified that he threw his copy in the trashcan but does not know what Powers did with his copy.<sup>37</sup> Collins advised Powers that he was throwing his copy in the trashcan.

With respect to paragraph 9(b) of the complaint, I see no need to detail the testimony of Manufacturing Manager John Semmes and Supervisor Mininno, including the fact that supervision advised the entire department, both MSAs and hourly employees, that hourly employees were not to go into the cardex area.<sup>38</sup>

I find no violation because there is no indication that this incident occurred because of the union activities of Powers. Moreover, even assuming the document issued was a warning, Employee Relations Manager Collins in effect countermanded and destroyed it. Accordingly, I shall dismiss paragraph 9(b) of the complaint.

Powers' version of Collins' mile-long hike statement is ambiguous. The only explanation or theory of the allegation by CGC appears in his oral argument on page 7 (G.C. Exh. 17) where he states, "Prior to the representa-

<sup>36</sup> The record reflects that in the Purolator practice, a "matter of record" is the memorializing of an event and will not constitute a warning unless it is so designated.

<sup>37</sup> I presume that Powers' copy is the one identified by him at the prehearing hearing and received there as Pt. Exh. 1 (R. 570). It is dated January 9, 1980, and asserts that the incident occurred on January 8.

<sup>38</sup> To the extent that any resolution of the matter would be relevant as bearing on the credibility of Powers in other respects, I would credit the testimony of Respondent's witness on this point, including Supervisor Mininno and employee James Cashwell.

tion case hearing, Supervisor Collins told Powers that the Company would prove that MSA's [sic] were members of management and those who weren't supervisors would be fired." (Tr. 626.) Based on that position, it would appear that the General Counsel's position is that the logical interpretation of the statement by Collins is that MSAs who were found to be rank-and-file employees would, for some unspecified reason, be discharged. I do not credit Powers on this point and I do not accept his version. Instead, I accept the version described by Collins. While the version given by Collins is not itself a model of clarity, it seems that he was being a bit flippant, but not threatening. Accordingly, I also shall dismiss paragraph 8(e) of the complaint.

#### F. *The Individual Discharges*

##### 1. Katie Chavis fired December 6, 1979—no violation

Katie Chavis is 1 of the 10 employees who was discharged. She was the first of the 10 to be fired, and she had been employed over 3 years at the time of her December 6, 1979 discharge. She had just become active for the Union when she was fired for threatening employee Anna Williams with physical violence.<sup>39</sup> Following an investigation of the threat by Whit Collins, employee relations director, and John Semmes, manager of manufacturing, Chavis was fired. At the discharge, Chavis supposedly requested that Collins talk to witnesses MSA Leroy McCoy and employee Lawrence McLauren. Collins credibly denies the assertion but admits Chavis called the next day and gave him the names of McCoy and McLauren. Collins said he would talk to them if they came in. They did not do so at that time, but when McCoy did come in later on another matter Collins asked him about the incident. McCoy said he did not recall hearing anything one way or another. Neither McCoy nor McLauren was called as a witness by the General Counsel (or the Union).

The discharge was in accordance with past practice. Moreover, 5 months earlier, in July 1979, Chavis had been warned about using "abusive language" toward a relief operator (R. Exh. 11).

I find knowledge by Respondent of Chavis' union sympathies through MSA Ernestine Grisson. The morning before Chavis was fired, Grisson asked her whether Chavis had yet signed a card. Chavis said she was going to do so as soon as she got one (Tr. 322, 332). Grisson did not testify. I credit Chavis to the extent of this undenied testimony. Consequently, I find that Respondent violated Section 8(a)(1) of the Act through Grisson's interrogation of Chavis as alleged in paragraph 8(a) of the complaint. Even if Grisson were not a statutory supervisor, Respondent still is bound by her knowledge and conduct through her status as a management agent

<sup>39</sup> Chavis, as I find (in crediting the testimony of Williams and others), told Williams that "I am going to beat your ass" at the end of the shift. Chavis made this December 6 threat on two separate occasions without any provocation from Williams. It appears that Chavis was so motivated by a question Williams asked of Plant Manager Thies in a group meeting that morning. The question related to employees bothering other employees on a different line.

clothed with apparent authority as a member of management and to act for management. *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183 (5th Cir. 1977). (Employees could reasonably believe that supervisory trainee spoke on behalf of management under the circumstances.)

Manufacturing Manager John Semmes testified that Grisson recommended that Chavis be discharged over the threat. Both Semmes and Whit Collins, employee relations director, denied any knowledge of Chavis' union sympathies. I do not credit their denials. In any event, knowledge is imputed to Respondent through MSA Grisson, the statutory supervisor of Chavis.

Chavis testified that she is 5 feet 3 inches tall, 135 pounds, and considers herself "strong" (Tr. 370). In contrast, Williams, while 5 feet 4 inches tall, weighs only 108 pounds (Tr. 1840). Williams does not appear to be either strong or the fighting type. The record reflects that she was upset, tearful, and frightened by Chavis' threats. I find that Chavis' union activities and sympathies were not a motivating reason for her discharge. Accordingly, I shall dismiss complaint paragraph 10 as to Chavis.

##### 2. William B. Whitley

###### a. *The 8(a)(1) allegations*

###### (1) Introduction

At trial, CGC announced (Tr. 36) that Whitley would testify in support of complaint paragraphs 8(h), (i), (r), and (s). Two of these allegations were added by a trial amendment designated as the second amendment to the fourth consolidated complaint (G.C. Exh. 9). It appears that Whitley also testified in support of paragraph 8(g). The five paragraphs refer to dates in December 1979 and to alleged conduct of Distribution (Shipping) Supervisor Walter James Knox.

In paragraph 8(g), the General Counsel alleges that Respondent, through Supervisor Knox, violated Section 8(a)(1) of the Act by creating the impression among its employees that their union activities were under surveillance on or about the following dates: (1) December 3, 1979; (2) early part of December, and (3) third week of December.

Paragraph 8(h) alleges that Respondent interfered with employees' rights to freely engage in union activity by Knox "surreptitiously viewing its employees as they worked" in mid-December 1979.

By paragraph 8(i), the General Counsel alleges that Supervisor Knox, on the following dates, informed employees that they should not be so open about their union activities: (1) mid-December; (2) second week of December; and (3) latter part of December.

On December 2, 1979 (the earliest date of any complaint allegation) Knox, according to paragraph 8(r), allegedly "threatened an employee by telling said employee not to talk to first shift employees."

Shipping Supervisor Knox, per paragraph 8(s), allegedly prevented an employee from talking and associating with prounion employees on December 2, 1979.

(2) Paragraphs 8(g) and (r) dismissed as to December 2-3, 1979

Whitley testified that about 6:55 a.m. on Monday, December 3, 1979 (the same third shift at which Whitley displayed his union T-shirt for Knox to see), Supervisor Knox came to him and, in the presence of warehouseman John Heath and the rest of the crew, told them not to talk to anybody on first shift during the overlap because they were being watched by General Supervisor Pete Escobedo and First-Shift Supervisor William Johnson (Tr. 59-60).<sup>40</sup> According to Whitley, he had never received similar instructions previously. Besides naming John Heath, Whitley also named Lillie Henry as working that same shift. Heath did not testify, and when Henry testified she was not asked about the foregoing.

Respondent's somewhat different version discloses that in the days before early November 1979, General Supervisor Pete Escobedo noticed employees from the third shift talking to the first-shift employees during the 30-minute overlap period (Tr. 3311-3313).<sup>41</sup> To eliminate this interference with the first-shift's production work, Escobedo, at his regular monthly meeting with his supervisors on November 5, told Knox and the first-shift supervisors, Willie Johnson and Joe Wargo, that he wanted the interference stopped (Tr. 3313).

Knox denied telling any employees in early December that they were being watched by first-shift supervisors (Tr. 2160), but stated that he had been "preaching" to his crew frequently that they should clean up during the overlap and *not talk* to the other employees because General Supervisor Escobedo "makes his rounds every morning at 7:00 o'clock." (Tr. 261.) Respondent offered no documentary evidence, such as memos or notices, to substantiate its version.

A document Respondent did offer through Supervisor Knox is the memo (R. Exh. 64) which he prepared about November 5 or 6 (presumably right after the November 5 meeting with General Supervisor Escobedo) and distributed to employees pertaining to a new system for rotating job functions (Tr. 2125). Logic compels me to conclude that if Escobedo had just finished making a point to his supervisors about the third shift distracting the first shift in the overlap period, Knox would have said something about it in this memo.<sup>42</sup> He did not. The only reference to the overlap is:

2. Stock selectors . . . . When seven o'clock arrive[s] *clean up* and stock the gas filter rack. [Emphasis added.]

<sup>40</sup> Complaint pars. 8(g) and (r), apparently.

<sup>41</sup> As explained by Knox (Tr. 2126) and Escobedo (Tr. 3312), the overlap period occurs between 7 and 7:30 a.m. The third shift is cleaning up for the last 30 minutes of its shift while the first shift starts its normal production at 7 a.m. Thus, the two groups are present for this 30-minute overlap.

There is no evidence that the employees were discussing the Union during the overlap.

<sup>42</sup> Although Knox testified that the memo was related to a meeting he held in late October with his crew, it is clear that the memo itself was not prepared until after Escobedo supposedly had mentioned the overlap problem (Tr. 2125).

[There] will be no sitting down in the operation of these jobs.

I conclude that Escobedo made no special point at this November 5 meeting about talking during the overlap, and that Knox did not either in November or December.<sup>43</sup> I therefore credit Whitley's uncorroborated testimony,<sup>44</sup> and I reject Knox's denial and Respondent's arguments.

Whitley, who had transferred to Knox's warehouse crew in about May 1979, was a problem employee whom Knox attempted to salvage. In this connection, Knox tended to protect Whitley from the consequences of his mistakes. This reached the point after a few weeks that MSA (DSA) Mary Ellen Benedict, Knox's supervisory assistant, told Knox that employee morale was declining because the crew felt Knox was showing favoritism to Whitley (Tr. 2122). Employee Sara English told Knox the same (Tr. 2289). The point of this diversion is to show another reason for my crediting Whitley's version.

I am persuaded that Knox was not interested in threatening Whitley about the latter's union activities,<sup>45</sup> and I find that Knox was seeking to protect Whitley and the others from possible adverse action by Respondent for failing to do their work. Thus, I find that Knox's early morning statements to Whitley and the others<sup>46</sup> were neither made for the purpose of interfering nor had the objective tendency to interfere with the Section 7 rights of employees. Whitley testified on cross-examination that Knox never threatened him about the Union or asked him any questions about it (Tr. 153). It must be remembered that Whitley was openly wearing his union T-shirt, and that this was the first night for anyone to do so.<sup>47</sup> The natural consequence of this event would be to spark conversation among employees. In fact, Whitley asserts that Knox said he was concerned they would do so and wanted to protect them (Tr. 149). A reasonably prudent employee would recognize that Knox was simply telling the employees that they must continue to do their jobs, for supervision would be observing them to see that their

<sup>43</sup> This is not to say that Knox had never cautioned his crew against too much talking during the overlap. However, I find that any such caution was not based on the talking, but on instructing his crew to be sure that they cleaned the area before Escobedo came through checking it. Indeed, Knox stated that in the October 1979 meeting he had with his crew, both McKibben and Escobedo were present and complained of the area being left messy after the overlap period (Tr. 2124).

<sup>44</sup> The General Counsel is not required to produce corroborating testimony, even where such is available, where the administrative law judge credits the one witness whom the General Counsel called as against opposing testimony. *C.P. & W. Printing Ink Co.*, 238 NLRB 1483 (1978).

<sup>45</sup> The evidence reflects that Knox and Whitley were very friendly, with almost a father-son relationship, until this changed, according to Whitley, about 3 or 4 days after Whitley announced his union organizing function (Tr. 176-179).

<sup>46</sup> Whitley admitted that both John Heath and Lillie Henry also expressed their support of the Union to Knox that night (Tr. 135). Knox could well have concluded that the employees might tend to discuss the Union rather than to work during the overlap. Indeed, Whitley admits that at the time of the announcement by him, Heath and Henry, Knox told them that he did not care so long as they did their work (Tr. 135).

<sup>47</sup> While the testimony of Knox indicates that there had been union campaigns in the past, it appears that there had not been one recently.

union activities did not interfere with their work.<sup>48</sup> Concluding that Knox neither created the impression of surveillance nor prevented employees from talking about the Union on December 2, 1979, I shall dismiss paragraph 8(g), as to the date of December 3, 1979, and paragraph 8(r).

(3) Paragraph 8(s) dismissed

I do not credit Whitley's testimony that during the third shift which commenced December 2, 1979, Knox told him that he was going to keep Whitley, John Heath, and Lillie Henry separated for their protection or that he did in fact separate them (Tr. 60-61). Even if this ambiguous statement, apparently the subject of paragraph 8(s), were credited, Knox, whom I credit in this respect, testified that the small crew must work together. The crew consisted of five employees not counting MSA Mary Ellen Benedict (Tr. 104). Indeed, as we shall see below in discussing the discharge of Whitley, the record reflects that at times thereafter they did work together. Therefore, I shall dismiss paragraph 8(s).<sup>49</sup>

(4) Paragraph 8(h) dismissed

CGC has not pointed to any evidence, and I find none, supporting the alleged "surreptitiously viewing" conduct of Supervisor Knox in mid-December 1979. Accordingly, I shall dismiss paragraph 8(h).

(5) "They are watching you"—violation as to December 9, 1979

Respecting the other allegations in paragraph 8(g), Whitley testified that on December 9, Knox told him that the first-shift MSAs were watching him and the third-shift employees (Tr. 61). Whitley never described any incidents of this.<sup>50</sup> Knox denied telling employees they were being watched by first-shift supervisors (Tr. 2160). Based on my close observance of the witnesses, and on all of the record evidence, I credit Whitley. I therefore find that Respondent unlawfully created the impression of surveillance as to the "early part of December 1979" allegation in paragraph 8(g).

As CGC has pointed to no evidence, and I have found none, in support of the "Third week of December 1979" allegation regarding the creation of impression of surveillance (G.C. Exh. 9), I shall dismiss that portion of paragraph 8(g).

<sup>48</sup> "[E]mployees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." *Chemtronics, Inc.*, 236 NLRB 178 (1978).

<sup>49</sup> Whitley admitted that at the time of the trial both John Heath and Lillie Henry were still employed at Purolator (Tr. 151). Knox confirmed this along with the fact that Allen Hooker, another supporter of the Union, was still employed (Tr. 2287). While this circumstance does not prove that Whitley was not unlawfully fired, it is not a totally irrelevant fact.

<sup>50</sup> At one point, Whitley started to report that employee Hooker told him something about MSA Mary Ellen Benedict. Upon objection to hearsay by Respondent, CGC elected not to elicit the testimony for a limited purpose and stated that he would call Hooker as a witness (Tr. 75). Hooker was never called.

(6) "Don't be so open"—violation

Paragraph 8(i) sets out three events in December when Knox told employees (Whitley) not be so open about their union activities. I credit Whitley's version that this did occur on two separate occasions around mid- (and second week of) December 1979 (Tr. 62-64, 149, 151), and I do not credit the rather complicated version set forth by Knox.<sup>51</sup>

Unlike Knox's protective, work-related cautions to his employees on the morning of December 3, the remarks of "You shouldn't be so open," in conjunction with the December 9 "They are watching you" (Tr. 61, 151), are coercive. Particularly is this so in light of Whitley's credited testimony that about two nights after the "Don't be so open" admonition, Knox, in the cafeteria, told Whitley that he "should be more like Allen [Hooker] and be cool, not be so open with [Whitley's] union activity, be cool." (Tr. 64a.) I find these statements to be within the rule of *PPG Industries*, 251 NLRB 1146 (1980). Thus, notwithstanding that Whitley was a visibly active union supporter, the remarks are coercive because they tend to convey the message that Purolator would be so displeased with his open activity as possibly to retaliate against him. Accordingly, I find that by the conduct alleged in paragraph 8(i), Respondent violated Section 8(a)(1) of the Act.

b. Whitley fired

Background

Hired by Purolator in November 1978, Whitley was assigned to work as a case line operator (Tr. 101). As already noted, in early 1979 Whitley penned a letter of five pages "To Whom It May Concern" highly critical of wages and working conditions at Purolator. It is undisputed that in the subsequent meeting he had with management officials, Whitley expressed the opinion that Purolator needed a union.

Notwithstanding Whitley's bold expressions at the early 1979 meeting, and particularly his opinion about the need of a union, he admitted that he thereafter continued in his line operator job without receiving any warnings (Tr. 102). Indeed, when a better position opened on the third shift in warehouse/shipping (distribution center) Whitley bid on it and was awarded the job with a pay increase (Tr. 103).<sup>52</sup> MSA Mary Ellen Benedict testified that Whitley came to the warehouse in May 1979 (Tr. 2297), and Warehouse Supervisor Walter James Knox placed the date as May 7 (Tr. 2170). Knox credibly testified that he gave Whitley an informal 90-day probation/training period since Whitley, except for

<sup>51</sup> As CGC pointed to no evidence supporting such during the "latter" part of December 1979, I shall deem that allegation abandoned and I shall dismiss par. 8(i) as to that date. It is not incumbent on me to find whatever evidence, if any, CGC relies on in support of this allegation. *Medical Mutual of Cleveland*, 248 NLRB 441, 444 fn. 3 (1980).

<sup>52</sup> Personnel Manager Frank Grady Jr. explained that Purolator utilizes a posting/bidding procedure on certain jobs and confirmed that Whitley was awarded the shipping job as a result of the bidding procedure (Tr. 3448).

driving a forklift, was inexperienced in the warehouse procedures (Tr. 2258).

Regardless of how satisfactory Whitley was in working as an assembly line operator for Helga Powell,<sup>53</sup> he soon demonstrated to supervisors and employees alike on Knox's crew that he made too many mistakes. Reference already has been made to the complaints of favoritism members of Knox's crew expressed to him. Knox testified that he was concerned because shipping errors reflect adversely on him as a supervisor (Tr. 2291). Knox spoke to Whitley about these matters around June (a "month or two" after Whitley came to the warehouse), and Whitley asked for another chance (Tr. 2291).<sup>54</sup> Knox acceded at first because he was trying to help Whitley (Tr. 2295).

It did not help. Although Knox testified that Whitley was sharp enough to do the work, he was erratic—one week good, the next bad. "I just don't know where his mind was." (Tr. 2292.) Whitley, it appears, lacked the mental discipline to handle the job consistently without errors.<sup>55</sup> Whitley admitted that at various times Knox told the employees it was important not to make errors (Tr. 108).

From exhibits introduced, it appears that in about June 1979, Knox and MSA Benedict began making notations of errors and of informal counselings with Whitley and other employees over errors (R. Exhs. 65, 66, 67, 68, and 69). Whitley's notations are no greater than the other employees until September 1979 when the frequency noticeably picks up. Actually, the notation exhibits clearly are not complete records, for Whitley's initial warning (R. Exh. 2), relating to October 25, is not listed on the calendar Knox maintained on him (R. Exh. 69).

In the third week of October 1979, Knox held a meeting with his employees and told them that they would have to reduce their errors or face disciplinary action (Tr. 2127). He told them that such action could be forthcoming over gross errors; time consuming and consecutive mistakes; or numerous mistakes in one night's work (Tr. 2196). Whitley conceded that at one meeting Knox did say the employees had to "tighten up" (Tr. 123).

In November Knox spoke to his employees about a new system of rotating employees between the jobs (such as stocker, caller, stamper). He memorialized this by a memo he personally typed and distributed on either November 5 or 6, 1979 (Tr. 2125). The meeting was held

<sup>53</sup> Whitley was working for Powell at the time he bid. As Powell is a supervisor over components, it is not clear whether the "case line operator" job Whitley started on is the same one he transferred from when he left Powell. Finally, while there is some question in the record of just how satisfactory an employee Whitley had been for Powell (Tr. 2175), no evidence was presented that he was less than satisfactory. Knox accepted Whitley even though Powell warned him that Whitley was "a lot of mouth" and talked "jive." Knox testified that he figured he could work around that (Tr. 174).

<sup>54</sup> It seems that Whitley would seek to lay the blame on others, such as the truckdrivers, for his mistakes. He then would importune Knox with "Come on, Brother, give me one more time."

<sup>55</sup> Knox's shipping crew worked from bills of lading in loading customers' trucks with different types and brands of filters. The record contains several "past practice" warnings to different employees about loading mistakes which cost time and good customer relations, and Respondent filled the record ad nauseam with "past practice" warnings for poor performance in general.

the same night. The stated objective was "To rotate employees into new jobs so that each will become more efficient Distribution operators." Knox ended the memo by stating that it would go into effect "Nov. 7, 1979 on 3rd shift."

Knox testified that he devised the rotation plan, in part, to overcome the frequent errors and to motivate the employees to learn all the jobs (Tr. 2179-2180). In the first week of the rotation there were more errors, but then the employees improved and Knox felt that the rotation plan was a success (Tr. 2181).<sup>56</sup>

### c. Whitley's four warnings

#### (1) First warning—event of October 25, 1979

Around the first of November, Whitley received his first warning for "Poor Performance (Errors in shipments)." It was a "verbal" warning recorded in writing (R. Exh. 2). Whitley signed his acknowledgement of receipt. The text of the warning reflects that he made numerous errors pulling stock for five bills of lading.<sup>57</sup> The last sentence of the text states:

Reoccurrence [sic] of this nature could result in more severe disciplinary action.

The first warning predates Respondent's first notice to Whitley's union activities by about a month. Personnel Manager Grady testified that Respondent utilizes a progressive disciplinary system (Tr. 3335, 3442, 3446). This number and kind of warnings depend on the severity of the offense (Tr. 3343). It appears that poor job performance (not expressly listed on Respondent's plant rules, or codes of conduct) receives the four-step procedure of: verbal warning; written warning; suspension or final written warning in lieu of suspension; discharge.<sup>58</sup> Grady explained that the four events must be for the same general infraction (Tr. 3470). While the age of a warning is considered, warnings (other than for poor attendance) have no expiration date (Tr. 3443).

#### 2. Second warning—event of December 3, 1979

On December 7, Whitley signed his acknowledgement of a written warning for "Poor Performance (Errors in Shipments)." (R. Exh. 3.) The text of the warning reflects that on the night of December 3, 1979, Whitley incorrectly stamped six cartons which were then loaded on a truck. According to Knox, whom I credit, Whitley noticed his error (Tr. 2136, 2263, 2293). The text of the warning, as with the initial warning, reminds Whitley

<sup>56</sup> The testimony of Knox is a bit confusing as to whether the rotation plan was implemented before or after his caution of possible disciplinary action. On cross-examination at one point he indicated the rotation plan issued first (Tr. 2177). However, the sequence given above seems reasonably accurate.

<sup>57</sup> Whitley testified that Knox did not show him the errors but just told him about them and that he, Whitley, could not recall making the errors (Tr. 174).

<sup>58</sup> This system appears as part of a written code of conduct (R. Exh. 113) which Personnel Manager Grady testified has been posted for years (Tr. 3344, 3351, 3439).

that a reoccurrence could result in "more severe disciplinary action."

Whitley testified that when Knox informed him he had made the mistakes, and he told Knox that he had been "sabotaged." (Tr. 175).<sup>59</sup>

I credit the testimony of Knox and find that Whitley made the stamping error which caused a loss of time for unloading and reloading (partially at least) a truck to correct the error; that Knox considered this a "gross" mistake subject to an independent warning; and that the warning was well within Respondent's overall past practice.<sup>60</sup> I find no unlawful motive regarding this second warning.<sup>61</sup>

### 3. Third warning—event of December 18, 1979

Whitley's third warning (R. Exh. 70) relates to the evening of December 18 when he served as a caller. Although he had performed this function briefly with assistance at various times previously, I credit Whitley's testimony (Tr. 155) and that of Lillie Henry (Tr. 549) that this was the very first time Whitley had full responsibility for the job. As the title suggests, it was Whitley's job that night to call out the items specified on the bills of lading. Two stock pullers would then throw the items on a conveyor belt and another employee would stamp the items before they reached the truck for loading. MSA (DSA) Benedict previously had usually performed as "caller," but on this night Knox told the crew that Benedict was his assistant and would not do the work anymore (Tr. 167, Whitley).

The warning, which Whitley refused to sign (and such refusal was duly noted on the warning by Knox) charges "Unsatisfactory Performance (Errors in Shipments) In Lieu of Three Days Off—Final Written Warning." The relevant text of the warning states:

On the night of December 18, 1979, Whitley made numerous mistakes on bills that He call[ed] to be loaded on Carrier from the conveyor line . . . .

It is undisputed that a total of about five mistakes were made by Whitley.<sup>62</sup> Also undisputed is the fact that the

<sup>59</sup> I credit Knox that Whitley would never outright admit to a mistake; that he would either say he did not see how he could have made the mistake or attempt to blame someone else.

<sup>60</sup> As for Knox's own past practice, I conclude that he apparently reacted over the years whenever errors became too numerous and he became concerned that he was being put in a bad light before his superiors. Thus, his past warnings seem to come in bunches. For example, he issued three warnings on May 4, 1978, to three different employees for unrelated events (R. Exhs. 74, 76, and 77). He issued four others in October 1974 to four employees (R. Exhs. 45, 50, 56, and 61; one incident involved two employees). In October 1979, he began his current crack-down.

<sup>61</sup> Respondent acknowledges the need of this inquiry at p. 26 of its brief: "Because Whitley was fired as a result of a step procedure in which the fourth warning resulted in termination, each warning must be examined to determine if it was tainted by Whitley's union activities." By December 7, of course, Respondent was well aware that Whitley was organizing for the Union.

<sup>62</sup> The date of December 18 is a bit confusing. I find that the shift started at 11 p.m. the night of Monday, December 17. Management officials signed during the day of Tuesday, December 18. Knox testified that the shift which begins at 11 p.m. is dated as the following day (Tr. 2259).

employees caught and corrected three of the mistakes, but on two others the employees had to "go into the truck." That is, they had to take the time to go into the truck and unload or do whatever it takes to locate and correct the problem (Tr. 543, Henry). According to Henry, whom I credit, going into the truck on these two occasions only took 5 to 10 minutes each time (Tr. 544).

Conflicts in the evidence at this point, however, are substantial, and it seems that none of the witnesses testified with precision and clarity. It is clear that DSA Benedict gave some notes concerning Whitley's mistakes to Knox when the crew finished loading the truck in question. Whitley's testimony suggests that Benedict spent her entire time watching him. Benedict testified that she worked around the line (Tr. 2305). In the absence of testimony on this point by other crewmembers, I do not credit Whitley that Benedict made any unusual effort to observe Whitley.

Knox thereafter, in the dock area, asked Whitley about the mistakes. Based on Benedict's notes, Knox thought Whitley had gone into the truck five times (meaning, usually, a substantial loss of time). Whitley explained that they only had to go in twice (saying once initially), with no loss of time; that the other mistakes had been caught and corrected; and that it was his first time to do the entire calling anyhow.

Knox said he would check out the matter on how many trips had been made into the truck, but emphasized again that the event involved numerous errors which required time to correct. Still later that same shift, Knox spoke to Benedict who confirmed that only two of the errors required "going into the truck" (Tr. 2265).<sup>63</sup> At that point Knox decided that the numerous mistakes required a warning which he typed himself (Tr. 2267) and, at 7 a.m. on December 18 presented to Distribution Manager William E. McKibben who then signed (Tr. 2268). McKibben told Knox to present it to Whitley before sending it to the personnel department. Moments later in the cafeteria (where Knox handled such matters, Tr. 2155, 2206), Knox presented the warning to Whitley who refused to sign it on the basis, in essence, that it was unjustified (Tr. 64-66).

The foregoing sequence appears to be the most reasonable that a synthesis of the testimony can produce.

A significant credibility issue exists on the question of whether a couple of nights later Knox checked with Lillie Henry regarding Whitley's mistakes and was told by her that the crew had "gone into the truck" only twice the night Whitley received the warning. According to Henry, Knox said that he thought they had gone in more than twice, but that now he would "take care of the write up" (Tr. 547). According to Whitley, the night after he received the warning, Knox told him to "forget about what happened last night" that he had checked into the matter and "found out different" and "Don't

<sup>63</sup> Benedict was not asked during her testimony to corroborate this point. Indeed, her description of her involvement suggests that she heard nothing further about the incident after she turned over her notes to Knox and saw and heard him talk to Whitley in the dock area (Tr. 2307-2308). However, it is logical that Knox would have later rechecked with his DSA on the point.

worry about the write-up.”<sup>64</sup> Whitley asked if that meant it would not go to the office, and Knox supposedly replied, “No, don’t worry about it.” (Tr. 66.) Personnel Manager Grady testified that in the January 3, 1980 termination interview, Whitley alluded to this asserted statement of Knox (Tr. 3335).

During his direct testimony, Knox was not asked about the Whitley statement and, of course, did not deny it. When cross-examined by CGC concerning Henry’s statement, Knox at one point did not flatly deny it, saying, “I don’t recall ever talking to her about mistakes that Whitley made.” (Tr. 2230.)<sup>65</sup> Earlier on cross-examination, however, he testified, “I didn’t have a conversation with Ms. Henry.” (Tr. 2202.)

I find that Knox *did* make these assertions even though the inherent probabilities of the situation would suggest otherwise. That is, the warning had already been processed through management’s ranks by the time Knox made these remarks to Whitley and Henry. Nevertheless, I make this finding particularly because I was favorably impressed by the demeanor of Henry, the consistency in Whitley’s position (as corroborated by Grady) and the absence of testimony on the key point by Knox.

Notwithstanding my finding that Knox made these assertions, the testimony of Whitley and Henry shows only that Knox did not have the warning voided. Such a failure gives rise to several inferences, only one of which is that management, in order to discriminate against Whitley, denied a (theoretical) request by Knox to cancel the warning. This supposition involves a prohibited pyramiding of inferences (i.e., that Knox did so request; that management did refuse; and refused for the purpose of discriminating). The basic fact remains that Whitley made several mistakes on this occasion and a warning was issued and placed in his personnel folder. I therefore find that the General Counsel has failed to demonstrate that Whitley’s union activities were a motivating reason for Respondent issuing the December 18, 1979 warning to him.

#### 4. Fourth warning—event of December 29, 1979

This fourth event led to Whitley’s discharge. The warning, for unsatisfactory performance (errors in shipping), states that the action issued is “Termination” (G.C. Exh. 71). Whitley claims he was never shown this warning or told about it in advance. I find that Knox told him he would get a “write-up,” but I further find that Knox never presented it to Whitley. The stated “Reason for Action” is:

On the night of December 29, 1979, Mr. Whitley was instructed by his supervisor to load full pallets on Carrier Trailer (Smith Transfer). One pallet of AFP 91’s was left off on B/L #24045. The pallet was noticed on the dock before the carrier pulled

out. This would have caused the customer to be short 21 cartons on his shipment. Mr. Whitley received his final written warning for similar errors on December 18, 1979 and due to reoccurrence of these errors after a final written warning, termination is recommended at this time.

The signatures of Knox, McKibben, and Personnel Manager Grady are dated January 2, 1980. DSA Benedict’s signature is undated. General Supervisor Escobedo’s signature is dated January 3, 1980. December 28, 1979, fell on Saturday.

On the December 29 shift, John Heath’s job was to stamp the pallets with the correct labels and Whitley’s job was to load the pallets on the trucks. James Knox testified that on the night in question, he was standing at the counter doing paperwork when Whitley came running in. Whitley told Knox that he thought he had left a whole pallet of material off a truck. Knox jumped in his car and attempted to chase the truckdriver down. By flashing his lights, Knox finally got the driver to stop. Knox explained what Whitley had told him and asked the driver if he was missing any pallets. The driver replied that he had everything. By this time, Knox was extremely upset at having been sent on a wild-goose chase. When he got back to the plant, Whitley walked up to him with a big grin on his face. Knox then told him in no uncertain terms that he and Heath *would be disciplined* if they ever left pallets off a truck (Tr. 2143-2144). Heath did not testify and Whitley was not called to rebut this testimony. I credit the foregoing testimony of Knox.

Later that evening it is undisputed that Heath did not stamp a pallet and that Whitley did not load it on the truck. DSA Benedict discovered the errors (not stamped and not loaded). Fortunately, the truck had not left the premises and was loading at another dock some distance away. Before the truck left the premises, the pallet got stamped and loaded on the truck.

According to Whitley, when Knox (on this occasion) told him the pallets had not been loaded they both went and inspected them and together discovered that they were not stamped. DSA Benedict added, “He is right, these pallets aren’t stamped, he can’t put them on the truck” (Tr. 68). Whitley testified that he could not perform his job until the stamper performed his (Tr. 69).

Q. [By Mr. Connor] What else happened next?

A. Just everything went cool, it weren’t my fault.

Q. Did you ever hear anything regarding that incident?

A. Not until I got terminated.

Knox, whom I credit, testified that Whitley attempted to absolve himself by saying, “John didn’t stamp it, John didn’t stamp it,” but that he had previously told him it was a joint responsibility (Tr. 2147). Whitley admitted he was obligated to see that the pallets get loaded (Tr. 171). He simply sought to excuse his mistake on the basis that the pallet had not been stamped. Knox told both of them they would receive a “writeup” for this mistake (Tr. 2147). The record reflects that the error caused both Knox and DSA Benedict to lose time on the mistake.

<sup>64</sup> According to Whitley, when Knox presented him the warning to sign and Whitley refused, Knox said he would check into the assertion by Whitley that he had been into the truck only twice rather than five times (Tr. 66). I do not credit this version of the sequence of events.

<sup>65</sup> His testimony that he does not talk to other employees about disciplinary action he is giving somebody else is beside the point (Tr. 2202, 2229).

Moreover, while this mistake was caught before the carrier left, Knox could be justified in fearing that the next time it would not be. Knox credibly testified that such "gross mistakes" caused him concern for the security of his job as supervisor (Tr. 2201). Heath's warning (R. Exh. 72) is dated the same as Whitley's.<sup>66</sup>

As with much of the rest of this case, Respondent introduced evidence of a past practice of warnings on this very point. In a prior instance, John Heath and Sara English received and signed warnings on December 7, 1979, for a situation where English was the stamper and Heath was the loader.<sup>67</sup> They failed to load four pallets and the shipment went to the customer without the four pallets. For this joint responsibility mistake Knox warned them (Tr. 2152).

Although Knox testified that he presented the termination warning to Whitley in the cafeteria and that the latter refused to sign it (Tr. 2206), Whitley, as earlier noted, testified that he heard nothing more about the incident until he was fired in the office by Personnel Manager Grady on Wednesday, January 3, 1980 (Tr. 29-41, 69-70). Knox was unable to pinpoint whether it was January 2 or 3, 1980, that he asked Whitley to sign the warning (Tr. 2208, 2214-2217, 2284, 2287). Whitley testified he worked one day into the new year (Tr. 172). He further testified that he did not work the evening of Tuesday, January 1, 1980. If, in fact, he meant he did not work the New Year's day shift (which would have begun at 11 p.m., Monday, December 31), then he would have reported for work on January 1, 1980, 11 p.m. Thus, Knox could have presented the warning to Whitley shortly after 7 a.m. on Tuesday, January 2, 1980.

In fact, I find that Knox *never* presented the fourth warning to Whitley to sign because it was not really a warning but a recommendation of discharge.<sup>68</sup> Knox noted on Heath's warning that Heath refused to sign it. Had Whitley so refused, I am confident that Knox would have noted that on the termination recommendation. Because of the passage of time between the event and the testimony of Knox before me on September 23, 1980, over 9 months later, and in view of the several events

<sup>66</sup> The text of the reason states:

This is a written warning. On the night of 12/29/79, John Heath was instructed to make sure all full pallets were stamped on B/L #24045. He failed to comply with instructions resulting in pallet of AFP-91 not being loaded on carrier. The pallet was noticed on dock before carrier left. This would have caused the customer to be short 21 cartons on shipments.

<sup>67</sup> The warnings are in evidence for English (R. Exh. 52) and Heath (R. Exh. 73). I have considered, and rejected, the possibility that these warnings were issued to English and Heath because they, along with Whitley, announced their support of the Union to Knox the night of December 2, 1979. The timing, in the absence of other evidence, appears to be coincidental, for I assume that a few days expired between the November 30, 1979 shipment date and the time the customer received the shipment, discovered the error (even if the same time of receipt of shipment), and notified Respondent. Nothing was developed on the record to show that the lapse of a week was for anything other than normal business requirements.

<sup>68</sup> It is almost a matter for administrative notice that the purpose employers have employees sign warning documents is only to acknowledge receipt of notice—not to confess guilt. Therefore, since Whitley would be terminated if Knox's recommendation were accepted, there would be no point in having Whitley acknowledge receipt before the termination interview. At that point there is no relationship to foster, and no lesson to be taught, for the document recommends discharge.

and dates involved, I do not find that Knox deliberately attempted to mislead me by testifying he actually presented the document to Whitley.

Knox testified that he has recommended that only one other employee, Mosco McLean, be discharged for poor performance (Tr. 2251-2252, 2273). McLean was fired on October 14, 1977, on the occasion of his third warning. In that incident McLean, contrary to prior instructions, permitted a truckdriver to take three wooden pallets along with a load of less than 40 cartons per pallet. The proper procedure called for the pallet to be shipped with the cartons only when there were 40 or more cartons (R. Exhs. 57 and 156 ddd).

On Wednesday, January 2, 1980, Personnel Manager Grady and Distribution Manager McKibben reviewed Whitley's personnel file and discussed Knox's recommendation that Whitley be discharged. They then discussed the matter with Employee Relations Manager Whit Collins and the group decided that Whitley should be discharged because of poor performance (Tr. 3333, Grady). Grady telephoned Whitley and told him not to report to work that night but to come see him the next morning (Tr. 70, 3334).

#### d. Termination conference

On the following day, Thursday, January 3, 1980, Grady, in the presence of McKibben, told Whitley he had bad news for him. He testified that he briefly reviewed the prior warnings, including the fourth one. Whitley became upset and protested that Knox had said the third one would not be placed in his file. Whitley also said he was not the only employee involved in the fourth incident (Tr. 3335-3336, Grady). As to Whitley's remark about the third warning, Grady testified that he told Whitley the document contained the signatures of Knox and McKibben so he presumed it to be valid. Grady testified that as the meeting was not to investigate anything, he moved on and informed Whitley that he was terminated for poor performance (Tr. 3336, 3452).

Whitley's version of the interview differs to the extent that he asserts that Grady, in referring to the four "reprimands," did not describe them and refused Whitley's request to let him see them (Tr. 41, 70). Grady said they were "on file" but a second time declined Whitley's inspection request. I find that Whitley did ask to see the reprimands, and that Grady denied this request, but I further find that Grady did briefly describe the reprimands as previously noted. Indeed, it was during this process that Whitley voiced his surprise that the third warning was on file and stated that Knox had said it would not be placed in his file (Tr. 3335).

During cross-examination by counsel for the Union, Grady testified that Whitley was not demoted back into manufacturing because he had demonstrated that he had the ability to perform the work in the distribution center (Tr. 3450). Grady explained that while discriminatee Louise Puckett had been demoted from a bid job and permitted to return to a line assembly job, she had been demoted because her poor attendance was critical to the bid job (Tr. 3449). I see no basic difference between the situations of Puckett and Whitley, yet the former was

moved to a lesser position while the latter was fired. On the other hand, both were union supporters. Although Knox testified that other warehouse employees did not work out were returned to plant jobs, he gave no details or clarification. The most that can be said is that Respondent apparently has done both—fired warehouse employees, but transferred others. I am unable to conclude that the different handling of these cases demonstrates an unlawful disparity as to Whitley.

*e. Conclusion—no violation*

As the evidence reflects that Whitley made the mistakes for which he was warned, and that the warnings are consistent with past practice, I find that the General Counsel has failed to demonstrate that Whitley's union activities were a motivating reason for his January 3, 1980 discharge. I therefore shall dismiss complaint paragraph 10 as to William D. Whitley.

3. Marilyn A. Raeford

*a. Introduction*

Marilyn A. Raeford worked at Purolator about 13 months before her discharge on January 28, 1980. Three complaint allegations relate to Raeford. The first is found in paragraph 9(d) which alleges that in the middle of December 1979, Respondent assigned her to more onerous and less desirable work. Paragraph 9(c) alleges that Respondent suspended Raeford for 3 days beginning January 3, 1980, in violation of Section 8(a)(3) of the Act, and paragraph 10 of the complaint alleges that Respondent unlawfully discharged Raeford on January 28, 1980.

Raeford testified that beginning about December 2, 1979, she began attending union meetings and soliciting employees to sign union authorization cards (Tr. 406-407). She further testified that in December 1979 she told her supervisor, George Hyde, that she was a "card pusher." Hyde responded "That's your right. You have a right to do what you want to." (Tr. 408.) In his own testimony, Supervisor Hyde confirmed this testimony and pinpointed the date as being Monday, December 3, 1979 (Tr. 3253-3254). Leonard Barber, Raeford's supervisor at the time of her discharge on January 28, testified that he had seen Raeford wear a union shirt (Tr. 2988).

At page 45 of its brief, Respondent states, "Based on the foregoing testimony, Respondent admits that it had knowledge that Raeford was a union supporter. The General Counsel, however, must do more than show that Respondent was aware that Raeford was a union supporter. He must also show that Raeford's union activities were a motivating factor in her discharge." Respondent further points out in its brief that there are no other allegations in the complaint that Respondent ever threatened or interrogated Raeford concerning her union activities, and Respondent emphasizes that Supervisor Hyde's immediate response to her announcement that she was active for the Union was to tell her that she had the right to be.

*b. More onerous work—paragraph 9(d) violation*

Raeford testified that 1 week after she told Hyde that she was a card pusher, Hyde began moving her around to different jobs. Among the places to which she was moved were the blister pack<sup>69</sup> area, the warehouse and the front of the line (Tr. 409). Raeford testified that until these reassignments began, she had performed as a gasket girl who had been utilized to train new employees (Tr. 409). In fact, Raeford testified in about September or October 1979 Supervisor Hyde told her that he would move everybody else off the line before he moved her because she was the fastest employee he had on the line (Tr. 408). Raeford testified that when she worked at the gasket table she was able to do the work sitting, but that in working at the blister pack and in other operations she had to stand (Tr. 477-478). Work in blister pack requires bending to pick up boxes (Tr. 478).

Supervisor Hyde testified that Raeford actually was classified as an assembler.<sup>70</sup> The job that she performed most often was that of a gasket girl (Tr. 3239). Hyde further testified that about January 3, 1980, he did begin moving Raeford to other jobs (Tr. 3248), and that this was the first time he had moved her to a different job for some reason other than the fact that the company was running a filter which did not require a gasket (Tr. 3249).

Raeford admitted that she was a line worker and could be asked to do any job on the line (Tr. 429). Supervisor Hyde testified that on his oil line there are approximately 40 jobs which are assembler jobs and that Raeford and the other line workers can be asked to do any of them (Tr. 3239). He also explained that some of the filters Respondent manufactures do not require gaskets. When these kind of filters are being run, the employees who normally put on gaskets must be moved to other jobs on the line or to blister pack (Tr. 3240). Raeford confirmed that in the past when gasket girls had not been needed, she would move to various jobs on the oil line as well as to blister pack (Tr. 438). She testified that this occurred approximately once a week (Tr. 439-440). Thus, on the credited testimony of Hyde I find that Raeford was not moved to jobs she had never performed before, and I find she was not asked to do anything which was not part of her job description. Finally, I note that Brenda Young, taken out of order as Respondent's witness on this point after being called as a witness for the General Counsel, testified that as a gasket girl she would be sent to other jobs, such as blister pack section, when filters were being run which required no gaskets (Tr. 528).

Respondent also called employees Anna Williams, Sharion McCargo, and MSA Mary Frances Horton who testified that the other jobs on the oil line were no more

<sup>69</sup> Supervisor Stephen E. Shorter explained that the word "blister" derives from the fact a machine heat seals a plastic bubble, or blister, to a cardboard card which retailers use for displaying parts which are inside the blister (Tr. 8241).

<sup>70</sup> Although the transcript (Tr. 3239, L. 4) reflects that Hyde described her classification as "labor grade 8, Seam," it is apparent from the balance of the evidence that either he testified "labor grade 8 Assembler" or intended to testify "assembler." I so find. Accordingly, there is no need to correct the transcript as Respondent moves at p. 46, fn. 10 of its Br. I.

difficult than putting on gaskets. Supervisor Steve Shorter gave testimony, which I credit, that there is a constant movement of employees to the blister pack area, and that the jobs there are quite simple (Tr. 8241). While this testimony is no doubt true, it does not overcome the credited evidence of Raeford that work at the gasket table is still preferable to jobs elsewhere, such as in blister pack where there is much bending and stooping. Accordingly, I find that the gasket work is in fact more desirable work.

Hyde recalls that the first time he moved Raeford from the gasket table for a reason other than that gaskets were not being applied to filters which were not then being run was approximately 1 month after Raeford disclosed her sympathies concerning the Union (Tr. 3249). He was able to recall this date because when he did so move Raeford from the gasket table she refused to do the job that he assigned to her to perform (Tr. 3249). This refusal led to Raeford's suspension. Before treating the suspension itself, it is appropriate to consider the reason Hyde began moving Raeford in early January 1980.

Hyde testified that beginning as far back as September 1979 Raeford had approached him and asked that she be moved. She reported that she could not get along with her coworkers because she did not like them and they did not like her (Tr. 3245-3246). He testified that because Raeford was one of his best workers that he told her that if other employees were causing the problems, he would move them instead of her (Tr. 3246). Still Raeford asked to be moved, that last time being during the latter part of December shortly before Hyde actually decided to move her (Tr. 3246). Hyde explained that the reason he finally decided to move Raeford instead of someone else was that he discovered that it was Raeford who was causing the morale problems between her and the other workers (Tr. 3247). Prior to moving Raeford, Hyde spoke to MSA Kathy L. Foos and MSA Mona Brainard. They informed him that Raeford spent her time making faces at them and watching what other people were doing (Tr. 3247). Hyde also began making his own observations and discovered the same fact including that she was making faces at him after he walked by (Tr. 3246, 3299-13). Raeford was not called in rebuttal to deny these assertions. On the basis of these conversations and his own observations, Hyde concluded that it was Raeford who was causing the employees to dislike her (Tr. 3247).

Hyde also testified that during the latter part of 1979 the performance of the gasket girls began to drop, and this continually caused the line to stop (Tr. 3248, 3273). He observed that Raeford and employee Brenda Young had particularly declined in their performance (Tr. 3248). Whereas Raeford had originally been the fastest gasket girl, by December she had become the slowest (Tr. 3280-3281). During this period Hyde also talked to Brenda Young about her performance and told her that he had observed her working at about one half her normal speed. Young told Hyde that Marilyn Raeford and Louise Puckett were causing the problems (Tr. 3273, 3286). Based on all these facts, Hyde concluded that Raeford was creating problems in that her work performance had deteriorated drastically (Tr. 3289, 3299-

13). Therefore, around early January 1980, Hyde began asking Raeford to work on other jobs (Tr. 3249).

Earlier in this decision I rejected Hyde's testimony regarding his conversation with Brenda Young, and credited Young's version of the conversation, including his reference to Marilyn Raeford and Louise Puckett. Accordingly, I do not credit Hyde's testimony, and I find that around January 3, 1980, Hyde began moving Raeford to different jobs because of her union activities. Although complaint paragraph 9(d) refers to mid-December 1979, the litigated evidence establishes that the discriminatory conduct began around January 3, 1980. Accordingly, I find that beginning about January 3, 1980, Respondent assigned Marilyn A. Raeford to more onerous and less desirable work because of her activities on behalf of the Union.

*c. Suspended January 3, 1980—paragraph 9(c)  
violation*

Raeford testified that when she came to work on about January 3, 1980, MSA Kathy Foos told her that Supervisor Hyde wanted her to work in the "can box." (Tr. 410, 450, 482.) She testified that she had not done this job previously, that she has observed other employees perform it, and that it appeared to be difficult. However, she admitted on cross-examination that it is not as hard a job as putting on gaskets (Tr. 451). Working the "can box" simply means that the employee stands at a large box containing the empty metal shells of filters and lifts them out four at a time in each hand, for a total of eight, and places them on a conveyor line.

MSA Foos testified that when she told Raeford to work in the can box that Raeford stood there for a few minutes and turned around and walked away (Tr. 3001). Foos immediately paged Hyde and told him that Raeford had walked off the line (Tr. 3002). By coincidence, Hyde and General Supervisor Leon Turner were in the personnel department when Foos paged Hyde. Hyde testified that he and Turner met Raeford as she was coming into the personnel department. When Hyde asked her what the problem was she said she was not going to do the job. When Turner asked her why, Raeford replied that it was not her job. Turner told her that she was a labor grade 8 and that it was part of her job. Raeford replied that she wanted to talk to Frank Grady (Tr. 3249-3250).

Personnel Manager Grady testified that he listened to Raeford's version first and then he heard the version of Hyde and Turner, separate from Raeford. Hyde and Turner claimed that Raeford said she was refusing to do the job. Grady informed them that Raeford was claiming that she just did not want to do the job (Tr. 3340-3341).

Grady further testified that he consulted with other management officials, Manufacturing Manager John Semmes, Whit Collins, and Plant Manager Thies and that they reviewed her personnel folder which contained a prior written warning (R. Exh. 14) for leaving the line before the end of the shift on March 21, 1979, and for refusing to do her assigned task. Moreover, her personnel folder revealed that her May 1979 performance review (R. Exh. 13) by Supervisor Hyde, although reflecting that she had good technical skills, disclosed that

she had an attitude problem. Thus, Supervisor Hyde penned the following note:

Attitude still leaves a lot to be desired. Only does task that she wants to do.

The initials of another management official, appearing to be that of Personnel Manager Grady on May 30, 1979, states:

I expect some definite improvement in attitude.

Grady testified that Respondent made the decision to suspend Raeford in view of her past warning history. Grady and Hyde then communicated this decision to Raeford. Grady testified while Raeford was not pleased about the decision, she left without further incident. The suspension notice and final written warning (R. Exh. 15) states in part:

In view of the seriousness of this violation, employee will receive a final written warning and a three day disciplinary lay off. Days off will be Thursday, January 4, Friday, January 5, and Monday, January 7, 1980. Any further instances of this violation could result in your termination.

Raeford testified that the document was never shown to her (Tr. 455). She admitted however that Grady told her that one more written warning and she would be discharged (Tr. 455). Hyde testified that he presented the warning to Raeford when she returned from her 3-day suspension and did so in the presence of Personnel Manager Grady (Tr. 3253). Although Grady was not asked about this during his own testimony, I credit Hyde that he did present the document to Raeford and that she refused to sign.

Grady testified that Raeford was not discharged on this occasion, but rather was suspended, because there was some reasonable doubt as to whether she actually had flatly refused to do the work as distinguished from saying she did not want to do it (Tr. 3346). As Raeford conceded that Grady told her that she would be terminated if she received one more writeup (Tr. 454), it is clear that Raeford knew why she was being suspended.

Raeford testified that since Personnel Manager Grady had told her that Purolator had an open-door policy and an employee could come see him at any time, she left the line to go see Grady (Tr. 410). Moreover, she testified that she did not obtain permission to leave the line to go see Personnel Manager Grady because the line had not started to run. She said this was about a 3:45 p.m. and the line does not start running until about 4 minutes before the hour. She confirmed that she had punched in and that she was standing with the other employees ready to go to work (Tr. 449). MSA Foes testified that the line actually started to run 2 minutes after Raeford walked away (Tr. 3002).

Raeford also testified that another employee normally did the can box job (Tr. 482-483). The record reflects, and I find, that no one employee does the can box job all the time. George Hyde (Tr. 3240-3242), MSA Kathy Foes, (Tr. 3002), and Supervisor Leonard Barber (Tr. 2810) all testified that all employees rotate among this

job and several other jobs. During any given day, no employee will work more than 2 hours on the can box job (Tr. 3002, Foes; Tr. 3242, Hyde).

Personnel Manager Grady, during cross-examination by the Union, stated that while Purolator does have an open door policy, if employees have jobs to do then appointments have to be arranged (Tr. 3461). There is no evidence in the record that Respondent permitted employees to leave their work areas, either during work or when work was to begin momentarily, and go to the personnel department without obtaining permission or an appointment.<sup>71</sup> Nevertheless, it is clear that Raeford's action in leaving the work area to go see Personnel Manager Grady was a direct response to Respondent's unlawful conduct in transferring her from the gasket table on or about that date. In short, her conduct, while perhaps not acceptable under normal circumstances, must be judged in terms of the provocation. Under that light, it is clear that her suspension, while not directly motivated by unlawful considerations, was based on an illegal transfer. Accordingly, I find the suspension given to Raeford to have been unlawful as alleged in paragraph 9(c) of the complaint. Respondent shall be ordered to pay her back-pay for any earnings she lost.

*d. Discharged January 28, 1980—no violation*

Paragraph 10 of the complaint alleges, and the record reflects, that Respondent discharged Raeford on January 28, 1980. While the General Counsel alleges that Raeford was discharged because of her union activities, Respondent asserts that she was discharged for being insubordinate to Supervisor Leonard Barber, for conveying a threat to MSA Foes, and for refusing to follow instructions of MSA Foes. The notice of termination form (R. Exh. 102) provides as reasons for the action:

Based on a review of the incident that occurred on January 24, 1980, the decision was made to terminate Ms. Raeford's employment. She will be terminated for the following reasons: 1. Refusal to follow the instructions of the MSA; 2. Insubordination to the supervisor; 3. Conveying a threat to one of our MSAs, Kathy Foes. Note also that on January 3, 1980, Ms. Raeford received a final written warning and a three (3) day disciplinary lay off for refusal to do an assigned job. This termination will be effective on Monday, January 28, 1980.

Raeford testified that when her suspension ended and she returned to work on January 8, she observed a new employee there by the name of Joan (last name unknown). At one point that day Joan was called to Supervisor Hyde's office. Raeford testified about 10 or 15 minutes later Joan returned and told Raeford the nature of her conversation with Supervisor Hyde (Tr. 413, 423).

<sup>71</sup> General Supervisor Leon Turner's testimony possibly implies otherwise when he stated that employees have the option of going to Grady at any time rather than to their supervisor (Tr. 3226). In the absence of specific examples, I decline to interpret that testimony to mean that employees are permitted to walk off their line jobs at will to go to the personnel office.

Although counsel for the General Counsel urged that Raeford be permitted to testify concerning the report made by Joan under FRE 803 as a *res gestae* exception to the hearsay rule, I sustained Respondent's hearsay objection (Tr. 416). The General Counsel made an offer of proof that if Raeford were allowed to testify she would testify that when Joan returned from Supervisor Hyde's office she told Raeford that she, Joan, had been warned by Supervisor Hyde to keep away from Raeford, Louise Puckett, and Barbara Taylor because they were for the Union (Tr. 422). Raeford testified that there were no other witnesses when Joan told her this. I rejected the offer of proof.

Supervisor Leonard Barber testified that on January 24, 1980, he was short on people and was told by Supervisor Turner to go and get Marilyn Raeford who was working in the blister pack area. When Barber got Raeford he took her to oil line 1 and assigned her to work with MSA Mary Frances Horton (Tr. 2806-2807).

Raeford testified that on January 24, 1980, Supervisor Leonard Barber informed her that she would be working for him. Raeford testified that she did not know whether anyone was putting on gaskets that day or were doing other jobs (Tr. 455). At any rate, she confirms that she was assigned from blister pack to oil line 1 to work for Leonard Barber (Tr. 456).

Raeford testified that after Barber came and got her they went to his office where General Supervisor Leon Turner was present. Barber started talking fast and low giving her instructions on when to arrive and other matters and she said that she could not hear what he was saying. Barber told her that he would not repeat himself and that she should have been paying attention. He told her to go back to the line and Raeford said when she got out of the chair to leave she said "shit." (Tr. 424.) As she was walking out the door, Barber told her to come back. Raeford testified that she said, "Do you want me in there or do you want me on the line?" He told her to come and sit down and she said, "You don't scare me." He again told her to sit down and she repeated that he did not scare her. He told her to go clock out (Tr. 425). Raeford testified that Barber was speaking loud, fast, and angry and talking to her as if she were "a dog." (Tr. 425.) Raeford testified that everyone in the plant, including Supervisors MSAs and Barber himself used that four-letter word frequently and no one has been told to clock out because they used it (Tr. 425). She further testified that when she clocked out he met her downstairs and as she handed him the timecard she asked him what all of this was for and he said for "cussing." (Tr. 427.)

A more understandable, and I find more accurate, description of the circumstances leading to Raeford's discharge was elicited during cross-examination of Raeford and, in more detail, from Respondent's witnesses. After performing some different jobs on January 24, Raeford wound up working in the "can box." This was the first time she had performed the job on the oil line (Tr. 457-458). Although Raeford concedes that MSA Mary Frances Horton told her that she was expected to take four cans in each hand, Raeford was only picking up three. She told Horton that she was doing the best she could but that she needed some gloves and was irritated

over the assignment (Tr. 460). Horton brought her some gloves and stayed with her a few minutes to show her how to do the job (Tr. 461). Raeford states that she had performed this work about 10 minutes when she was sent upstairs where she had a conversation with Supervisor Leonard Barber which resulted in her termination (Tr. 462). Raeford concedes that the line was continuously stopping because she was only picking up three cans at a time even though she was doing the best she could. She testified that she was not given enough time to learn the job (Tr. 462-463). She concedes that Horton picked up four at a time when demonstrating the process, but observed that Horton had been doing it a long time (Tr. 464).

MSA Horton testified that she was the MSA in the seam section of the oil line, and that the various jobs in that section included placing cans (can box), inspecting elements, dropping guides, dropping elements and putting on springs (Tr. 2629). Employees rotate between the jobs. Horton testified that when Raeford was brought to Horton's section on January 24, Raeford was assigned to placing cans. When Raeford asked for gloves, Horton obtained some for her.<sup>72</sup> Horton testified while Raeford was doing the job, the line was continuously stopping because Raeford was not keeping enough cans on the conveyor line (Tr. 2631). Horton testified that the other employees nearby would help Raeford but still she got behind (Tr. 2631). Supervisor Leonard Barber came by and observed for a little while and told Horton to send Raeford up to the office that he wanted to speak with her (Tr. 2631). Horton did the job while Raeford was upstairs. When Raeford came back 10 or 15 minutes later she threw the gloves in the box where Horton was working and kept on going saying she could only do two or three at a time (Tr. 2632). Horton testified that the other employees used both hands and picked up four cans in each hand for a total of eight whereas Raeford would only pick up two or three in each hand and sometimes used only one hand (Tr. 2633, 2650). It appeared to her that Raeford did not care whether she did the work or not (Tr. 2634).

Horton testified that there was nothing to picking up the cans, that most of the time an employee picks up the knack in 5 minutes and that she demonstrated to Raeford how to do the job two or three times (Tr. 2634). In Horton's opinion, Raeford was not attempting to do the job properly (Tr. 2635). Horton gave a demonstration in open court of the process using actual cans (Tr. 2640-2642, 2643). She has been working at Purolator several years and has never seen anyone able to work fast enough to keep the operation working successfully by picking up fewer than four cans in each hand (Tr. 2648).<sup>73</sup>

<sup>72</sup> The use of gloves appears to vary among employees. Horton testified that she does not use gloves, and they do not make the job more difficult (Tr. 2651).

<sup>73</sup> Tr. 2649, L. 15, records her answering "yes" to the question of whether she has ever seen anyone who could pick up two at a time and keep the table filled. In view of Horton's complete testimony, particularly at Tr. 2648 referred to above, it is clear that either the transcript is in error or Horton misunderstood the question. In either event, I see no need to correct the transcript to reflect "no" as Respondent moves at Br. 61.

Supervisor Barber testified that during the few minutes he observed Raeford she was only picking up two cans with each hand (Tr. 2807). Barber concluded that Raeford was doing the work nonchalantly and was not putting forth an effort to keep the line running (Tr. 2990-2991). He testified that placing cans was one of the simpler jobs on the line and he could not recall anyone who could not do the job (Tr. 2983).

Raeford confirmed that she gave a Board agent her pretrial affidavit of February 6, 1980, in which she stated as follows (Tr. 472):

The MSA came over and said to pick up four cans. I did not say anything but I kept picking up three. One of the other girls said to her I had not done the job before. The MSA said yes, and asked me if I had and I told her no, I hadn't. She started showing me and said the new people could pick up four cans. I did not say anything and kept picking up three cans.

Barber testified that when Raeford came to his office he advised her, in the presence of General Supervisor Turner, that she was not keeping up on the line and that she would not be able to keep up as long as she only picked up two cans with each hand. He told her she had to pick up four cans in each hand. Raeford replied that she was doing the best she could and that she could not pick up four cans. Barber told her that she had been given gloves, that everyone else was keeping up, and that there was nothing else he could do. He told her that from then on she would be working for him, that her starting time would be 3:45 p.m., and that her MSA would be Fran Horton. Raeford then said, in a "wild-like" tone of voice that she didn't "give a shit." She then stood up and started out the door. Barber told her to come back. Raeford replied, "Do you want me on the damn chair or on the damn line?" (Tr. 2807-2808, 2813, 2962-2964). At that time Barber told Raeford to go clock out. He told her she was suspended for the rest of the night and to report to personnel the next day.<sup>74</sup> Moments later Barber found Raeford, not at the timeclock, but on the other side of the plant in blister pack. He told her she would have to leave the plant. She replied, "Leonard Barber, I am on my own damn time." As he escorted her out the door, Raeford said, "You tell that Foes I will get her." (Tr. 2808-2809, 2964.)

Later that night, Barber wrote a memorandum note to Personnel Manager Grady concerning the incident and placed it on Grady's desk. The exhibit is in evidence as Respondent's Exhibit 115 and it is consistent with Barber's testimony.

The following day Personnel Manager Grady conferred with Manufacturing Manager Semmes, Turner, and Barber. He then interviewed Raeford when she came to work. After obtaining her story, which was similar to her testimony at trial, Grady told Raeford that

he wanted to look into the matter further and that she would be suspended until the following Monday (Tr. 3360). Grady then interviewed MSA Horton. Respondent subsequently decided that Raeford should be discharged for being grossly insubordinate to Supervisor Barber, for directing a threat toward MSA Foes and for failing to follow the instructions of MSA Horton. Grady testified that they also considered the fact that Raeford had received a final written warning less than one month earlier (Tr. 3361-3362).

The following Monday, Grady, with Supervisor Barber, informed Raeford that her employment was terminated and he gave her the reasons. He testified that she seemed upset and indignant and said that the Union will be in or she would be back or some similar terminology (Tr. 3362). Raeford admitted that Grady informed her of the reasons for her discharge (Tr. 469-470). Raeford admits that she laughed when Grady gave her the reasons for her termination and that Grady told her, "This isn't funny." (Tr. 470.) Raeford testified that she told Grady that it was all right and that he could look for the Union.

According to Raeford, she told Barber when they were leaving the plant, "You tell Kathy that's all right." (Tr. 468.) She concedes that she was disgusted at the time. She also testified that she knew that MSA Foes would know what Raeford meant by the statement, testifying that Foes had something to do with all that had happened to Raeford including having her placed on Leonard's line and working in the can box. "She was behind everything that happened to me." (Tr. 473.)

I credit the version of Respondent's witnesses and I therefore find that the General Counsel has failed to demonstrate that a motivating reason for the discharge of Marilyn A. Raeford was her union activities.<sup>75</sup> Even though Raeford should not have been moved from her gasket table work on January 3, 1980, it still is entirely possible that Raeford would have been working in blister pack on January 24 and been assigned to Supervisor Barber/MSA Horton's crew at least for that day. The attitude she demonstrated on the line is what caused her to be summoned by Barber to his office. Her insubordinate manner to Barber and her threat to MSA Foes were not shown by the General Counsel's evidence to have been caused by Supervisor Hyde's moving her to a different job beginning around January 3, 1980. Thus, Raeford would have been discharged in any event notwithstanding her union activities. Accordingly, I shall dismiss paragraph 10 insofar as it pertains to Marilyn A. Raeford.

#### 4. Sin Ung Yu

##### a. *Background*

In his oral arguments, CGC contends:

<sup>74</sup> Although Turner confirms Barber's version of the profanity, he testified that he in fact informed Raeford she was suspended for the evening (Tr. 3195, 3218). The difference seems immaterial. Moreover, I do not credit Raeford's version that Barber was speaking to her in a discourteous way.

<sup>75</sup> It would appear that even if the testimony of Raeford were accepted regarding her conversation in the office with Supervisor Barber, that version also would constitute insubordinate conduct and a basis for Respondent's terminating Raeford.

The evidence clearly establishes that Sin Yu was selected by the Company for discharge in order to intimidate the approximately 40 Korean employees who worked for the Company. Sin Yu was the only Korean actively in the union campaign. [Tr. 1822(a).] Sin Yu had worked for the Company for five years prior to his trumped-up discharge of February 13, 1980. It is uncontradicted that prior to the advent of the Union, Sin Yu was an outstanding employee who had received five commendations for his work record. [Tr. 1665.]

Yu's fifth written commendation (G.C. Exh. 11e), from Mike D. Skertich, the then plant manager, is dated February 8, 1978, and reads in relevant part:

I would like to take this opportunity to congratulate you on your most recent Performance Review.

We here at Purolator are most proud of our employees whom [sic] attain the maximum score on their reviews.

It is employees with your type of performance that allows [sic] us as a company to supply the highest quality products to our customers at an acceptable price. This, in turn provides a more secure job for all of us.

Again, my congratulations in being one of our best employees.

Skertich added a double postscript to the foregoing commendation. The first is typed and states:

I take note that this is your 5th perfect score attained on your performance review. I am proud of your performance—Thank you!

The "5th" is circled in pen with the following handwritten observation:

I believe this to [be] the best I have ever received—Thank you!

/s/ Mike D. Skertich  
2/8/78

*b. January 1980 welding warning—paragraph 9(b) dismissed*

Beginning in August 1979 Yu experienced a series of safety problems at work. He sustained eye injuries in August and September and was suspended for 3 days in December for operating a grinder without wearing his safety glasses on December 10 (Tr. 1683, stipulation). Yu testified that Employee Relations Manager Collins, in suspending Yu, told him to go home and think about the Union (Tr. 1622). Collins denies this assertion, and neither the suspension nor the assertion is alleged to be unlawful. Although Yu testified he was active in distributing union cards to many Korean employees, the record does not reflect when he began such activities. On the other hand, by early December 1979 Respondent was well aware of the Union's organizing campaign. I observed Yu and Collins very closely during their testimony and I credit Yu's version. By implication, therefore,

Yu's organizing activity predated December 10, 1979, and had come to Respondent's attention by that date.

On January 23, 1980, Yu received a "Matter of Record" for unsafe welding on January 19 at a time when flying sparks could have injured two employees working in close proximity. (R. Exh. 93.) Issuance of the January 23 "Matter of Record" to Yu is alleged in complaint paragraph 9(b) to constitute a violation of Section 8(a)(1) and (3) of the Act. Even assuming that the document can be utilized as part of the disciplinary process (a matter Purolator denies), I find no violation. Yu had been experiencing safety problems, the record reflects that sparks were flying, and Respondent did not nail Yu with another suspension. Accordingly, I shall dismiss paragraph 9(b).

*c. Yu fired February 13, 1980—violation*

Yu's February 13, 1980 discharge is a different matter. The evidence indicates that Respondent had been seeking to dissuade Yu from supporting the Union. First there was the mid-December 1979 caution by Collins that Yu should think about the Union. When Yu returned to work MSA Joung "Ruby" Patten (of Korean ancestry) told Yu that Manufacturing Manager Semmes wanted to know whether Yu had changed his thinking about the Union (Tr. 1623).<sup>76</sup> Patten did not testify during the "C" case portion of the trial.

Respondent objected to this testimony on the basis of Patten's lack of agency. Initially I sustained the objection, and rejected an offer of proof (Tr. 1628), but thereafter I reserved ruling on the admissibility of the testimony depending on whether MSA Patten is found to be a statutory supervisor (Tr. 1632, 1639). The General Counsel seeks no finding of a violation of the Patten-Semmes matter, and in light of the circumstances, I stated I would find none (Tr. 1640).

Semmes denied the interrogation attributed to him by Yu-Patten (Tr. 3561), but I do not credit him.

On January 24, Yu protested to Collins concerning the January 23 "Matter of Record" Yu had received for unsafe welding. Collins told Yu not to worry about it too much. As Yu was leaving Collins' office, the latter asked him if he liked Purolator. Very much said Yu. Collins then inquired where Yu would work if he "quit" Purolator (Tr. 1644). Collins denies this, but I credit Yu's version and find that this was another attempt to "dissuade" Yu from supporting the Union.<sup>77</sup>

In January, Wilson T. Sellers replaced Jimmy Tew as supervisor of Yu and the other second-shift maintenance mechanics. Tew apparently had operated in a somewhat relaxed manner, whereas the style of Sellers was tighter and more "by the book." Yu testified that Sellers made him nervous.

Around February 10, Sellers transferred Yu to maintain a Thiele machine on oil line 3. Yu had never before

<sup>76</sup> Patten is often used as an interpreter with the Koreans. Although Yu testified through an interpreter, it is clear that he can handle ordinary work conversations in the absence of pressure or stress.

<sup>77</sup> As Yu had worked at Purolator for some 5-1/2 years, Respondent obviously felt that he could have some influence over a significant voter bloc.

worked the Thiele. He testified that about 10 days prior to his February 13 discharge he began openly wearing a union button (Tr. 1618, 1708). Yu was to be trained by mechanic Vernon Tew. During the third day of Yu's training, mechanic Tew told Yu that he was going to take a break and for Yu to watch the machine "carefully." (Tr. 1659.) In Tew's absence, Leonard Barber, supervisor of oil line 3, came over to Yu and asked him whether he could handle the machine (Tr. 1659a, 1694).<sup>78</sup> Yu replied that he was learning. Barber then asked Yu to clean the machine, and Yu replied that he would do so when the machine stopped running. Barber walked away and several minutes later returned and told Yu to pick up some filters on the floor on the other side of the Thiele and put them on the conveyor belt running through that point.<sup>79</sup> Yu replied that mechanic Tew had told him to watch the machine. He credibly denied telling Barber "I am a mechanic." (Tr. 1699.)

On Yu's failure to go around to the other side of the machine and load filters, after Barber had instructed him to do so, Barber told Yu to go to Supervisor Sellers' office. There is some question whether Yu understood what Barber meant by the latter instruction, for Barber testified that Yu followed him as he went to his own desk. Yu credibly testified that Barber spoke loud and angry and that the area was noisy. In any event, all parties eventually ended up in Personnel Manager Frank Grady's office. Following a review of the incident by Grady and Semmes, an interview of Yu by Grady, and a conference by Grady and Semmes with Collins and Thies, Grady told Yu he was fired for not following the instructions of Supervisor Barber (Tr. 1661). When Yu tried to explain to Grady that MSA Vernon Tew told him to watch the machine, Grady replied that it was unnecessary to talk about Vernon Tew (Tr. 1661). Vernon Tew credibly testified that Plant Manager Thies had told the mechanics in about September 1979 that it would be nice if mechanics volunteered to help with production duties, but that such was not required (Tr. 1015).

Mechanic Tew testified that about a month after the election of March 27 (i.e., around April 27, 1980), he asked MSA Sharon Tew why Yu had been fired.<sup>80</sup> MSA Tew replied that Yu's discharge was "set up." (Tr. 1004.) MSA Tew explained that when Yu had been transferred over to maintain oil line 3 that Barber told her she had "three days to fire" Yu. On the second day MSA Tew told Barber that Yu was a good worker and that she was not going to fire him unless he did something justifying his discharge. Later that second day (actually the second

shift) Barber told her (Tr. 1005): "Tonight is the night that you are going to fire him." When Tew said no, Barber said: "I will do it myself." Barber, it turns out, proceeded to do exactly as he had promised.<sup>81</sup> MSA Sharon Tew did not testify. She did not honor the General Counsel's subpoena (enforcement was not thereafter sought), and Respondent did not call her or indicate it had subpoenaed her. In view of the issue over her status, I draw no adverse inference from Respondent's failing to subpoena MSA Sharon Tew.

In view of the foregoing, and based particularly on my observations of the demeanor of the witnesses, I find that Barber approached Sin Ung Yu the evening of February 13, 1980, for the sole purpose of finding, or creating, a plausible pretext on which to discharge Yu because of his union activities. I further find that Barber did so at the design of Respondent and not as an independent lark. Whereas Respondent had been willing previously to "dissuade" Yu, it dropped its constraint when Yu went open and visible, through his union button, some 10 days before his discharge. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 10, by discharging Sin Ung Yu.

#### 5. Amilcar Picart

##### a. Supervisor Helga Powell—paragraphs 8(a), (n), (o), (p), and (q)

Amilcar Picart testified in support of complaint paragraphs 8(a), (n), (o), (p), and (q) which alleged that Supervisor Helga Powell, in a late February 1980 conversation with Picart, unlawfully interrogated him and threatened that employees would suffer unfavorable changes if they voted in the Union.

Powell concedes that she did discuss the Union with Picart on a day in late February after calling him to her office. She admits some of the conversation, has a different version as to part, and denies part. I credit a portion of each version and make the following composite finding regarding the conversation.

Powell asked Picart why he wanted the Union, and he replied for job security. I find this to be an unlawful interrogation as alleged in complaint paragraph 8(a).

Regarding job security, Powell said that, if the Union gets in, when machine breakdowns occur she would send the employees home on layoff rather than letting them work elsewhere in accordance with current practice. I find such threat to be unlawful as alleged in paragraph 8(p).

Powell explained that under some union contracts, employees would not be able to take their grievances or problems, other than routine work-related ones, to their

<sup>78</sup> The machine and related functions appear to be a rather complex operation. Moreover, Yu had to watch at least 10 other machines (Tr. 1707).

<sup>79</sup> Yu estimated the work would have required about 10 minutes, and that a warning bell on the Thiele would ring if the machine stopped working (Tr. 1697).

<sup>80</sup> Sharon Tew was the MSA on oil line 3 under Supervisor Barber. Vernon Tew served as an observer for the Union at the March 27 election and had openly supported the Union. Vernon Tew is MSA Tew's uncle. In this decision, I find Sharon Tew, as with the other MSAs, to be a statutory supervisor. Even if Sharon Tew was not a statutory supervisor, she clearly was Respondent's agent in view of the managerial authority Purolator had clothed the MSAs with. *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183 (5th Cir. 1977).

<sup>81</sup> On cross-examination, Vernon Tew testified that he had given three pretrial affidavits, one of which, dated May 27, 1980, although executed after the above conversation, does not describe it. On further examination, Tew explained that while the agents who took his affidavits did not ask him about Sharon Tew, CGC Connor had so asked and Tew had told him (Tr. 1024, 1028). Moreover, it is written that "What a prospective witness will tell a prehearing investigator will often depend upon how searching the questions of the investigator are." *Standard Forge & Axle Co.*, 170 NLRB 784, 786 fn. 8 (1968), enf'd. 420 F.2d 508 (5th Cir. 1969).

supervisors but would have to go to the shop steward. This is the subject of complaint paragraph 8(n). I find the remark to be, as alleged, an unlawful threat to eliminate the right of employees under Section 9(a) of the Act to present problems to supervision/management. *Colony Printing & Labeling*, 249 NLRB 223, 224 (1980); *Sacramento Clinical Laboratory*, 242 NLRB 944 (1979); *Howard Mfg. Co.*, 180 NLRB 220, 231-232, 233 (1969), enfd. 436 F.2d 581 (8th Cir. 1971). The cases cited by Respondent at pages 261-262 I of its brief are inapposite.

Crediting, as I do, Powell's denials that she said anything about changes in jobs or shifts, or segregating employees into union and nonunion groups, I shall dismiss complaint paragraphs 8(o) and 8(q).

b. *Picart fired April 21, 1980—no violation*

The parties stipulated that Respondent's records reflect that Amilcar Picart was hired July 24, 1978; was promoted to relief operator (MSA) January 8, 1978; was demoted from MSA on November 26, 1979 (R. Exh. 17); and was terminated April 21, 1980 (Tr. 592).

Respondent concedes knowledge (as of the time of Picart's termination) that he supported the Union. It appears that Picart was one of 100 or so employees who were openly wearing union insignia the week before the March 27, 1980 election.<sup>82</sup>

Picart admits (Tr. 571), as Supervisor Helga Powell testified (Tr. 3299-55), that Powell gave him (1) a verbal warning in January 1980 for poor attendance; (2) a written warning in March for poor attendance; and (3) a final written warning in April for poor attendance. Picart testified that he understood that termination would be the next step (Tr. 571, 581).

On Saturday, April 19, 1980, after having received the three warnings described above, Picart admittedly walked out of the plant after Powell had denied his request to leave work. Under Picart's version he told Powell he was sick. Picart testified that he also told employees Norris Brayboy, Virginia Brayboy, and Terry Jones that he was sick (Tr. 560). None was called as a corroborating witness. Powell testified that a few minutes before the 3 p.m. shift started Picart asked her to let him go home if anything broke down. She said if that happened he could do so. About 5 p.m. Picart said he was tired and wanted to go home. Powell said she was tired too, and shorthanded, and he could not leave. I credit Powell rather than Picart. Minutes later Powell, after looking for the missing Picart, discovered that he had clocked out and left the premises. When Picart attempted to return to work Monday, April 21, Personnel Manager Frank Grady told Picart he had quit. Picart denied this. As Respondent states at page 100 of its brief: It is clear that regardless of the terminology used, Picart's employment was terminated. The General Counsel adduced no credible evidence of disparity.

<sup>82</sup> Picart testified, in response to a leading question by union counsel, that he was wearing the insignia as early as February (Tr. 564). The precise time seems immaterial here, although I find that Powell was aware of his sympathies at the time of their late February conversation discussed above.

I find that Respondent fired Picart on April 21, 1980, for leaving the job contrary to an express denial of permission to do so, and I further find that Picart's union sympathies were not a motivating factor in his discharge. Accordingly, I shall dismiss complaint paragraph 10 as to Amilcar Picart.

6. *Elsie Edwards fired July 1, 1980—no violation*

Hired about May 8, 1978, Edwards worked as a routine inspector for the quality control department at the time of her July 1, 1980 discharge. Respondent admits knowing (predischARGE) that Edwards was a union supporter. In the January-March 1980 preelection period, Edwards was one of many employees who openly wore union insignia. She testified she began attending union meetings in December 1979 (Tr. 210).

The evidence reflects that Edwards' work history fluctuated between marginal and poor, with the chief problem being her attitude toward her job and especially toward her coworkers. For example, on Edwards' October 1979 performance review, signed by Edwards, Supervisor Donna A. Ogg wrote as follows regarding "Attitude & Cooperation" (R. Exh. 6):

Attitude and cooperation especially toward coworkers stays in a state of continuous change, from good to bad and vice versa.

Ogg gave Edwards 42 points out of a possible 60. Ogg credibly testified that the average points she gave was 49 (Tr. 2705). In the April 1980 semiannual performance review, Supervisor Ogg gave Edwards only 36 points (R. Exh. 7). Her attendance and quality of work were the two areas where Edwards had dropped the most since October 1979. In fact Edwards received two warnings (R. Exhs. 8 and 9) in January 1980 for negligent performance of her inspection duties.

In addition to being moody, as Ogg's description suggests, Edwards also demonstrated that she was capable of far less attractive conduct. This concerns an incident on May 30, 1980, in which she cruelly teased Siripong Crowdis to the point that Crowdis was in tears.<sup>83</sup> I closely observed both Edwards and Crowdis,<sup>84</sup> and I reject Edwards' denial (Tr. 243) that she teased anyone to the point of tears. Indeed, I find Edwards to be a totally unreliable witness, and I do not accept one word of her testimony regarding disputed facts.

Following her October 1979 evaluation, Edwards permitted her moody attitude to embroil her in controversy after controversy.<sup>85</sup> A final warning (R. Exh. 86, G.C.

<sup>83</sup> Crowdis, from Thailand, was unhappy over having to leave her baby in Thailand when she came to this country with her American husband. Despite requests from Crowdis that Edwards leave her alone, Edwards maliciously needed Crowdis about her baby in Thailand, then repeatedly called Crowdis "cry baby" when she broke into tears (Tr. 2475).

<sup>84</sup> I observed Crowdis display spontaneous congeniality before me.

<sup>85</sup> Employee Minnie Blount credibly described an incident in December 1979 in which Edwards began rejecting every filter. Blount, observing nothing wrong with the filters, asked Edwards what was wrong with them. Edwards said nothing was wrong with them but that she was removing them from the line "because I am in this mood" and "whenever I get in a mood like this, I just take them all off." (Tr. 2487.)

Exh. 5) covering several incidents was issued to Edwards on June 12, 1980, advising her that "termination could be in order" if "immediate and sustained performance improvements are not forthcoming." Several matters are covered by the lengthy warning, including the May 30 Crowdis incident.

The final event which culminated in Edwards' discharge occurred when Edwards, the night of June 30, unilaterally transferred herself from an oil line to an airline (different departments and supervision). General confusion was the least problem created by this unilateral action. Following an investigation of the matter by Respondent's officials, Edwards was fired.

I find that the General Counsel has failed to show that Respondent was motivated to discharge Edwards because of her union activities, and I shall dismiss paragraph 10 of the complaint as to Edwards.

## 7. Discharge of the MSAs

### a. Introduction

On March 18, 1980, Respondent discharged MSAs Dorothy Diane Godwin, Lexie A. Powers, Virginia E. Peoples, and Betty Roberts. The primary position of the General Counsel is that these four individuals are employees and since they were admittedly discharged for not vigorously supporting Respondent's opposition campaign against the Union, their discharges violated Section 8(a)(3) of the Act. The General Counsel secondarily argues that even if there are supervisors the discharges are still unlawful, and in violation of Section 8(a)(1) of the Act, by virtue of being an integral part of a pattern of conduct calculated to interfere with, restrain, and coerce employees with regard to their Section 7 rights. As his tertiary alternative, the General Counsel contends that because Respondent informed the MSAs on December 14, 1979, that they were free to engage, or not to engage, in union activities pending a determination on their status by the NLRB, then Respondent was not at liberty to discharge them after "setting them up" and that their discharge in such circumstances, even though they be supervisors, violates Section 8(a)(1) of the Act. The Charging Party's position is consistent with the General Counsel's in this respect. Union counsel asserts that it is illegal to set up the MSAs and then "zap" them for their union activities after drawing them out (Tr. 787, 3809).

The Charging Party's additional theory, labeled "James Bondish" by Respondent's counsel (Tr. 791, 3806), is that Respondent deliberately sought to taint the election. Under this theory, Respondent, through Collins' December 14, 1979 remarks, deliberately set the MSAs free to engage in union activities for the express purpose of establishing the legal basis for arguing that the petition should be dismissed, or the election set aside, because of supervisory (MSA) taint. The Union also contends that Respondent abused the Board's processes by deceptively manipulating its positions before this Agency. Any remedial order, it seems, must at least require Respondent to offer full and immediate reinstatement to the fired MSAs and pay them backpay.

### b. Chronology

The decision to discharge these four MSAs was made by Steve Thies, Respondent's plant manager. Thies testified that around the end of February 1980, Respondent received the February 27, 1980 decision from the Acting Regional Director finding that MSAs were supervisors (Tr. 3740).<sup>86</sup> The following day, February 28, the MSAs on each shift were assembled so that they could be informed of the decision (Tr. 9287). Thies personally conducted the meeting with the first-shift MSAs. During this meeting, Thies told the MSAs that the NLRB had found them to be supervisors. He then reviewed TIPS (no threats, interrogation, promises, surveillance) with the MSAs concerning what they could and could not legally do during the campaign (Tr. 3740-3741). The MSAs were specifically told to stay away from the Ramada Inn, which was known to be the Union's headquarters (Tr. 3743).

Thies testified that when the announcement was made, the vast majority of the MSAs applauded and cheered (Tr. 9288). However, he observed four MSAs who did not react favorably to the announcement. These MSAs were Dorothy Diane Godwin, Delores Hargett, Virginia Elaine Peoples, and Betty Roberts (Tr. 3741). Thies subsequently received word that two MSAs on the second shift had reacted unfavorably to the decision. These MSAs were Barbara McNeill and Lexie A. Powers (Tr. 3741-3742).

The next day Thies talked individually with each of the MSAs who had not reacted favorably to the announcement (Tr. 3742). The conversation with each MSA was basically the same. Thies told each of the MSAs that he had noticed or been informed that she ("he" with respect to Powers) had not reacted favorably. Thies then asked each one if she could support the company during the campaign. Each MSA said that as a result of the decision she/he would support the Company (Tr. 3745, 3747, 3752, 3758, 3763, 3770). Thies then again reviewed TIPS with each MSA.

The following day Thies again talked to each of the six MSAs and asked if she had handed out union literature or cards in the campaign. Thies testified that he asked this question to make sure that he was aware of any liability Respondent might have as a result of the participation of supervisors in the campaign (Tr. 3147). Only Lexie Powers told Thies that he had handed out any cards. Powers said that he had handed out one card (Tr. 3759).

<sup>86</sup> It is clear that Purolator received the decision on February 28, for the parties stipulated (Respondent's relevancy objection was overruled, Tr. 9236) that on February 28 the Company posted a notice (C.P. Exh. 71) on the main bulletin board addressed "To All Employees" from Thies:

We received a decision from the National Labor Relations Board today concerning the voting eligibility of the assistant supervisors. As we had anticipated, the Labor Board held that all MSA's, DSA's and RSA's are "supervisors" as defined in the National Labor Relations Act. This means that they, like other supervisors, will not be eligible to vote in the upcoming secret ballot election. At this time, no date has been set for the election, but we will let you know as soon as the final arrangements have been made.

Thies testified that after he talked to each of the six MSAs, he considered them to be on a clean slate (Tr. 3854). After the February 29 announcement Thies, who described himself as Purolator's "quarterback" in the campaign, participated in numerous group meetings with the MSAs. At these meetings, TIPS were frequently discussed. Thies also discussed with the MSAs the various problems that they were encountering. The MSAs were also provided with black binders containing campaign material that they were to discuss with the employees (Tr. 3742-3744, 3750).

Thies testified that when he arrived at work on Monday, March 17, 1980, he was informed that a rumor was going around that *Diane Godwin* had attended a union meeting the previous evening at the Ramada Inn. Thies then called Godwin's supervisor, Danny Huffman, who told Thies that he had heard the rumor but was not aware whether it was true. Thies walked out to the floor and talked to Danny Huffman and Mickey Turlington, another supervisor, who were already discussing the matter. Huffman told Thies that Turlington had just asked Godwin if the rumor was true and that she had said that she had imbibed at the Ramada Inn's lounge (Tr. 3754-3755).

Thies went back to his office and discussed the matter with Whit Collins. They decided to call Godwin to the office and get her side of the story. When Godwin arrived, Thies asked her if she had attended a union meeting at the Ramada Inn. She said that she had been to the Ramada Inn but explained that she had not gone to the union meeting. Godwin explained that she and Sherri Ashcraft had been at a lake when Ashcraft suggested they go to the Ramada Inn. Godwin initially said 'No' but changed her mind. She and Ashcraft then went to the Ramada Inn. While the union meeting was going on, Godwin remained in the ladies room. After the meeting concluded, Godwin went into the Tap Room and sat down with two of the Union's organizers, Mike Black and Arnold Price (Tr. 3654-3655, 3755-3756).

After Godwin had gone through her story, Thies told her that it was a serious matter and that she, as an agent of the Company, would subject Purolator to unfair labor practice charges of spying (Tr. 3654). Thies initially told Godwin that she was discharged but changed his mind and told her that she was only suspended until he and Collins could evaluate the matter (Tr. 3750).

After Godwin left, Thies and Collins discussed the matter further. There were rumors that the Union was going to file unfair labor practice charges. Thies and Collins believed that there was a real possibility that Godwin's presence at the Ramada Inn while the union meeting was being held could be interpreted as unlawful surveillance (Tr. 3656, 3756). Collins and Thies, however, decided to wait until the next day to make a final decision.

The following day, Thies and Collins decided that because of Godwin's presence at the Ramada Inn, she could not remain employed. Thies then called Godwin and told her that she was terminated. Godwin mentioned that she could get a notarized letter from Mike Black and Arnold Price stating that they would not file a

charge if Respondent would not fire her. Thies responded that his decision was final (Tr. 3756-3757).

As a result of the Godwin incident, Thies made up a list of MSAs who he believed were either not adequately supporting Purolator in its campaign or were exposing Respondent to potential unfair labor practice charges. He then decided to terminate three additional MSAs: Virginia Peoples, Lexie Powers, and Betty Roberts (Tr. 3758).

Thies testified that he terminated *Lexie Powers* because he continually associated with union supporters and organizers on the picket line and because he failed to adequately support the Company in its campaign (Tr. 3762-3763). During the latter part of the campaign, Thies observed Powers regularly going out of his way to walk out to the picket line and talk to people on the line while they were handing out literature (Tr. 3760). Thies also testified that he did not feel that Powers was making sufficient efforts to support Purolator in its campaign. Thies had personally observed Powers' apparent lack of commitment in various group meetings. He had also received reports from Powers' supervisor, Vince Mininno, that Powers was not fully supporting the Company and that he was still wearing a union keychain (Tr. 3761).<sup>87</sup> As a result of these observations and conversations, Thies called Powers into his office on March 18, 1980, and told him that he was being fired for failing to satisfactorily perform his supervisory responsibilities (Tr. 3762).

Thies apparently told Peoples, Powers, and Roberts that they were being discharged for failing to perform their "supervisory responsibilities in a legal and satisfactory manner" (Tr. 3762 Thies; Tr. 3659 Collins). Thies testified that what he meant by the term "legal" was that they, as agents of Purolator, were doing acts which might subject Respondent to unfair labor practice charges (Tr. 3858). He stated that this reason applied only to Godwin and Powers (Tr. 3858). Respondent does not contend that either Roberts or Peoples did anything unlawful.

Thies testified that he decided to discharge *Betty Roberts* because she failed to adequately support the Company in its campaign. Thies reached this conclusion on the basis of his own observations and on conversations with other MSAs and supervisors. During one group meeting, Roberts asked Thies why Ken Engler was promising people jobs. Thies replied that he was unaware of this but that he would investigate it. Thies then had Personnel Administrator Leonard Gibbs talk to the man allegedly promised a job, as well as to Ken Engler. Gibbs reported back that both the employee in question and Engler denied the alleged promise (Tr. 3764-3765). Subsequently, Thies reported his finding to Roberts. Her response was that she did not believe him. Later that day, Thies, who was disturbed by Roberts' comment that she did not believe him, called her up to his office. They discussed the incident further and Thies asked Roberts if she trusted him. She said that she did not. Thies then asked if there was anything that he could do to gain her trust. She replied that she did not know if he could do anything (Tr. 3766-3767). Roberts' testimony was essen-

<sup>87</sup> Mininno was not asked about any of this when he testified (Vol. 17).

tially the same, and she dated the conversation as the day before her discharge (Tr. 910-911). Thies also talked to Roberts' supervisor, Danny Huffman, about her performance in the campaign. Huffman informed Thies that Roberts did not seem to be doing all that she could in supporting the company campaign (Tr. 3767).

Thies also received reports from several other MSAs that when Roberts talked to employees about the campaign material, there was a large amount of laughter, despite the fact that there was nothing humorous in the literature (Tr. 3773).

Huffman did not testify in the "C" case portion of this trial. During questioning by union attorney Sarason in the "R" case portion, however, Huffman testified that not only was he *not* consulted before MSAs Roberts and Peoples were fired, but no one ever told him why they were discharged. In fact, he testified that he was a little surprised by it (Tr. 7771). He had to go ask Manufacturing Manager John Semmes if it was true that they had been terminated, and Semmes told him yes, because of job performance (Tr. 7802). He testified that Godwin was fired because "she was not producing in MSA fashion." (Tr. 7774.) Huffman testified that all his employees asked him why they were fired, and he just told them they had been terminated (Tr. 7773). The parties stipulated that three of the MSAs fired, Godwin, Peoples, and Roberts, worked for Huffman (Tr. 7705). This testimony, while perhaps not contradictory of Thies', is hardly corroborative.

As a result of his observations and the reports of MSAs and supervisors, Thies felt that Roberts did not trust him and that she was not adequately supporting Respondent in its campaign. Consequently, he decided to terminate Roberts. On March 18, 1980, Thies called Roberts into Whit Collins' office and told her that she was being discharged for failing to perform her supervisory duties in an acceptable manner (Tr. 3768).

Thies testified that he decided to discharge *Virginia Peoples* because she failed to adequately support the Company in its campaign. Thies reached this conclusion on the basis of his own observations and on conversations with other MSAs and supervisors. During one group meeting, Peoples commented that employees were asking what was good about the Union and that she did not know how to answer the question. Thies replied that in his opinion there was nothing good that a union could offer employees. Peoples then made a rhetorical comment to the effect, "You mean there is nothing good about a union?" (Tr. 3772.)

In another group meeting, Peoples asked why, if it were true that the Union fined and assessed employees, that nothing appeared in the UPIU balance sheet under that category. Thies replied that this figure was probably incorporated in the category labeled "Other" (Tr. 3772).

Thies testified that he also talked to Peoples' supervisor, Danny Huffman, who told him that he was not convinced that Peoples was putting forth sufficient effort in supporting the company campaign. Thies also received reports from MSAs that when Peoples talked to employees about the campaign material, there was a lot of laughter coming from the room (Tr. 3773).

On March 18, 1980, Thies had John Semmes bring Peoples to Whit Collins office. Thies then told Peoples that she was being terminated for failure to perform her supervisory duties in an acceptable manner (Tr. 3773-3774).

As for Delores Hargett and *Barbara McNeill*, Thies testified that the latter told him at the end of February that, although she had been for the Union before the February 27 decision, after Thies' announcement she in fact was for Purolator (Tr. 3745). He testified that over the following weeks he observed, and her supervisor reported, that McNeill was at least going through the motions of presenting Purolator's campaign material (the "black book") to her employees and that he concluded she was in fact "working toward the objectives that the Company had set forth." (Tr. 3746.)

In a similar meeting with *Delores Hargett*, Thies asked her whether she had handed out any union literature or cards and she told him she had not (Tr. 3747).<sup>88</sup> Thies testified that Hargett appeared thereafter to participate in and support Purolator's campaign "as she best knew how." (Tr. 3751.) Thies testified that neither Hargett nor McNeill was discharged (Tr. 3774).

There is no direct evidence that the reasons for the discharges were made known to rank-and-file employees. Neither the General Counsel nor the Charging Party proffered any employee witnesses who were aware of the reasons for the discharge of any of the MSAs. Whit Collins testified that he could not recall being asked by any employee or telling any employee what the reasons were for discharging the four MSAs (Tr. 3688-3689).

The record reveals that the only persons who were told the reasons for the discharges were the other MSAs. Plant Manager Thies testified that in order to avoid any possibility of unfounded rumors, he told the other MSAs that Godwin, Peoples, Powers, and Roberts had been discharged for failing to perform their supervisory duties in a legal and acceptable manner. Thies, however, did not explain what he meant by this (Tr. 3873). No one was informed of the underlying incidents leading up to the discharges. Thus, no one was told that Diane Godwin was fired for going to the Ramada Inn while a union meeting was in progress. Similarly, no one was told that Lexie Powers was fired partly because he (allegedly) associated with union supporters and organizers on the picket line.

Thies testified that he heard no rumors regarding why the MSAs were fired, and that, indeed, he wanted the other MSAs to hear from him the (limited) reason for their discharge rather than from someone else (Tr. 3687). Employee Relations Manager Collins testified that to his knowledge he never told any MSA or any other employee why the MSAs were fired (Tr. 3687). Moreover, he could not recall any employee asking why the MSAs were discharged (Tr. 3689-3691). The General Counsel did not adduce any evidence contradicting Thies and Collins on this point.

<sup>88</sup> He asked McNeill the same question and, presumably, received the same answer (Tr. 3749).

*c. Union activities of the four MSAs—their termination*

*Dorothy Diane Godwin's* testimony is substantially the same as that of Thies described above. Although she did not mention waiting in the powder room at the Ramada Inn, or sitting at a table with Union Representatives Arnold Price and Mike Black after the Union's meeting, she was not called to rebut such evidence. Moreover, she concedes that she did go to the Ramada Inn that evening.

Notwithstanding Godwin's testimony that she was never told to avoid the Ramada Inn, I credit Thies' testimony that the MSAs were told, not only not to spy or engage in TIPS (all of which Godwin admits), but to avoid the Ramada Inn. This is not to say that Godwin subjectively disobeyed. Perhaps she in fact did not hear that particular instruction. Nevertheless, the controlling issue is not whether she heard and understood, but whether Respondent legally could discharge her regardless of whether she heard (and without asking whether she had heard and understood).

Godwin's only union activity was to attend one union meeting in December. She told Thies about this after the roundtable sessions began in February. He made no comment (Tr. 946). She did not attend the January preelection hearing and testified that she did not get "involved" with the Union until after her discharge (Tr. 979).

Godwin testified that she was in the process of reviewing the black binder materials with her employees, and had not interviewed all of them, when she was fired (Tr. 973).

*Virginia Elaine Peoples* testified that she attended four union meetings during the period of December 14, 1979, through February 28, 1980. Of more significance is her testimony that she attended one day at the preelection hearing and sat with the union group. Thies, Collins, and Semmes also attended that day (Tr. 748). She never wore a union insignia (Tr. 740-8). When Thies made the February 28 announcement (Peoples also dates the event as February 28) to the MSAs, Peoples testified that she just sat there while most of the MSAs "jumped for joy." (Tr. 751.)

Peoples took notes at a roundtable session where Collins spoke about collective bargaining and Union Representative Arnold Price. Thies was present, and at the end of the meeting asked Peoples to come to his office with him.

In the office, Thies told Peoples that he had been watching her and that he was concerned about her loyalty to the Company. He asked if she was for the Union. "I told him I was but that I wouldn't do anything to get anyone to vote for the Union." (Tr. 740-12.) He asked why she and the employees felt a union was needed, and she told him the reason was inflation "and the black people felt they had been discriminated against." He then asked for and inspected the notes she had taken. Although she told him she would support the Purolator campaign (Tr. 771), she concedes she never wore a Purolator pin (Tr. 769). She testified that she went through the black binder material with her employees and wrote down the questions they had which she could not answer and asked about the questions at the next round-

table session with management's attorney. She then reported the answers back to her employees (Tr. 772). She testified that she did talk to the employees as Thies had asked her to do (Tr. 776). Indeed, she told them that Thies had said he was fairly new on the job and was asking the employees to vote no and give him a chance to try to make things better in the plant (Tr. 777).

Peoples testified that Thies discharged her in Collins' office in the presence of Collins and Semmes. He read a statement to her, "As of now you are being terminated for failure to perform legal supervisory duties." When she asked "what?" he repeated the statement and then said it was his company and he was going to run it the way he wanted to, and that he had nothing else to say to her. He asked Semmes to escort her out (Tr. 740-15). I credit the version of events as given by Peoples.

The testimony of *Betty Roberts* reflects that her union activities were very similar to those of Elaine Peoples. Roberts also testified that she never wore a union pin or union T-shirt (Tr. 843, 937). Although she went with Peoples to the January 16 hearing date in the preelection hearing, and sat with the group of about 15 union supporters (Tr. 844, 876, 936), she was undecided as to whether she was for the Union or not (Tr. 936). Her supervisor, Danny Huffman, was among the supervisors present (Tr. 844). Manufacturing Manager John Semmes was standing in the hall and looked at Roberts and Peoples as they entered the hearing room (Tr. 845). As with Peoples, and unlike most MSAs, Roberts did not applaud Thies' announcement about the Acting Regional Director's February 27 decision (Tr. 842).

Sometime in about January, Roberts testified, Collins remarked that employees could check their personnel folders. About a month later Roberts recalled this and decided to check her folder (Tr. 845, 848). She did so. The time was a week or two before the end of February (Tr. 849). She discovered an old (September 1978) write-up critical of her initial 2-week performance as a utility relief operator (early MSA title). She complained that she had never been shown the document. Ken Engler and Paul Porter thereafter apologized that the supervisor had not informed her of the matter, and the next day Personnel Assistant Leonard Gibbs told her the writeup had been torn up (Tr. 846).

On about February 29, Roberts was called into Thies' office where he told her he had heard that she was for the Union, and that there were plant rumors questioning her loyalty to Purolator. He told her that he observed her (lack of enthusiastic) reaction to his announcement of the day before (Tr. 840). He asked if she were for the Union, and she told him "yes." He told her that no one in management could be part of the Union. She said that in light of the decision, she "would be for the company all the way," that she would not attend any more union meetings, or participate in any union activities, and that she would do whatever he said had to be done (Tr. 839).

Thies asked why she thought the plant needed a union, and she said because of the unfair writeup she had received which without her knowledge and had been placed in her personnel folder without her being told. Thies said it had been torn up.

He asked why other employees favored the Union and she said they wanted more money and someone to speak for them in the office to avoid the old run-around "we will look into it" answer (Tr. 840).

With no prior notice or warning, Roberts was called into Collins' office on March 18, 1980, and there in the presence of Collins and Semmes, Thies told her that she was being terminated because she had failed to perform legal supervisory duties. He gave no clarification (Tr. 850). Semmes escorted her out.

Roberts testified that she covered the materials in the black binder with her employees and got answers to their questions. Two of the questions she asked attorney Creech at the roundtable (about eight MSA attendees) sessions were whether any other union president had been caught embezzling and whether the Union's president was bonded (Tr. 916). She never failed to follow any campaign instructions before her discharge (Tr. 917). I credit Roberts' testimony.

*Lexie A. Powers* testified that he began attending union meetings after Collins made his December 14, 1979 remarks to the MSAs, and continued attending Thies' announcement on February 28, 1980 (Tr. 613). He testified on January 21 in the preelection hearing in Case 11-RC-4817 (Tr. 620). In late January he wore a union T-shirt on one day when they arrived, but when the union baseball caps and union pins arrived in early February he wore one of each every day until the end of February (Tr. 616, 679). On February 8, Powers, after securing the attention of 60 to 75 employees in the cafeteria at lunchtime, urged them all to attend a union meeting on February 10 at the Ramada Inn (Tr. 614). On February 11 he copies of a union leaflet at the plant gate before work.<sup>89</sup> After Collins' February 28 announcement (Thies spoke to the day shift) about the Acting Regional Director's decision finding them to be supervisors, Powers no longer attended union meetings, removed his union insignia, ceased his activities for the Union and wore a Purolator hat and pin until he was fired (Tr. 691).

In early March the roundtable discussions began between management representatives and small groups of MSAs. At the first and only discussion Powers attended, attorney Creech was present to answer questions. Powers asked attorney Creech how he was to handle the situation in view of his past position of favoring the Union and with his wife, Marean, being a supporter of the Union (Tr. 684). After I overruled Respondent's objection of attorney-client privilege (Tr. 685-687), Powers testified that attorney Creech told him just to work at it slowly and that Respondent would give the MSAs black binders containing campaign materials to present to their employees (Tr. 688). Powers never received such a binder, for as both Powers (Tr. 688) and Thies (Tr. 3761) testified, Thies told Powers Management did not trust his loyalty to Purolator.

<sup>89</sup> He stored the leftover copies in the same locker in which he maintained his football. Supervisor Mininno's instruction that he remove the leaflets has been found above to violate Sec. 8(a)(1) of the Act. Earlier I found the February 7 incident, in which General Supervisor Ken Engler told Powers and Ricky Cordrey to remove their union buttons not to be a violation of the Act in view of the circumstances which followed.

Thies testified he personally had observed Powers going out of his way to speak to the union supporters distributing leaflets at the plant entrance on his way to work, and that others had reported as much to him. Thies also testified that he cautioned Powers on two or three occasions within the first few days of the February 28 (bulletin board) announcement against socializing with union supporters (Tr. 3849). He concedes he did not give Powers a warning when Powers continued such conduct (Tr. 3850).

On cross-examination Powers testified that he ceased his support of the Union after February 28 and tried to actively support Purolator (Tr. 739). He confirmed that in a pretrial affidavit he gave a Board agent on March 5, 1980, he stated, "I have been laying low after I found out there was a question on the status of the MSA's." (Tr. 740-1.) At page 145 of its brief, Respondent contends that the quoted statement impeaches his testimony that he supported Purolator after February 28. There are two defects to this contention. First, the full context of the remark was not given. Powers could have been expressing the idea that he was suppressing his natural inclination to support the Union, and not that he was supporting Purolator. Second, the affidavit was given on Wednesday, March 5—less than a week after the February 28 announcement. The short time lapse leaves open to question whether Powers had time to have done anything more than to begin wearing the Purolator hat and pin. Moreover, it is undisputed that when he asked for a copy of the black binder containing Purolator's campaign materials he was told he would not receive one because he could not be trusted. I therefore reject Respondent's impeachment contention.

Called in rebuttal by the Union, Powers and his wife, Marean, testified that they rode to work together each day. They denied that Powers socialized as Thies described. Powers, they testified, would drop Marean off at the handbilling line and he would proceed to park the truck in the parking lot. He would not go back to the group handbilling but went the opposite direction into the plant (Tr. 3943, 3945, 3955). Powers testified that only on the first occasion such leaflets were distributed did he even accept one as he stopped to let his wife out (Tr. 3938).

Unlike the matter-of-fact termination interview described by Thies, Powers testified that facing him were Thies, Collins, and Supervisor Mininno. Thies told Powers he was being terminated for "refusal to do supervisory duties." Powers inquired as to what duties had he not performed. Thies responded, "Lexie, I don't have to answer that. I am the Plant Manager, this is my plant and I will do what I want to do and you will be escorted off the property immediately." Mininno then escorted Powers out and off the premises (Tr. 623). My conclusions regarding Powers' testimony are set forth in the following section.

d. *Conclusions*

(1) The General Counsel's primary theory

Because I find the MSAs to be supervisors within the meaning of the Act, the General Counsel's primary theory, that the fired MSAs are employees, fails. His other theories must be treated.

(2) The General Counsel's secondary theory—no violation

It is clear that Respondent had a legal right to require its supervisors to vigorously support it in the campaign and to refrain from associating with, or even giving the appearance of associating with, union organizers and union supporters who were carrying on activities on behalf of the Union. Steve Thies testified that in his opinion Lexie Powers (Tr. 3760-3761), Betty Roberts (Tr. 3767-3768), and Virginia Peoples (Tr. 3773) were not fully supporting Purolator in its campaign. As there is no evidence that these MSAs were asked to do anything unlawful, Respondent argues that it had a right to terminate them when they failed to support the Company to the satisfaction of Respondent's management.

In this respect, Respondent cites the Board's decision in *Western Sample Book & Printing Co.*, 209 NLRB 384 (1974). There the employer discharged three supervisors for failing to adequately support the company in its campaign. Specifically, the employer was dissatisfied because these supervisors failed to reveal enough information about the union and the union activities of their employees. The Board found that the employer's campaign instructions stopped short of requesting the supervisors to perform any illegal acts and that their discharges were lawful. The administrative law judge, with Board approval, stated:

[T]here has been established a class of employees, meeting the statutory definition of supervisors, who can be brow beaten, harassed, threatened, and discharged for failure to prevent the unionization of the establishment where they are employed, or, as in the instant case, if the employer concludes that such supervisors have exerted insufficient energy in discovering information concerning the union and thereby failed to assist the employer's antiunion campaign. [209 NLRB at 390.]

Elsewhere in this decision I find that, in general, the MSAs are statutory supervisors. Subject to findings I make below regarding these four MSAs, ordinarily I would find that Respondent lawfully discharged Godwin for showing up at the Ramada Inn on March 16 where a union meeting was held. It must be remembered that only 4 days earlier the Regional Director issued his initial complaint in this case. That pleading contained an allegation in paragraph 8 that Respondent violated Section 8(a)(1) of the Act by the December 1979 conduct of two supervisors, George Hyde and James Knox, "Creating the impression among its employees that their union activities were under surveillance." (G.C. Exh. 1-o.) The return receipt reflects that Respondent received its copy of the pleading on March 13. Clearly Respondent had

reason to be concerned about Godwin's conduct, not only in relation to her case, but also in terms of whether a failure to discipline her might undermine the credibility of its defense that it constantly urged the MSAs to follow the TIPS rule.

Nevertheless, as Godwin had been employed over 10 years for Respondent, one must wonder whether the harsh penalty of discharge not only was overkill, but whether such overkill reveals that there was another, and "real," motive—to zap her because, as is discussed below, she reportedly solicited at least one other MSA, Sybil Carol Craig, to sign a union card in early January 1980. This question becomes even more pertinent in light of Thies' statement that his decision was final when she said she could get a notarized statement from the union representatives that they would not file a charge if Respondent did not fire Godwin (Tr. 3757).

Although Godwin visited the Ramada Inn after Respondent's February 28 announcement to the MSAs, in view of the fact that she had been employed over 10 years with Respondent, and as Respondent declined even to consider an apparent promise by the Union to file no charge over Godwin's visit, I find that Respondent persisted in discharging her so as not to undermine its position on the motion to dismiss the petition or, if the Union won the election, the objections it would file. In addition, I find that Respondent simply wanted to get rid of Godwin because of her lingering union sympathies—even though Purolator had suggested that she could support the Union. Whether Godwin was active for the Union during January is immaterial, for by relying on MSA Sybil Craig's March 11, 1980 affidavit in support of its motion to dismiss the petition, Respondent demonstrated that it believed that Godwin had been active.

And Respondent, normally, could hardly be faulted for terminating Betty Roberts after she told Thies that she did not trust him and that she did not know what could be done to cause her to trust him (Tr. 911). I accept Thies' testimony that it was Roberts' lack of trust which partly motivated him to discharge Roberts, and not the fact that she raised questions about the conduct of Supervisor Ken Engler (Tr. 3768).

The case of Peoples is more difficult than that of Godwin or Roberts. However, the evidence would seem to point to a conclusion that Thies was in fact more concerned about Peoples' lack of enthusiasm in March for the Purolator cause than he was over her fairly limited union activities prior to February 28.

Under normal circumstances, therefore, I would find no violation in Respondent's discharge of MSAs Godwin, Peoples, and Roberts. The case of MSA Lexie Powers is a different matter.

I credit the testimony of Lexie and Marean Powers that Powers did not socialize with union supporters handbilling at the plant entrance after February 28. Furthermore, I do not credit Thies' testimony that he cautioned Powers on two or three occasions against such socializing with union supporters. Under all the circumstances, and based on my close observance of the witnesses as they testified, I find that Thies did not in fact

believe that Powers had socialized with employees who were carrying on union activities.

Thies testified that he fired Powers because he continued to exhibit prounion conduct after the February 28 announcement (Tr. 3762). I do not credit Thies on this point, and I find that the real reason Thies fired Powers was because of Powers' activities for the Union between December 14, 1979, and February 28, 1980.

Respecting his secondary theory, the General Counsel argues that the MSA discharges were an integral part of an overall pattern of conduct designed to deprive unit employees of their Section 7 rights, citing *Bros. Three Cabinets*, 248 NLRB 828 (1980). But there is no evidence that the employees ever learned of the reasons for the discharges. In *Bros. Three Cabinets* the employer informed the employees that it had discharged a supervisor and an employee because they were "instigators," and that they would be fired if they supported the union. Unlike *Texas Gulf Sulphur Co.*, 163 NLRB 88 (1967), where no violation was found even though the employer notified the employees that a supervisor had been discharged because of his union activities,<sup>90</sup> here Respondent did not attempt to capitalize on the MSA discharges, by announcement or remarks by supervisors, in order to advance its cause in the campaign. In fact, there was no evidence that rumors circulated about the reasons for the MSA discharges.

The Board in *Bros. Three Cabinets* stated that there is no violation when, as here, an employer has discharged a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was "reasonably adapted" to that legitimate end. The mere fact that, as an incidental effect, employees may fear that the same fate will befall them if they engage in similar activity is insufficient to convert otherwise lawful conduct into a violation of Section 8(a)(1) of the Act. There must be a showing that the employer has intentionally created an atmosphere of coercion in which employees cannot be expected to perceive the distinction between the employer's right to prohibit union activity among supervisors and their right to engage freely in such activity themselves. No such showing has been demonstrated here. I therefore reject the General Counsel's secondary theory, which relies on such cases as *Bros. Three Cabinets*, supra, that the discharge was an integral part of an overall scheme to interfere with, restrain, and coerce employees with regard to their exercise of statutorily protected rights.

### (3) The General Counsel's "setup" theory—no violation

The General Counsel's third option, that Respondent should not be permitted to authorize supervisors to engage in union activities and then zap them for doing so, is unsupported by any case authority.<sup>91</sup> Of the four

<sup>90</sup> The notice also reassured nonsupervisory employees that they were free to engage in union activities.

<sup>91</sup> To the extent CGC at one point (Tr. 783) explained the "setup" theory on the basis that the MSAs were employees until the February 27 Decision and Direction of Election when they became supervisors, I find that explanation to be an incorrect articulation of the theory. As Respondent observes in its brief I, if the MSAs were supervisors, then they

MSAs fired, I have found that only Powers and Godwin were fired because of their union activities between December 14, 1979, and February 28, 1980. Notwithstanding this finding as to Powers and Godwin, Respondent asserts that it is unaware of any legal support for the "setup" theory, and it argues at page 147 of its brief:

Indeed, Respondent contends that it could lawfully tell a supervisor that he could engage in union activity and then fire him when he did engage in such activity. As a supervisor, that person simply has no protection under the Act. While the foregoing conduct would be permissible, Respondent did not engage in such conduct.

I must reject the General Counsel's "setup" theory to the extent it is not linked to a particular context, such as deliberate taint or abuse of the Board's processes. To the extent that the "setup" theory merges with the Union's deliberate taint theory or abuse of the Board's processes theory, I shall await those topics before treating further the cases of MSAs Godwin and Powers.

Even assuming that public policy, in the administration of the Act, would proscribe a "setup" discharge of a supervisor for union activity in a particular context, the discharges of Peoples and Roberts would not be unlawful, for they were not fired for any pre-February 28 union activities.

### (4) The Union's Talladega Cotton theory

Citing *Talladega Cotton Factory*, 106 NLRB 295 (1953), enfd. 213 F.2d 209 (5th Cir. 1954), the Union contends in its brief I that MSAs Godwin, Peoples, Powers, and Roberts were illegally discharged because the discharges, making a "dramatic point" to unit employees, when coupled with Purolator's "manipulation" of the MSA status issue, reveals the Company's overwhelming desire to defeat the Union "and meant that the Company was encouraging illegal conduct." *Talladega Cotton* stands for the principle that an employer contravenes Section 8(a)(1) of the Act by discharging a supervisor who refuses to obey an instruction to violate the Act on behalf of the employer in an effort to defeat a union organizing campaign. Only Peoples and Roberts gave any testimony about events possibly falling under this category. These incidents have been covered above. They relate to the question by Roberts to Thies of whether it was right for General Supervisor Ken Engler, as rumored, to promise a line employee a maintenance job (Tr. 907).<sup>92</sup> Thies caused an investigation to be made

were such during all of the time we mainly are concerned with here. In his later articulation, CGC does not refer to the MSAs as having been nonsupervisory employees at any time (Tr. 3812).

<sup>92</sup> Although Roberts testified that MSA Delores Hargett had told her that the promise was on the basis that the employee vote for the Union (Tr. 905), Roberts' description of her question at trial did not include that condition (Tr. 907), nor does Thies' description include it (Tr. 3764). In view of the investigation that followed, and the results, it appears that this difference is immaterial. Peoples, who was at the meeting, testified that the question included the union condition (Tr. 756). I do not credit Peoples because she added that Thies included with his response of checking into it that he did not see anything wrong with a person wanting a better job. I do not believe that Thies would have said that if Roberts' question had involved a condition of voting no in the election.

through Personnel Administrator Leonard Gibbs and thereafter told Roberts that the results showed that the rumor was false. Roberts told Thies she did not trust him. Thereafter, she and Hargett then conducted their own investigation by going to employee Michael McLamb (or McLain) who had originated the rumor. The record is in conflict as to whether McLamb was the promisee or simply was reporting what the promisee, a palletizer, had told him. McLamb supposedly told Roberts and Hargett that he had not told Gibbs he knew nothing about the matter (Tr. 912). This testimony was not offered for the truth since it obviously would have been hearsay for that purpose (Tr. 913). McLamb was not called as a witness. The following day Roberts was fired.

While the foregoing perhaps raises an inference that Roberts was fired because Respondent feared she would oppose any illegal activity,<sup>93</sup> the much stronger inference, and the one I accept, is that Thies quite reasonably was displeased that Roberts said she did not trust him. As this chiefly is what caused Thies to fire Roberts, I find that the discharge was not unlawful under the *Talladega Cotton* or *Buddies Super Markets* concept.

At the same meeting Roberts voiced her question about Engler, MSA Peoples raised a question whether Supervisor Roy Wilson had gone down Peoples' line taking names, or pictures, of employees wearing union T-shirts. Peoples actually described the matter as one of Wilson taking names of union supporters a week before the election. She asked Supervisor Steve Shorter why Wilson was doing this and Shorter replied that it was "to see how far the Union campaign was progressing and who was for the Union and who was for the Company." (Tr. 740-14, 773.) There is no specific complaint allegation regarding this incident. In his brief testimony (Vol. 18), Shorter was not asked about this conversation, and Wilson did not testify. Peoples testified that when she asked her question of Thies about Supervisor Wilson taking names, he told her he was not aware of it and would check into it (Tr. 756). Roberts confirms that Thies so responded (Tr. 907).

Thies testified that at the meeting MSA Peoples asked why Wilson was taking pictures of employees wearing union shirts. He said he would check into it. He learned from John Semmes that the photographs were house-keeping pictures (Tr. 3771). MSA Roberts confirmed that Leonard Gibbs, in response to Roberts also asking about the pictures and the names, showed her a picture of some trash which he said Wilson had been photographing (Tr. 908). Roberts testified that Gibbs "told me to tell the people who said Roy Wilson was taking their pictures that he wasn't taking pictures of them with union buttons or union shirts on, he was only taking pictures of trash around the plant." (Tr. 908.) Roberts said "okay" and reported this to her employees. Wilson did not testify.

At page 149 of its brief, Respondent states, in footnote 29, "Apparently, the picture and name taking incident

<sup>93</sup> A concept more in line with *Buddies Super Markets*, 223 NLRB 950 (1976), enf. denied 550 F.2d 39 (5th Cir. 1977), than with *Talladega Cotton*.

was one and the same." I find that they were two separate matters. In view of Peoples' uncontradicted testimony, I find that Wilson, a week before the election, did survey the anticipated election vote by means of a list of the split between the visible supporters of the Union and of Purolator. As there is no specific complaint allegation regarding this matter; as Respondent objected to it; and as CGC said it was being elicited only as background relating to discriminatee Peoples (Tr. 740-13), I shall not find it to be a violation of the Act.

I find the evidence insufficient to establish that Peoples' inquiry about Wilson taking names (and including the admitted matter of the photographs) was a motivating reason for her discharge by Respondent.

#### (5) Systematic surveillance

Another concept related to *Talladega Cotton* is the situation where an employer implements, through its supervisors, a regular and systematic surveillance of the union sympathies and activities of its employees. Such conduct is unlawful even where its existence is unknown to unit employees. *Belcher Towing Co.*, 238 NLRB 446 (1978), enf. in pertinent part 614 F.2d 88 (5th Cir. 1980); *GTE Automatic Electric*, 204 NLRB 716, 721 (1973). But merely requiring supervisors to report what they see and hear in the normal course of their day, even though the supervisors detest being "finks" and informers, and discharging the supervisors for failure to be adequate "finks" in the employer's estimation, is not illegal. *Western Sample Book & Printing Co.*, 209 NLRB 384, 390 (1974).<sup>94</sup> The unsavory connotation of "fink" aside, the fact is that an employer has a legitimate interest in learning what his supervisors know, for the law imputes their knowledge to him.

There is no evidence here of the MSAs being asked to engage in any systematic surveillance. The evidence concerning the details of the one-on-one meetings with the MSAs held with their employees is very sketchy. Neither the General Counsel nor the Charging Party indicated that he had subpoenaed one of the "black binders" containing Respondent's antiunion campaign material, and the brief descriptions (from many different witnesses, including some in the postelection portion) of that material in the record do not disclose anything of an unlawful nature.

The closest indication that Respondent's presentation to its employees may have been a regular and systematic program at the edge of legal limits appears in the already noted testimony of Supervisor George Hyde. Of course, this assumes that the supervisors were utilized as the MSAs—to make a presentation to their line employees—and that Hyde's method is a substantially correct description of the technique Purolator prescribed. Under cross-examination by counsel for the General Counsel, Hyde testified that in presenting Purolator's position to the employees he brought into his office (he did not interview

<sup>94</sup> Although the employer's instructions and conduct in *Western Sample* come close to describing systematic surveillance, that case stands for the proposition that while an employer may require supervisors to report what they see and hear through innocent acquisition, it cannot require them to engage in illegal conduct. *Belcher Towing Co.*, supra.

those pushing the Union), he asked each whether she "had been affiliated with a union or had worked with a union." If the employee replied no, "I would ask them if they knew anybody who worked for a union, to see if they had views of the benefits that they could get from that." (Tr. 3291.) He testified that "my whole purpose" was "to have the employees speak freely to me, to tell me what is on their mind." (Tr. 3292.)

Hyde's description obviously gives only a limited view of his entire presentation. In any event, the evidence falls far short of establishing that Respondent's campaign presentation program was unlawful because it systematically surveilled employees, or otherwise constituted illegal interference, or that any of the four MSAs were fired for opposing it.

#### (6) The Union's deliberate taint theory

At first glance, the Union's deliberate taint theory actually seems to self-destruct.<sup>95</sup> This is so because the cases hold that "Mere supervisory participation in a union's organizing campaign does not, without a showing of possible objectionable effects, warrant setting aside an election." *Gary Aircraft Corp.*, 220 NLRB 187 (1975). The Board observed in *Gary Aircraft* that there are two situations where such participation could have an objectionable effect. First, employees may be led to believe the supervisor was acting on behalf of the employer and that the employer favors the union. Second, employees may be coerced out of fear of future retaliation by union-oriented supervisors into supporting the union. Neither situation is present here.

There also is a related rule. Where the employer is aware of a supervisor's union activities yet stands idly by, it will not thereafter be heard to complain of the supervisor's conduct as a ground for setting aside an election. *Decatur Transfer & Storage*, 178 NLRB 63 (1969), *enfd.* 430 F.2d 763 (5th Cir. 1970); *NLRB v. Manufacturer's Packing Co.*, 645 F.2d 223 (4th Cir. 1981). The Charging Party apparently contends that Respondent's act of setting the MSAs free in mid-December 1979 to engage in union activities was an intentional effort to frustrate the election through objectionable conduct by MSA supervisors.

Respondent argues that it was caught in a delicate situation, for any directions to the MSAs not to engage in union activities could be found violative of Section 8(a)(1) if the MSAs were determined to be nonsupervisory employees. Moreover, it should be remembered that Respondent (through Collins) made the announcement by responding to an MSA's question, and not at its own planned initiative.<sup>96</sup> *Vail Mfg. Co.*, 61 NLRB 181, 182

<sup>95</sup> The theory is described above and by attorney Sarason at Tr. 783-787. There is no independent 8(a)(1) allegation in the complaint regarding the "deliberate taint" theory. The Charging Party advances it as a separate theory independently supporting the existing complaint allegations that the discharges of the MSAs violated Sec. 8(a)(1) of the Act. As a separate party, the Union is not restricted to the General Counsel's legal theory and may advance a different legal theory in support of the same complaint allegation.

<sup>96</sup> There is no evidence that Respondent solicited the MSAs' question by prearrangement.

(1945), *enfd.* 158 F.2d 664 (7th Cir. 1947), cited and relied on by the Charging Party, is inapposite. The Board there found that the employer had violated Section 8(a)(1) of the Act by attempting to persuade two foremen, found to be statutory supervisors, to be classified as "operators" so they could vote against the union in a pending Board election. The employer there had no good-faith belief that the two foremen were anything but statutory supervisors. The key point, however, is that the employer initiated the action, and the taint was indeed deliberate.

Under these circumstances, I find that the evidence is insufficient to show that Respondent *deliberately* attempted to taint the election process by Collins' December 14, 1979 response of MSA freedom.

#### (7) The Union's abuse of processes theory

##### (a) Events

At one point counsel for the Union referred to Respondent's overall action on the MSAs as a "gross" violation of Section 8(a)(1) of the Act (Tr. 794). This seems to be an assertion that Respondent has abused the processes of the Board by deceptively manipulating its position on the MSAs before this Agency with the object of frustrating the statutory election process.<sup>97</sup> The abuse of processes concept describes Respondent's advancing its position before the Regional Director that the MSAs were supervisors, while failing to inform him of Collins' December 14, 1979 freedom announcement, and then contending before me in the "C" case that the MSAs were supervisors, yet failing to explain the effort it had made in the "R" case to dismiss the election petition.<sup>98</sup> Although the Charging Party never fully articulated its abuse of Board processes theory at the trial, it is nothing more than a spin off from the deliberate taint theory. It is clear, and Respondent had notice, that the Charging Party was complaining about deceptive manipulation of positions before this Agency.

The initial focus here is Purolator's February 28, 1980 motion for collateral investigation. In that motion Respondent, seeking dismissal of the election petition, professes its lack of knowledge, consent, or acquiescence in the conduct of its MSAs. The motion states, in part:

The Employer is informed and believes that some of its supervisors, including A. L. Powers, James Graham, and others, without the Employer's knowledge, consent or acquiescence, have actively solicited rank-and-file employees to become, remain and support the petitioning union. The Employer

<sup>97</sup> The Charging Party further articulates its argument on this at Br. I, p. 5. Respondent did not impliedly consent to litigation of this theory as a basis for finding a violation of the Act, and there is no independent allegation in the complaint regarding abuse of the Board's processes. However, the theory is available as a basis for supporting the existing complaint allegation that the MSAs were unlawfully discharged.

<sup>98</sup> Purolator's attempt to have the election petition dismissed would have had even less chance of success than it did had Respondent candidly told the Regional Director (and the Board) that on December 14, 1979, Collins had told the MSAs that they were free to engage in union activities until the NLRB ruled on their status.

believes that these and other supervisors, without the Employer's knowledge, consent or acquiescence, have been members of the petitioning union's organizing committee which spearheads the union's organizing drive and formulates the policies and campaign strategies of the union while continuing in the capacity of supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, hereinafter referred to as the Act.

The Employer is informed and believes that the rights of its employees have been violated because of the illegal and unlawful activities on the part of the Employer's supervisors—all without the knowledge, consent or acquiescence of the Employer. The supervisors involved in this illegal activity occupied the job classifications of supervisory assistants.

The actions of these and other supervisors have prevented and impeded the employees from exercising their right to select, or not to select, a collective bargaining representative. The showing of interest in the instant case has been obtained by the overt, intentional and forceful actions of persons occupying the status of supervisor within the meaning of the Act. Therefore, the showing of interest and the atmosphere surrounding it in this case are invalid and illegal since they have been tainted with supervisory participation, intervention and force.

Further, the Employer shows that the entire atmosphere surrounding the union's organizing drive is tainted because of the illegal actions referred to above and that the "laboratory atmosphere" sought by the Board has been violated to the extent that the Petition in the instant case should be dismissed with prejudice and the Petitioner required to secure a new showing of interest, after the lapse of a six-month period, without the illegal activities referred to herein.

Attached to the motion was the January 24, 1980 affidavit of John R. Semmes, manager of manufacturing assembly, who asserted that subsequent to the filing of the Union's petition unnamed employees had reported to him that (MSA) Powers and (MSA) James Graham were active for the Union, and in view of the reports, "I believe that James Graham, A. L. Powers, and others used their position as supervisors of Purolator Products, Inc. to secure the signatures of company employees on union authorization cards which have been submitted to the National Labor Relations Board by the union to support its claimed showing of interest."

Additional statements, obviously submitted to or obtained later by the Regional Director, are attached from Supervisor Vincent *Mininno* (who stated on March 11, 1980, that he had observed Powers wearing union insignia and carrying union cards in January and February); Supervisor Anthony H. *Guin* (who described Powers' late January solicitation of employees in the plant cafeteria to attend a union meeting that Sunday afternoon); employee Charles M. *Askea Jr.* (who states in his un-

sworn statement of March 10 that Powers, who gives him instructions, had much earlier solicited him to sign a union card and attend a union meeting); James *Cashwell* (a forklift driver who asserts in his unsworn statement of March 10, 1980, that he works for Powers who, in early December 1979, (1) solicited Cashwell to sign a union card and go to a union meeting and (2) told Cashwell that what Purolator said about the Union was "bullshit" or only part of the truth); MSA Sybil Carol *Craig* (who stated in her March 11, 1980 Board affidavit that, in early January 1980, MSA Diane Godwin had solicited Craig to sign a union card in MSA Cecilia Sanders' presence, and that Craig had reported this to Supervisor Steve Shorter); and from Personnel Manager *Grady* (Board affidavit of March 11, 1980).

The March 11, 1980 affidavits of Grady and Craig briefly describe, among other matters, Collins' December 14, 1979 remarks to the MSAs at the Bordeaux. Grady states:

*In this meeting, Whit Collins reiterated the Employer's position that MSA's are part of management and agents of the company and as such were expected to support the company. This was in reference to the union activities at Purolator at the time. Collins further told the MSA's that if they had any question about their position as a MSA or their role as a MSA, to come by his office and talk to him. Whit Collins, at no time, told the MSA's that they had the right to vote yes for the Union as well as no, nor did he make any reference to the voting aspect of the union campaign.*

I became aware of the MSA's (or some of the MSA's) involvement in the union campaign around the 1st of December, through a conversation Lexie Powers had with a supervisor, Vincent Mininno. *The MSA's had been told prior to this time that they were not to become involved in any union activities . . . . The Employer responded to its awareness of MSA's involvement in the union campaign by reiterating its position that the MSA's were part of management, in subsequent meetings.*

*. . . I have noticed MSA Lexie Powers wear union insignia to work every day. I have not told Powers that as [an] MSA he was not allowed to wear this union insignia. This is the only knowledge I have of MSA's supporting the union campaign. [Emphasis added.]*

In her March 11, 1980 affidavit, Craig described the December 14 meeting, in relevant part:

At the end of the meeting, Whit Collins spoke to the MSA employees (about 60 present) and he said that he knew there were union activities going on in the plant, and, as best as I can recall, Collins said that in the company's eyes, the MSA employees were part of management and that he felt like we should not engage in union activities, and that if any of the MSA's had doubts as to which side of the fence we were on, to come by his office and talk to him. Collins said that everybody (I don't recall if he

specifically said MSA employees or if he just said everybody) had a right to vote, but he felt like the MSA's were part of management and if we had any doubt about it to stop by and see him. The impression I got from what Collins said was that the MSA employees could not vote and should not engage in union activities. [Emphasis added.]

It appears that by letter dated March 24, 1980, Region 11 informed Respondent's attorney that the collateral investigation had not disclosed any supervisory taint. The letter does not appear in the record. The only description of it is contained in the Regional Director's Supplemental Decision.

Following the March 27 election, Respondent filed objections, the second and fourth of which allege supervisory taint. These objections read:

2. The Regional Director conducted the election even though union authorization cards were secured by persons who were supervisors within the meaning of the Act, and even though persons who were supervisors participated in union organizational activity during the union's organizational drive.

4. Throughout the campaign, supervisors, as defined in the Act, engaged in electioneering activities on behalf of the union.

In his June 4, 1980 Supplemental Decision, the Regional Director overruled Respondent's Objections 2 and 4 on the following basis:

The investigation revealed that approximately three MSA's did sign union authorization cards but there is no evidence presented to indicate that any of the MSA's had obtained employees' signatures on union authorization cards. The crux of the Employer's evidence involved two MSA's attending union meetings, talking to employees about the Union by wearing union insignia daily and announcing upcoming union meetings. Although the Employer admits it was aware of certain MSA's supporting the union activities, it admittedly took no steps to stop this activity. On March 24, the Regional Office sent the Employer's attorney a letter stating that it had completed the collateral investigation which the Employer requested and that the investigation revealed that the Petitioner's interest had not been tainted by supervisory participation and the petition would continue to be processed. The letter stated, "Even assuming that the National Labor Relations Board finds the MSA's to be supervisors, any activity by them concerning the union organizing campaign is not sufficient to warrant dismissal of the petition. *Fall River Savings Bank*, 246 NLRB No. 128; *Sourdough Sales*, 246 NLRB No. 20, and *Stevenson Equipment Company*, 174 NLRB 865."

On July 5, 1980, Respondent mailed to the Board its request for review of the Regional Director's supplemental decision. Among the items it appended to such request for review is a copy of its Motion For Collateral

Investigation with the above-described supporting affidavits. By its telegraphic Order of August 14, 1980, the Board denied such request in its entirety "as raising no substantial issues warranting review." By telegram of August 27, 1980, it denied Respondent's motion for reconsideration.

Looking back at the affidavits Respondent filed in support of its Motion For Collateral Investigation, one must conclude that a serious question is indeed raised by the abuse of processes theory. Personnel Manager Frank Grady's March 11, 1980 affidavit, in particular, stresses the fact that the MSAs had been told prior to December 1, 1979, "that they were not to become involved in any union activities." The additional affidavits, and the motion itself, rely on the implied assumption that Respondent *at no time* told the MSAs they were free to engage in union activities, and on the express contention that the MSAs had been told "that they were not to become involved in any union activity." Along with this double-barreled thrust, Respondent in essence asserted its surprise that some of the MSAs would have engaged in union activities. Not once in these documents did Respondent, in the candor a party must practice when coming before a court or this Agency, advise the Regional Director that Employee Relations Manager Collins had told the MSAs on December 14, 1979, that until the NLRB ruled, the MSAs had the legal right to engage in union activities.<sup>99</sup> But for the estoppel principle set forth in the case law above, including that cited by the Regional Director, Respondent might well have succeeded in having the election petition dismissed.

Now Respondent has come before me relying on the testimony of Collins (Tr. 3605), and that of four MSAs,<sup>100</sup> that on December 14, 1979, Collins did in fact tell the MSAs that they had the legal right to engage in union activities until the NLRB ruled.<sup>101</sup> As noted, Respondent argues (Tr. 794; Br. 1, p. 146) that Collins could have responded no differently on December 14, 1979, without exposing Respondent to an 8(a)(1) violation for suppressing the Section 7 rights of the MSAs if they were determined by the NLRB to be employees. While Collins' on-the-spot response may not be faulted by hindsight arguments, the question here is whether Respondent acted improperly before this Agency.

In mid-December 1979, Respondent began a massive supervisory training program for the MSAs. The affidavit of John Semmes, attached to Respondent's motion to dismiss the petition was taken on January 24. Clearly Respondent was all the while preparing its motion to dismiss for filing if the Regional Director found the MSAs to be supervisors. Thus, Respondent was prepared to go

<sup>99</sup> There is an important difference between expressing awareness that MSAs have been engaging in union activities, and failing to admit that management had informed all MSAs that they were free to engage in union activities until the NLRB ruled.

<sup>100</sup> Powers, Tr. 609, 611; Peoples, Tr. 743; Roberts, Tr. 876, 934; and Godwin, Tr. 955, 975, 977.

<sup>101</sup> Collins apparently made no clear distinction between the Region and the Board. As events disclose, Respondent acted on the Acting Regional Director's decision and did not await the Board's action on Petitioner's request for review before incorporating the MSAs into Purolator's campaign to defeat the Union.

either way—move to dismiss on the basis of taint if the MSAs were found to be supervisors, and request review in the unlikely event they were found to be employees. If its request for review failed, and the Union won the election and was certified, Purolator could then test the certification in a circuit court through the technical 8(a)(5) route. Whichever course developed, as dictated by events, the Union would be faced with long and expensive delays. At worst, time could defeat the Union by the process of erosion of support through lost interest. While an employer lawfully may utilize available procedures for delay, it may not do so in a manner which employs deception before this Agency in order to deliberately frustrate the statutory election procedure. Such conduct would be an abuse of the Board's processes in violation of Section 8(a)(1) of the Act. *St. Francis Hospital*, 249 NLRB 180-181 (1980).

I do not believe Collins when he implied, on cross-examination by the Union (Tr. 3673), that he was unaware that the training sessions which took place after December 14 contained item two under session II, (covering subjects taught on December 14, 1979). The language reads as follows:

**YOUR DUTIES AND OBLIGATIONS AS A SUPERVISOR UNDER THE NATIONAL LABOR RELATIONS ACT**

**1. Legal Definition of a "Supervisor"**

**2. "Supervisors" as Agents of the Company**

"Supervisors", as defined in the National Labor Relations Act, are considered agents of the company. In that respect, everything that is said and done by a "supervisor" may be binding on the company.

Based on the duties that you perform, you are a "supervisor" and a part of the management team at Purolator. Because of this, you are an agent of the company and what you say and do is binding on the company.

Collins admitted that Personnel Manager Grady prepared the manual under Collins' direction (Tr. 3671).<sup>102</sup> Grady works for Collins. It is incredible for Collins to suggest that he did not know what the manual contained or who assembled it (Tr. 3673-3674). In fact, Collins testified that he "drifted from group to group to see if there was anything they did not understand." (Tr. 3671.) Common sense declares that Collins would not be monitoring the different MSA training sessions for the purpose of clarifying some topic if he had no beforehand knowledge of what the training manual contained.

While I want to avoid duplicating here the more complete treatment I devote to the manual in the representation portion of this decision, it also is pertinent to note that the introduction page of the manual also contains, in part, the following paragraphs:

<sup>102</sup> At the preelection hearing, Grady testified that he prepared, formulated, and assembled the manual, and, with the exception of safety, taught the course (R. 263). The manual, containing some 2 dozen pages of text, is a very comprehensive supervisory training course.

A program of supervisory development has been planned to give you instructions and training on how to become a better supervisor. The purpose of this program is to answer questions concerning your duties and to provide you with the tools to do your job better and more effectively.

You as supervisory assistants are a part of the management team at Purolator and this training program is designed to help you develop good supervisory skills which will benefit you and the company.

**(b) Conclusion**

In the absence of a complaint paragraph independently alleging Respondent's abuse of the Board's processes conduct to be a violation of Section 8(a)(1) of the Act, and as Respondent did not impliedly consent to a finding of a violation, I shall decline to find one. On the other hand, the theory is presented to support the existing complaint allegation that the discharge of the four MSAs violates Section 8(a)(1) of the Act. In light of the foregoing events, I find that Respondent deliberately abused the Board's processes by taking contradictory positions before the Agency, and not advising the different authorities of the Agency of such contradictory positions, all for the purpose of frustrating the orderly election procedure established pursuant to Congressional statute.

MSAs Godwin and Powers were fired because of their pre-February 28 union activities or sentiments. Because MSAs Godwin and Powers, pawns in the abuse of processes scheme, became victims of the scam by being punished for activity expressly authorized by Respondent, I find that their discharge violates Section 8(a)(1) of the Act, and I shall order that they be reinstated with backpay and interest.<sup>103</sup>

Although MSAs Peoples and Roberts were pawns in the general scheme, they were not victimized by the abuse of processes scheme. It could be argued that Peoples and Roberts should be reinstated with backpay in order to fully remedy the abuse of processes conduct. I find, however, that there should be some connection between the abuse scam and their discharge before entering such an order. As the evidence fails to demonstrate that their failure to support Purolator to the Employer's satisfaction after February 28 had any connection to the December 14, 1979 announcement or Respondent's motion to dismiss the election petition, I shall dismiss paragraph 10 as to Peoples and Roberts.

<sup>103</sup> Reinstatement, with backpay, of these statutory supervisors is warranted because Respondent's conduct in abusing the processes of the Board requires a public policy remedial order. It is common for statutory supervisors to receive remedial protection under the Act where they have been fired in violation of Board policy. For example, *Belcher Towing Co.*, 238 NLRB 446 (1978), *enfd.* 614 F.2d 88 (5th Cir. 1980) (remedial protection for supervisor discharged for refusing to violate the Act); and *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980) (statutory policy protects even a supervisor's free access to the Board).

G. *Other Discrimination Allegations*

1. Mary Louise Puckett

a. *Introduction*

The complaint, as amended, contains three allegations relating to Mary Louise Puckett. Paragraph 8(g) alleges that on December 3, 1979, Respondent, through Supervisor George Hyde, created the impression among its employees that their union activities were under surveillance. Puckett testified in support of this allegation. In paragraph 9(e) of the second amendment to complaint (G.C. Exh. 9), the General Counsel alleges that "Respondent on or about January 7, 1980, and February 18, 1980 transferred employee Mary L. Puckett to more onerous and less desirable work resulting in a reduction of wages." The third and final complaint allegation involving Puckett appears in paragraph 9(c) where it is alleged that Respondent suspended Puckett on February 13, 1980, for 3 days in violation of Section 8(a)(3) of the Act.

In his oral argument (G.C. Exh. 17), counsel for the General Counsel did not address any of the allegations involving Puckett.

b. *Testimony of interference—paragraph 8(g) dismissed*

When Puckett came to work on Monday, December 3, 1979, after having been off work the previous Friday to see a doctor, Supervisor George Hyde asked her for a doctor's excuse. This request was contrary to his past procedure. According to Puckett, Hyde told her, in his office upstairs, that he knew she and Marilyn Raeford had been off work the previous Friday because they had gone to a union meeting. Puckett testified that she told Hyde that she had not gone to any union meeting but if she had known about the meeting she would have gone (Tr. 1038, 1077). Puckett testified that her open union activities of distributing leaflets and wearing union pins, hats, T-shirts and insignia visibly at the job, all began in January or February 1980 (Tr. 1034-1037).

Hyde testified that on Monday, December 3, 1979, as he was walking by the gasket table where Marilyn Raeford and others were working, Raeford told him that the reasons she was out Friday was that she had attended a union meeting, that she was for the Union and was pushing cards for the Union. Hyde told her that such was her prerogative to do. He testified that seamer operator Puckett, working next to the gasket table, said nothing. Later on the production floor he asked Puckett why she was out the previous Friday and she replied that she was sick. He asked whether she had a doctor's excuse and she said she would bring one. Nothing was said about union meetings in that conversation. Puckett never brought him a doctor's excuse (Tr. 3253-3255).

In view of the fact that Puckett testified in a rather disorganized fashion, I credit the version given by Supervisor Hyde. Moreover, it seems highly unlikely that Hyde would have any reason to deny a conversation about the Union with Puckett while admitting that Raeford informed him that she had attended a meeting. I

therefore shall dismiss paragraph 8(g) as to George Hyde.

c. *Transfer to more onerous work—paragraph 9(e) dismissed as to January 1980*

Respondent admits that it transferred Puckett to a lower paying job on or about January 22, 1980. Hyde testified that prior to this transfer, Puckett worked as a seamer operator on oil line 2. The seamer job is a bid job and pays 10 cents an hour more than an assembler job. Good attendance is critical to the seamer operation. Hyde testified that he considered more than one absence per month to be poor attendance for a seamer operator (Tr. 3255-3257).

About December 5, 1979, Supervisor Hyde counseled Puckett about her absenteeism and gave her a warning for excessive absenteeism. The warning (R. Exh. 104) states in relevant part:

You have been warned and counseled several times on excessive absenteeism. In view of the above and the attached attendance record, I will consider moving you from seamer operator to a less critical position if this is not corrected immediately. Further [incidents] of this will result in removal from seamer operator.

Puckett signed the warning. The General Counsel does not allege in the complaint that Respondent violated the Act by issuing a warning to Puckett. The attendance record reflects that Puckett had actually received two prior warnings for poor attendance, one in April 1979 and a second warning in June 1979. Under Respondent's policy, attendance warnings older than 90 days do not serve as a basis for termination (Tr. 3298-3299). Puckett continued to have attendance problems in the months following and Hyde credibly testified that he did not give Puckett any written warnings during this time because a number of her absences were excused (Tr. 3299-1). Because Puckett was working a bid job, the fact that she was absent, regardless of whether her absence was excused or unexcused, was considered by Hyde to be a serious matter (Tr. 3258). Puckett admits that during the counseling session on December 5, Hyde told her that she should not miss any more days for 2 or 3 months or she would lose her [seamer] job (Tr. 1072, 1092).

The record reflects that Puckett's attendance improved briefly in December, but deteriorated again in January 1980. Hyde testified that during January 1980, Puckett was tardy-unexcused on January 2, left early-excused on January 4, and was out unexcused on January 16, and that as a result of the unexcused violations on January 2 and January 16 he decided to move Puckett from her seamer job. Therefore, on January 22, 1980, Hyde moved Puckett to a gasket job (Tr. 3266-3269). This transfer is documented in a progress report (R. Exh. 106). The document records that she has been warned about excessive absenteeism and states as the reason for the action:

You received a letter of counseling on December 5, 1979 regarding your excessive absenteeism. Since

then, you have been absent on January 16, 1980 and tardy for work another day. In view of this, I recommend that you be relieved as seamer operator and placed in a lessor [sic] critical position.

Hyde signed on January 22, 1980, as did MSA Kathy Foos. Hyde signed again on January 24 when he noted that Puckett refused to sign the report.<sup>104</sup>

Hyde explained that he did not count the January 4, 1980 absence because Puckett had permission from Personnel Manager Frank Grady to visit her father in surgery (Tr. 3267-3268). Instead, he moved Puckett because she was tardy-unexcused on January 2 and was absent-unexcused on January 16, 1980. These absences are confirmed by Puckett's attendance record (R. Exh. 105). As Respondent argues at page 182 of its brief, had it wanted to be hardnosed it could have insisted that Puckett remain at work despite her father's surgery or could have given her permission to leave but informed her that the absence would be counted against her. Respondent, however, did neither. Instead, it attempted to accommodate her problems. "Nevertheless, when Puckett subsequently missed another day without any excuse, Respondent had no choice but to move her and put someone in the job who would be there on a regular basis."

To show a consistent past practice, Respondent offered its Exhibit 38, a progress report dated May 14, 1979, indicating that employee Carol Fields was being transferred off a *bid* job to the labor pool because of poor attendance. Supervisor Mickey Turlington testified that he prepared this report and that Fields was in fact transferred from the bid job because of attendance problems (Tr. 1992).

The General Counsel offered no evidence of disparate treatment. In view of the foregoing, I find that the General Counsel has failed to demonstrate that Puckett's union activities were a motivating reason for her January 22, 1980 transfer, with reduction in pay, and I shall dismiss paragraph 9(e) of the complaint with respect to the January 1980 allegation. The February 18, 1980 transfer is treated below.

#### d. *Suspended February 13—violation*

The record reflects that Puckett was suspended for 3 days on February 13, 14, and 15, 1980, for events occurring the evening of Friday, February 8, 1980. A record of the suspension was prepared (R. Exh. 129) and Personnel Manager Grady testified that he presented it to Puckett on Monday, February 18, when she returned to work but that she refused to sign it (Tr. 3400). The suspension notice states that Puckett had been warned about "disorderly conduct on Purolator property; written warning w/3 day disciplinary lay-off." The text of the reasons for the action states:

<sup>104</sup> Puckett appeared to be confused in her testimony concerning the time of her transfer. She placed the event as occurring in relation to when she took off the first Friday in January when her father had surgery. She also testified that it was then that she was moved from seamer to blister pack and her pay reduced (Tr. 1081). CGC introduced no pay-tubs to substantiate Puckett's dating of the pay reduction.

On Friday, February 8, 1980, you were overheard by another employee, making inflammatory remarks to an MSA on your line, Sharon Tew. These remarks were unprovoked, disruptive in nature, and violate our code of conduct as outlined in our published Disciplinary Action rules. Based on our findings, you are being issued a written warning w/3 day disciplinary lay-off for violation of Guide II Rule 9; Disorderly conduct on Purolator Property. You were suspended from work pending investigation of the facts leading to this action on Wednesday, Thursday and Friday, February 13th, 14th and 15th and these days will be considered as your disciplinary lay-off. Further instances of this violation may result in more serious disciplinary action up to and including possible termination.

At page 188 of its brief I, Respondent contends, "It is not necessary that a determination be made as to what actually happened on the night of February 8, 1980. The issue is not whether Puckett actually engaged in the conduct for which she was disciplined; instead, the issue is whether Respondent had reasonable grounds for believing that Puckett had engaged in such conduct." I find that Respondent seized upon the opportunity to punish a strong union adherent while ignoring the conduct of MSA Sharon Tew because she was displaying procompany insignia.

While it is not necessary to make a determination as to what actually happened during the entire evening of February 8, an analysis of certain events is in order. That evening must be divided into two segments. The first portion pertains to that which occurred during the second shift which ends around midnight. The second portion of the evening pertains to the events which transpired when employees got off work and some went their merry way. For our purposes, the events which transpired during the first portion (i.e., during the shift on plant premises) is sufficient for this decision here. It is unlikely that anyone, on the basis of the record here, could resolve the differences as to what really occurred during the early morning hours of February 9.

From a composite of the testimony, it appears that there is no substantial dispute as to what occurred during the second shift until very near the end of the evening. At that point, there is a sharp conflict in the evidence. It appears that MSA Sharon Tew came to work wearing a T-shirt bearing the legend:

WE LOVE  
PUROLATOR  
VOTE NO

It is undisputed that on observing Tew wearing the T-shirt, Puckett made a remark about Tew and the Union. According to Puckett, whom I credit, she said in the presence of others that "The one's wearing the shirts are the ones that started it." (Tr. 1042.) Puckett testified in making this remark she was referring to the fact that much earlier in the union campaign Sharon Tew had been supporting the Union and encouraging employees

to attend union meetings at the Ramada Inn in Fayetteville.<sup>105</sup>

Kathy Lynn Foos testified that on February 8 she was the MSA on oil line 2 on the second shift. When work was to begin about 3:45 p.m., Foos testified that she heard Puckett make some comment about Sharon Tew and the Union. "I told Louise that if she had anything to say to Sharon to say it to her and stop talking around all of the girls." (Tr. 2996.) Puckett said she would do so. Foos testified about 20 minutes later that she (Foos) went to MSA and told her about Puckett's remarks. Moments later MSA Tew came over to Puckett and, in the credited version of Puckett, told her that if Puckett had anything to say to her, to say it to Tew's face. Puckett told her that Tew was the one who started the Union on the second shift and why Tew was now wearing the Purolator T-shirt Puckett did not know. Tew told Puckett that she would meet her at 1 a.m. at Puckett's house (Tr. 1044). Around 8:30 p.m. MSA Sharon Tew and MSA Kathy Foos came over to Puckett. Also present were Brenda Young, Lynn McNeill, and another employee whose name Puckett could not recall but who does not work at the plant anymore. MSA Tew said that since Puckett had told all her union friends that Tew was coming over at 1 a.m. that Tew would no longer go to Puckett's home at that hour but that she, Tew, knew where Puckett lived. Although Brenda Young was called as a witness by counsel for the General Counsel in support of an allegation regarding Supervisor George Hyde in paragraph 8(a) of the complaint, she was not asked anything about the Puckett-Tew matter. Lynn McNeill was not called as a witness by either party. Puckett gave Collins the names of both Young and McNeill and Collins did interview them. So did Manufacturing Manager John Semmes who testified that McNeill told him there had been words between Puckett and Tew most of the evening but that she did not overhear the conversation exactly other than to know they they were upset with each other (Tr. 3542).

Semmes testified that Brenda Young told him that she recalled the incident where Sharon Tew came over and started talking to Puckett. After Tew left, Young asked McNeill what was going on and McNeill replied that "Sharon Tew said that she would see her after work at her house." Brenda Young then replied, "I don't want to hear anymore, I don't want to get involved." (Tr. 3542, Semmes.) Brenda Young also told Semmes that at the end of the shift as she was going to the timeclock, she observed MSA Tew and Puckett walking toward the timeclock and involved in some kind of argument. She could not overhear exactly what was said but that as Tew "peeled off" to leave, Young overheard her say "Louise, you are fucking with the wrong person." (Tr. 5342.)

Gwendolyn Porterfield, called as a witness by Respondent, testified that she was working on the front of oil line 2 on the occasion in question. When the front of the line completed its work at 11:50 p.m. she went back

to the seam section where MSA Sharon Tew and MSA Kathy Foos were standing next to the can box. While the three were having a general conversation, Louis Puckett got up from the gasket table and walked over to where the three were standing and told MSA Sharon Tew that she (Puckett) was going to "beat the goddamn motherfucking hell out of Sharon Tew." (Tr. 3010.) According to Porterfield, Tew said nothing, just stared at Puckett, and dropped her hands. Porterfield said that Tew had said nothing to Puckett while Porterfield had been there. After the remark by Puckett, Porterfield testified that Tew turned around and walked to oil line 3 where she works as MSA.

When asked on cross-examination by Charging Party who was present when Puckett made the comment, Porterfield listed only herself and MSA Tew (Tr. 3011). She did not explain what happened to MSA Foos. MSA Foos testified that she was present at no further conversations between Puckett and Tew following the one occurring around 8:30 p.m. in the evening (Tr. 2998). Porterfield admitted that she started wearing the "WE LOVE PUROLATOR VOTE NO" T-shirt about a week before the March 27 election (Tr. 3011). Porterfield testified that she worked at that time for MSA Foos who also was against the Union.

Puckett testified that she denied the accusation during Respondent's investigation of the matter. MSA Sharon Tew did not testify. I note that Puckett is a small person. She described herself as being 5 feet tall and weighing 95 pounds (Tr. 1097). She estimated that Tew was a head taller and weighed about 130 pounds (Tr. 1098).

The shift ended at 12:15 a.m. and Puckett, whom I credit, testified that as she went to the timeclock to punch out she observed MSA Sharon Tew and MSA Kathy Foos waiting for her. Sharon Tew approached her and said she was going to kick Puckett's "ass." Puckett told her "Let me clock out." When Puckett had clocked out, Sharon Tew grabbed her again and told her that she was going to kick her (derriere) and that Puckett did not know who she had spoken with, that Puckett had spoken with "the wrong person." Clearly the statements of MSA Sharon Tew lends credence to the report that Semmes testified Brenda Young told him.

In her pretrial affidavit of February 20, 1980 (G.C. Exh. 8), on page 1 in the next to last paragraph, Puckett records that Tew told her, "She said I did not know who I was fucking with that I was fucking with the wrong one." The affidavit of Puckett contains two pages numbered two. After carefully examining the affidavit, I am convinced that the full-length typewritten page numbered two is the correct page two and the signature page, also numbered page two, is actually page 3, and that the three typewritten pages are all one affidavit, being that which was given by Puckett to the Board agent on February 20, 1980. The exhibit was received as past recollection recorded for the limited purpose of giving a time frame and coherence to the testimony of Puckett (Tr. 1119-1120). Her testimony was rather disorganized in terms of her being able to recall dates or the sequence of events.

<sup>105</sup> It should be recalled that as of February 8, the Decision and Direction of Election of February 27 had not issued. Therefore, the December 14, 1979 pronouncement of Employee Relations Manager Collins that MSAs were free to take any position they pleased regarding the Union was still in effect.

The following Monday before work (or possibly the weekend) Puckett filed a criminal complaint against MSA Sharon Tew on the basis of "threats to do bodily harm" (Tr. 1055, 1088).<sup>106</sup>

Still later that Monday, February 11, Collins testified that MSA Sharon Tew came to him and reported to him and Personnel Manager Grady that Puckett had sworn out a warrant for her arrest and that she was concerned that the sheriff may come to the plant to arrest her in the presence of other employees. Collins suggested that she contact an attorney friend of his. In the meantime he directed her to Semmes and requested that he get involved and find out what had taken place. Collins, who apparently was substituting for Plant Manager Thies who was away from the plant, had to go to another meeting at that moment (Tr. 3629).

Semmes testified that on Monday, February 11, Gwendolyn Porterfield came to him (clearly before he had any conversation with Sharon Tew) and told Semmes that she did not think it was fair about Puckett filing a charge with the prosecutor's office against Sharon Tew when in fact Porterfield had overheard Louise Puckett make a profane threat to Sharon Tew which Porterfield then repeated for the benefit of Semmes (Tr. 3537-3538). Semmes asked if anyone else had overheard the statement and Porterfield said that *she thought Kathy Fooks had*. Porterfield stated that she (Porterfield) had told Roberta Williams Friday night about the statement also (Tr. 3538).

After this meeting with Porterfield, Semmes called in Sharon Tew and asked her if the threat reported by Porterfield had actually been made by Puckett to Tew. According to Semmes, MSA Tew stated that she and Puckett had had some words that night but that *Tew did not recall or hear Puckett say that* (Tr. 3539). Semmes next spoke with Roberta Williams who confirmed that Porterfield had asked her the preceding Friday night whether she had heard Puckett say she was going to beat Tew's ass (Tr. 3540). Following this, Semmes testified he spoke with other operators on the line, including, as already noted, Brenda Young and Lynn McNeill. He then told Collins what he had learned so far and Collins told him to continue on with the interviews. Respondent did not call Williams as a witness.

Semmes testified that the following day he spoke to second-shift employee Cathy Venzualea who is Puckett's sister. Venzualea no longer works at the plant and has relocated to Arizona. According to Semmes, Venzualea said she did overhear one exchange between Sharon Tew and her sister Louise Puckett in which she observed Puckett pointing at Tew saying "if you have got anything to say to me, say it to my face; don't go to the front office on me." (Tr. 3544.) Tew allegedly just shook her head and made the statement that Puckett must think she is stupid. When Semmes asked what provoked this, Venzualea said that Puckett often does things like that to

get attention and at times when she and her sister would have a "falling out" Puckett would start jumping up and down (Tr. 3545). According to Semmes, Venzualea reported that on occasions Puckett would tell Venzualea that she was going to "beat her ass," but that Venzualea did not pay any attention to her because "that is the way that she was."

Later that evening Semmes assembled in his office Gwendolyn Porterfield, MSA Sharon Tew, General Supervisor Leon Turner, and Louise Puckett in order to resolve a conflict on the matter. Semmes asked Porterfield to say what she had heard Puckett say on Friday evening at 11:45 p.m. and Tew and Porterfield did so. Puckett denied the accusation, saying that it was all Sharon's fault and that Sharon Tew was the one who was coming over to her house to discuss the matter after work. According to Semmes, Puckett did not want to talk about the matter, that she just giggled, looked at the wall, turned her head, and "acted strange" (Tr. 3548). Semmes then had Puckett sit outside in the lobby while he called Collins at home. Collins told him to suspend Puckett until he could analyze everything the following day.

According to Puckett, whom I credit, she first asked Supervisor Lenoard Barber (present according to Puckett), then Semmes that she be permitted to have a witness present (Tr. 1057). Each told her she did not need one. In response to Respondent's objection of no complaint allegation, CGC asserted that he was eliciting evidence of the matter only as background, and would not request a finding. Charging Party requested that I nevertheless make a finding of a violation (Tr. 1057). The question of what Puckett expected as she entered the office, saw the group, and made her request was not developed. Even assuming that on being called into the manufacturing manager's office under such circumstances would reasonably cause her to fear that some kind of disciplinary event might be about to occur, I decline to find a violation since CGC said he was not seeking to amend the complaint. If the proper conditions were present, Puckett was entitled to an employee witness. *Anchorank, Inc.*, 239 NLRB 430 (1978); *Glomac Plastics*, 234 NLRB 1309 (1977).

Puckett testified that Semmes disregarded her denial of the accusations. He told her that he knew that she had threatened Sharon Tew, that she was always laughing, jumping, and dancing around and never doing her work. When she returned to his office after waiting in the lobby (apparently while he telephoned Collins) he told her that he would have to terminate her and for her to leave (Tr. 1061). The following morning she telephoned Collins to ask him if she could tell her side of the story.

A couple of days later (after Collins had also interviewed some employees), Collins met with Puckett and Personnel Manager Grady (Tr. 3630). The testimony Collins gave at the hearing concerning the conversation with Puckett described almost entirely the events which took place after the shift ended. Collins said he took notes and told her that he would be in touch with her. Thereafter he consulted with Semmes. Collins also testified that "Frank," presumably referring to Personnel

<sup>106</sup> The basis for filing the complaint may also have been related to further events during the morning hours. I find it unnecessary to resolve the disputed facts about those early morning events. Puckett testified that the district attorney subsequently told her that he did not have enough evidence to proceed (Tr. 1089). Puckett's complaint was either withdrawn or dismissed; the record is not clear on the point.

Manager Frank Grady, Jr., had talked to Cathy Venzulea who had given an entirely opposite version from what Puckett told Collins had occurred.<sup>107</sup>

Collins testified that in view of all the investigation "that it was a bunch of gobbly gook, and at that time, she would get three days off for disorderly conduct." (Tr. 3633.) He stated that Puckett was not discharged for threatening violence, as policy would permit, because "You have got to know Mary Louise Puckett." Elaborating on this, Collins said that he felt that Puckett was a person seeking to attract attention and was not in fact engaging in the act of violence or threatening violence on anyone and it was just her way of showing off and getting attention from other employees. It was his opinion that she disrupted these employees while at work on company property, and he wanted to show her that she could not do these things on company property while on company time and therefore he issued the suspension rather than a discharge (Tr. 3634).

I conclude that Respondent actually believed that there had been some sort of spat between Puckett and MSA Sharon Tew, and that in the investigation which followed it learned that the dispute was related to the question of support and opposition to the Union. Moreover, Respondent was well aware that both MSA Sharon Tew and MSA Kathy Foos were opposed to the Union and indeed that Tew, at least, was wearing a Purolator, Vote No, T-shirt and that Mary Louise Puckett was an avid and open supporter of the Union. During Respondent's investigation, MSA Tew admitted to Semmes that she did *not* hear the statement attributed to Puckett by Porterfield. Of course, there is no way that MSA Tew would not have heard that blatant physical threat supposedly uttered by Puckett if Porterfield's testimony were accurate. I do not credit Porterfield. Indeed, there is a significant discrepancy or vacillation in her testimony concerning whether MSA Foos was present. If MSA Foos was present at the 11:45 p.m. threat on February 8, one must wonder why Foos did not testify that she heard it. In fact, Foos testified that she was *not* present at any further encounters between Puckett and MSA Tew after 8:30 p.m.

Semmes admits that Brenda Young<sup>108</sup> told him that she overheard MSA Sharon Tew at the timeclock utter an obscenity to Louis Puckett. It is clear from the testimony of Semmes himself that there is enough suggestion that Tew was involved in profanity so that if any warning or suspension were going to be issued to Puckett, the only fair and even-handed procedure would be for Puro-

lator to issue one to MSA Sharon Tew also. This was not done, and the fact that only Puckett was suspended, in the face of the evidence Semmes admittedly had,<sup>109</sup> suggests that Respondent ignored the truth and seized on the opportunity to punish a known and active union supporter, and I so find.

Accordingly, I find that Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 9(c) for suspending Mary Louise Puckett on February 13, 14, and 15, 1980. As part of the remedy, I shall order that the progress report and suspension notice (R. Exh. 129) be destroyed and that Respondent notify Puckett personally, and by written memorandum, that it has done so. As it is clear that Semmes was already aware the evening of Monday, February 11, from MSA Sharon Tew herself, that Tew had not heard the alleged threat Puckett allegedly (by Porterfield) made to Tew, I find that Respondent should be ordered to reimburse Puckett for any wages she lost by being suspended the 3 days of February 13, 14, and 15.

*e. Transfer of February 18, 1980—violation—g(e)*

The second portion of paragraph 9(e) refers to the transfer of Puckett on February 18, 1980, to more onerous and less desirable work with a reduction in wages.

The record reflects that when Puckett returned from her suspension, John Semmes transferred her to a middle oven job on one of the air lines. He explained that he did so because the MSA on the seam section where Puckett worked was Kathy Foos. Kathy Foos was a friend of Sharon Tew and there was a tremendous amount of animosity between Foos and Puckett. Semmes testified that he felt there would be fewer conflicts if Puckett were moved elsewhere. He therefore moved her to where there was a vacancy. He testified that the transfer resulted in no loss of pay, no shift change, and no change in labor grade (Tr. 3550-3551).

Although Puckett testified that the new position paid 10 cents less per hour than her former job as seamer operator (Tr. 1065-1066), the record reflects that Puckett was not transferred from her seamer job to the air line but from the position of gasket girl to the air line. Puckett already had been transferred from her seamer job to the gasket table in January, and it was a result of that January transfer which decreased her pay by 10 cents per hour. There is no difference in pay between the gasket table and the middle oven job.

Puckett testified that performing the middle oven operator job resulted in blisters on her hands and was undesirable work. It appears that some of these problems were the result of her learning a new job.

The record also reflects that about a month later Puckett was moved to a molding job which opened up and which it appears she was holding at the time of trial (Tr. 1066, 3551-3552). The evidence does not show that the molding job is in any way more onerous than the gasket job.

<sup>107</sup> If the reference by Collins was to Personnel Manager Grady, then this seems to conflict with the testimony of Grady who said that he was not involved directly in the investigation, and that his role had been only to present the suspension notice to Puckett on her return to work (Tr. 3399-3400). If the reference to "Frank" is an error in the transcript, or a misstatement by Collins, and that the actual reference or intended reference was to Semmes, then the testimony by Collins does not square with the testimony given by Semmes concerning his conversation with Venzulea, for it is clear that Venzulea had various little of substance to add to the investigation of events that evening. Venzulea clearly was not present at the occasion of the alleged threat by Puckett to Sharon Tew at 11:45 p.m.

<sup>108</sup> The fact that Young told Semmes she did not want to get involved perhaps explains why she was not asked about this subject by CGC.

<sup>109</sup> That is, evidence showing that Puckett and MSA Tew had allowed their personal differences over the union matter to degenerate into some profanity.

Respondent argues that the foregoing reflects that this portion of paragraph 9(e) should be dismissed for the reason that the molding job really is not more onerous and less desirable and for the reason that there was no showing that Puckett was transferred because of her union activities.

While it is true Semmes transferred Puckett because of her personality conflict between Puckett and MSA Kathy Foos, it is clear that the personality conflict was based on differences of opinion over the union question. Thus, the transfer was not a permissible action to take. Moreover, it is clear that working at the middle oven was indeed more onerous and far more undesirable than the job of sitting at the gasket table and applying gaskets to the oil filters. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act as alleged in complaint paragraph 9(e) by transferring Mary Louise Puckett on February 18, 1980, from the gasket table position, and I shall order Respondent to offer Puckett reinstatement at that position.

## 2. Mary Katherine Naylor

### a. Introduction

Three complaint paragraphs relate to Mary Katherine Naylor. Paragraph 9(c) alleges that a suspension she received for the 3-day period of January 30 and 31 and February 1, 1980, is unlawful. Paragraph 9(d) alleges that she was illegally transferred on February 12, 1980, to more onerous and less desirable work, and paragraph 9(a) alleges that her February 14, 1980, unsatisfactory wage review violated the Act.

Naylor has worked for Purolator a total of about 10 years. As of the time of her testimony, she had been working at Purolator for 4 years of unbroken service. It is undisputed that Naylor was an active union supporter, and that on December 3, 1979, she informed her supervisor, Babs Cordrey, that she was actively supporting the Union (Tr. 372-373). Respondent contends that Naylor's union activities had nothing to do with the disciplinary suspension, the transfer, and the unsatisfactory wage review, and that what in fact brought these matters about was Naylor's unwillingness to cooperate with her fellow employees and be a good, productive employee.

### b. September 1979 meeting of John Semmes with oil line 3—aftermath

Naylor has worked as a cutter and clipper operator for the past 4 years. She had worked on oil line 3 in that capacity since about February 1979. In this work she cuts the paper that is used in the oil filter for part of the operation, and then she fastens it with a clip seal to form a paper pack (Tr. 372). In April 1979, both Naylor and Susan Sullivan were cutter-clipper operators on oil line 3. During that month Carolyn Bacon joined the two as a cutter and clipper operator. The MSA then was Joyce Shaver and the line supervisor was Vince Mininno. Bacon conceded in her testimony that she was slow catching on at first but that Naylor would do nothing to help her and in fact would make irritating comments about Bacon's work. Sullivan, on the other hand, would

assist her. Bacon testified that from the very first she noticed tension between Naylor and Sullivan.

MSA Joyce Shaver testified that Naylor came to her end of the line around February 1979, and that she noticed problems with Naylor began gradually. Susan Sullivan testified that she had worked with Joyce Shaver the entire 8 years Sullivan has worked for Purolator (Tr. 2385).

John Semmes testified that he became manufacturing manager in September 1979. At that time he also was serving as general supervisor on the first shift (Tr. 3522-3524). Semmes testified that when he became manufacturing manager there was a tremendous amount of employee conflict on the front of oil line 3. This conflict was creating substandard production. Production standards were being met only once or twice each week (Tr. 3523). Around this time, Semmes received a complaint from one of the employees, Bertha Jarman, that he should get involved because the supervisor and the MSA were not handling the problems (Tr. 3524).

In an effort to bring the problems out into the open and to solve them, he hoped, Semmes called a meeting in September 1979 of all the employees in the element section of oil line 3. During this meeting, the employees criticized both Mininno and Shaver. It also became obvious that conflicts existed between Naylor and Bacon and between Naylor and Sullivan (Tr. 3524-3525). Bacon (Tr. 2321), Sullivan (Tr. 2385), and Shaver (Tr. 2416) all testified that at this meeting Naylor accused Shaver of showing favoritism toward Sullivan. Sullivan responded that just because she and Shaver had been working together for a long time did not mean that Shaver was showing favoritism (Tr. 2385). Naylor concedes that she has expressed the opinion to Supervisor Mininno that Shaver could not handle the job, and that other employees had the same opinion (Tr. 395, 398). Naylor concedes that there was friction between her and Bacon-Sullivan (Tr. 396, 398).

Semmes testified that he concluded that the situation was a "big mess." (Tr. 3525.) He thereafter approved low performance reviews for Sullivan and Shaver, largely because of their inability to get along with coworkers (Tr. 3526). Respondent's Exhibit 79 is the October 1, 1979 review of Sullivan on which she scored only 31 points.<sup>110</sup> Under the section "Attitude and Cooperation," Supervisor Mininno wrote that Sullivan was unable to get along with Naylor (Tr. 3299-32). On the back of this review, Semmes wrote the comment that Sullivan needed to cooperate more with coworkers (Tr. 3526). Respondent's Exhibit 80 is the September 24, 1979, review of Joyce Shaver on which she scored only 32 points. Under the section "Attitude and Cooperation," Mininno wrote that Shaver needed to cooperate more with coworkers. He testified that Naylor's review had

<sup>110</sup> Personnel Manager Frank Gardy Jr. explained that the Purolator point system (utilized for semiannual reviews in use at the time) had six categories in which an employee could receive a score from 1 to 10 points, or a total maximum score of 60 points. An employee scoring 40 to 60 points received a pay raise of 10 cents per hour. An employee scoring 25 through 39 points would receive an hourly raise of 5 cents, and 24 points and below an unsatisfactory rating with no pay increase (Tr. 3384). Supervisor Babs Cordrey gave a similar description (Tr. 2532).

been given in August, prior to the surfacing of the problems (Tr. 3299-31). Semmes testified that Naylor also would have received a low review if her review had come up after he became manager of manufacturing (Tr. 3527).

The record reveals that after the September meeting held by Semmes, dissension and production problems continued. Bacon (Tr. 2333), Sullivan (Tr. 2399), and Shaver (Tr. 2432) all testified that until Naylor's transfer in February 1980, oil line 3 only met production once or twice per week, but that after her transfer they nearly always made production. The production count is visible to the employees both from the number of paper packs being stacked and from the production count which was posted on the blackboard.

Bacon, Sullivan, and Shaver all testified that Naylor was the biggest cause of the dissension and the production problems (Tr. 2363, 2401, 2437-2438, 2442). They also testified about a number of incidents to support their conclusions. One thing that Naylor would not do was help train new employees. Similarly, if a machine broke down, thus creating extra work, Naylor would not help out with the extra work (Tr. 2319-2320, 2397, 2428). Although Naylor would not help train anyone, she would continually criticize the training methods of the other employees. Bacon testified that Naylor would tell her not to follow Sullivan's suggestions and would make comments that Sullivan did not know how to train (Tr. 234-2335).

Semmes and Bacon testified about one occasion in which Naylor created problems by insisting on bringing her own chair to work. The cutter-clippers normally perform their job while sitting on stools. Every hour, however, they rotate from one position to another. Sometime around September 1979, Naylor brought her own personal chair to work. Every hour when the employees rotated, she would insist on dragging her own chair with her. This created lost production time as well as employee conflict. Finally, Semmes told Naylor that she would either have to leave the chair in one position or take it home. Naylor took it home (Tr. 2336-2337, 3527-3528).

Bacon and Shaver both testified about Naylor's problems with breaks. Naylor wanted to take her break every morning at 8 a.m. to join a friend. Shaver, therefore, always tried to relieve Naylor first (Tr. 2429). When Sullivan and Bacon started complaining, Shaver began rotating the order in which she relieved employees on breaks. On the first occasion that Shaver relieved Bacon before Naylor, the latter started taking paper packs off the line and stacking them for no apparent reason (Tr. 2335, Bacon; Tr. 2432, Shaver). Shaver testified that this incident occurred sometime in September after the meeting with John Semmes (Tr. 2458).

Carolyn Bacon testified that when Naylor did not feel like working, she would stack paper for no apparent reason (Tr. 2347). The significance of "stacking paper" is that the other employees had to help Naylor clip the paper. Susan Sullivan explained the significance of stacking paper:

When you "stack paper", it is double work on the girls working with you because we had to have

help to catch it up, and we are not supposed to stack paper unless we have a machinery problem or something; if the machines are working, if the machines are working good, we should be able to keep up, and have no paper stacked; but [Naylor] would do things that she wasn't supposed to do. [Tr. 2428.]

MSA Shaver also testified that Naylor created problems on the line. Shaver explained that if a machine went down and Sullivan and Bacon were trying to catch up on extra work, Naylor would not help out. Shaver stated that when Naylor was in a bad mood, she could not get along with anyone (Tr. 2428).

While all of the aforementioned problems were going on, John Semmes was trying to find out what the problem was and how it could be corrected. Around October or November 1979, Semmes transferred the supervisor of oil line 3, Vince Mininno, to the receiving department and replaced him with Babs Cordrey. Semmes testified that he made this move because he did not feel that Mininno was adequately handling the line. According to Semmes, the move did not bring forth the desired results (Tr. 3528-3529). Also around October or November, Semmes considered moving the whole front of the line to different positions. This would have meant moving Naylor, Shaver, Sullivan, Bacon, and Sadie Williams. Semmes rejected this idea because of the extensive training period that would have been required (Tr. 3529-3530).

During the winter months of late 1979 and early 1980, the dissension and low production of oil line 3 remained a problem. In addition to the testimony of Bacon, Sullivan, and Shaver, Debra Stump also testified about the problems existing on the line. She testified that she became a molder on oil line 3 in January 1980. On her second day on the line, Stump was dropping tubes when Naylor looked at her and said, "Would you liik at what they are doing." Naylor was pointing toward Carolyn Bacon who was cutting. Stump did not notice anything unusual and said nothing (Tr. 3299-17). Stump testified that when she started working oil line 3, the atmosphere was "real tense." She explained, "They were bickering or something, and you just didn't talk to anybody because everything was just tight; they acted like they were fussing and arguing all the time." (Tr. 3299-17.)

#### *c. Suspension of January 30, 1980—violation*

There is very little dispute in the testimony concerning the circumstances leading up to Naylor's suspension. Respondent contends that on this date Naylor, in a fit of anger, threw a magnet against an I-beam breaking the magnet into two or three pieces one of which hit Carolyn Bacon on the foot. There is no dispute that Naylor used some profanity on this occasion, although there is some slight disagreement as to the precise profanity she used.

On January 30, 1980, oil line 3 started working 2 hours earlier than 4:30 a.m. Shortly thereafter, Susan Sullivan was cutting while Kathy Naylor and Carolyn Bacon were clipping. Sullivan asked MSA Joyce Shaver if she could go to the restroom. Shaver told her to wait until

the line of paper she was working on ran out. After the line of paper ran out, Sullivan asked Bacon to cut for her while she went to the restroom. By this time, Shaver had walked off to do some paperwork. Bacon got up from her stool and told Naylor, who was down on the floor picking up clips seals with a magnet, that Sullivan was going to the restroom and that Naylor "needed to catch the paper." Bacon conceded that she did not know whether Naylor heard her (Tr. 2323).

Bacon then went around the support post, or I-beam, to the cutting table and sat down. All of a sudden, someone hollered, "Kathy, the paper is coming." According to Bacon, Naylor looked up and said, "Where the goddam hell did Susan go to." Bacon replied that Sullivan had gone to the restroom. Naylor, who still had the magnet in her hand, allegedly walked over to the cutting table and threw some clip seals in a trash box. She then took the magnet, which was attached to a rod, and threw it against a support post, or I-beam, about 3 feet away. One of the employees at the string tier machine made a comment about the paper packs coming down the line needing attention. Bacon testified that Naylor replied, "I don't give a damn what you do with this shit." (Tr. 2323-2324.)

Naylor testified that no one told her that anyone was leaving the line (Tr. 377). Naylor further testified that when she did not hear any clip seals making their usual noise she looked up from where she was bent down picking up clips and Bacon was cutting paper while Sullivan was gone. Naylor asked Bertha Jarman, to her right, where Sullivan was. Jarman replied that she had gone to the restroom. Naylor testified that she said, "I'll be goddamned if this ain't some shit." (Tr. 377, 399-3.) Her testimony on cross-examination is (Tr. 399-3):

- Q. What did you do with the magnet you had?  
 A. I swung my arm around to put it back at the beam and it hit up against it and it broke in two pieces and fell to the floor.  
 Q. Did you throw the magnet at the beam?  
 A. No.  
 Q. It never left your hand?  
 A. No.  
 . . . .  
 Q. (By Mr. Creech) Did you see the magnet break?  
 A. Yes, sir.

Naylor testified without contradiction that at the time of her suspension Personnel Manager Grady told her that the magnet cost 30 cents (Tr. 399-4). On direct examination she testified that she had broken other magnets before and that she also had seen other employees break magnets (Tr. 378).<sup>111</sup>

<sup>111</sup> Counsel for the General Counsel did not elicit further testimony clarifying this to show what the circumstances were in those other situations. That is, whether magnets were broken before by accident or in anger, whether any pieces hit other employees, and whether the breaking of such magnets came to the attention of supervision and what, if anything, was done in the way of warnings or no warnings or suspensions. Accordingly, I find this bit of testimony regarding broken magnets in the past to be of no value in addressing whether Respondent treated Naylor disparately by suspending her.

Moments after the magnet breaking and cussing occurred, MSA Shaver learned about it, and after telling Naylor she had to control her temper, made a report of the matter to Supervisor Babs Cordrey. After receiving the report from Shaver, and the rod and pieces of magnets (one piece was never found), Cordrey told Naylor that she was going to suspend her until 8 a.m. when someone from the personnel department would be present (Tr. 2510).<sup>112</sup> Naylor told Cordrey that she had no way to get home, and Cordrey told her that she could remain in the lobby to wait for Frank Grady or Whit Collins but not to go into the cafeteria or into the plant. Cordrey then returned to the work area and began interviewing the employees to ascertain what had happened. Most of the line workers told her they had not seen the incident and the only eyewitness was Carolyn Bacon. Cordrey had suspended Naylor around 6 a.m., and when Personnel Manager Grady arrived for work at 7:45 a.m. she reported events to him.

Grady testified that he called Naylor in and asked her what had happened. His testimony is substantially similar to the testimony Naylor gave in describing the incident. Grady told her that he needed some time to investigate the matter and that he was going to suspend her for the rest of the day (Tr. 3371-3372). Grady thereafter conferred briefly with John Semmes and then spoke with Carolyn Bacon and Joyce Shaver. Bacon told Grady that Naylor had slung the magnet, had used the profanity and that a piece of magnet had hit her (Tr. 3372-3374).

As a result of their investigation, Grady and Cordrey came to the conclusion that Naylor had thrown and broken a company magnet in a fit of anger, that she had used abusive language, and that she had created a safety hazard by throwing the magnet. They then decided that a 3-day suspension would be the appropriate discipline (Tr. 2515, 3380-3381).

Later that afternoon, Naylor was contacted and told to report to the personnel department the next morning. The following morning Grady and Cordrey reviewed the facts with her and told her she was being suspended for three days. She was shown a written progress report, the suspension notice (R. Exh. 127), which Grady and Cordrey had prepared detailing the reasons for her suspension.<sup>113</sup> Naylor refused to sign saying that it was not

<sup>112</sup> At the trial, Cordrey explained that she had been instructed by her superiors that whenever an employee who had professed to be pronoun was involved in an accident, that employee should be suspended until a full investigation had been made in order to prevent supervisors from making hasty decisions which might violate the law (Tr. 2512, 2598-2599).

<sup>113</sup> The warning was for "Use of Abusive Language and Careless Abuse of Purolator Equipment. Written Warning with Three (3) Days Off." The text reads:

On Wednesday, January 30, 1980 at approximately 5:15 a.m. in the morning, it was reported that you, upon discovering that the clip seal operator beside you had gone to the restroom, became very irate, used abusive language and threw a clip seal clean up tool against a support post on your line. The tool shattered into two (2) pieces and could have caused injuries to yourself or another employee. This outburst of temper and subsequent abuse of Purolator equipment will not be condoned. More severe actions may be necessary if there is a reoccurrence of this action. Due to your being suspended on Wednesday, January 30, 1980 pending review of this incident, the

*Continued*

fair. She asked if she were getting 3 days off for cussing. Grady said no and pointed out that she had destroyed company property. Naylor testified that when she ascertained from Grady that the magnet cost about 30 cents, Grady told her it was not the price of the magnet that mattered, but what concerned him was the fact that she had created a safety hazard (Tr. 399-4), and in the process she could have caused personal injury to herself as well as to her fellow employees (Tr. 399-4; 3382). That concluded the suspension meeting and Naylor returned to work the following Monday, February 4, 1980.

Based on my close observance of the witnesses, I conclude that Naylor did not actually throw the magnet at the I-beam, but I further find that she angrily swung around with the magnet rod in her hand to "hang" it (by its magnetic attraction) on the support post. However, in this display of temper, she hit the magnet against the I-beam with such force that the magnet broke and a piece hit Bacon's foot.<sup>114</sup> I further find that the profanity used by Naylor on this occasion was that reported by her rather than as described by Bacon. The broken magnet pieces, along with a whole magnet for comparison, were shown in evidence and a photograph was taken of them along with the rod (R. Exh. 28d). Naylor admitted that these magnets are approximately 1-1/2 inches by 2 inches and are made of cast iron (Tr. 378). Respondent could reasonably conclude that the magnet would not have broken unless some unusual force had been applied to it. Moreover, Respondent could reasonably have believed the report of Bacon, in light of the broken magnet and the profanity in anger, that Naylor had deliberately thrown the magnet at the post. Of course, what Respondent truly believed is the material question, not whether Naylor did not in fact throw the magnet.

In its brief, Respondent contends that it could have construed Naylor's actions as constituting deliberate destruction of company property. It argues that this construction would not have been unreasonable in view of Carolyn Bacon's statement that Naylor actually threw the magnet at a support post. "Under Guide I Rule 6 of Respondent's disciplinary policy (R. Exh. 113), Naylor could have been discharged for this offense. The fact that Respondent chose only to categorize her actions as careless abuse of company property supports the conclusion that Respondent was not motivated by unlawful reasons in suspending Naylor." (Br. 158-159.) With respect to the different reasons given for the suspension, Respondent argues that Naylor's angry conduct on this occasion coalesced into one dangerous act which justified her suspension even though she had never previously been warned during her employment.

On cross-examination, Supervisor Babs Cordrey testified that she knew at the time of her investigation of this

first day of your disciplinary lay off will be on Wednesday, and you will be given Wednesday, January 30, Thursday, January 31, and Friday, February 1, 1980 as disciplinary time off.

<sup>114</sup> Carolyn Bacon testified that she had worked at Purolator for 2 years and had never seen a clip seal magnet break (Tr. 2317, 2327). She stated that the only magnets which she had seen break were can-hanging magnets (Tr. 2350). Susan Sullivan testified that she had worked at Purolator for 8 years and never seen anyone else break a clip-seal magnet (Tr. 2393). Sullivan stated that can-hanging magnets break because they have a heavy can hanging on the bottom of the magnet (Tr. 2407).

incident that MSA Joyce Shaver, Susan Sullivan, Carolyn Bacon, and Debra Stump were against the Union (Tr. 2571).<sup>115</sup> Naylor also testified that following her December 3, 1979 announcement to Supervisor Cordrey that she was supporting the Union, Supervisor Cordrey stopped saying good morning and ceased being friendly to her, and her instructions became abrupt commands rather than friendly requests (Tr. 373-375). It is, of course, conceivable that Respondent changed its opinion as to who was causing the trouble on the line based on the fact that only Naylor, of the cutter-clippers, was supporting the Union.

There is no evidence that Respondent had ever tolerated action such as Naylor's. Respondent introduced numerous exhibits reflecting warnings issued to employees in the past for careless handling of property, abuse of property, engaging in conduct which placed either themselves or fellow employees in situations of danger, including warnings issued to employees for injuring themselves as a result of violating Respondent's safety procedures and rules.

Respondent calls attention to several warnings issued for abusive language. Katie Chavis received a written warning (R. Exh. 11) for using abusive language on July 6, 1979, toward her Relief Operator (previous title of MSAs) when the latter asked her to change positions on the line. Supervisor Turlington testified that on that occasion he heard Chavis tell MSA Ernestine Grisson that Grisson "would get hers" (Tr. 1998). David Patterson received a written warning (R. Exh. 40) for using (unspecified) abusive language on September 13, 1979, "toward his supervisor, relief operator, and toward the thiele operator." This apparently involved Supervisor Mitchell Turlington since he is the supervisor who signed the warning. James A. Wilkes received a written warning (R. Exh. 84n) for using abusive language on April 11, 1979, when relief operator Dolly Graham asked him about some damaged filters and containers. "In a fit of anger, employee told the operator to go to [hell]." Finally, Supervisor Babs Cordrey testified that before she became a supervisor she received a 3-day suspension when she told Supervisor Vincent Mininno to "shove it" in reference to her paperwork (Tr. 2583, 2588). The details of the Cordrey suspension were not fully developed by the parties. Cordrey did testify that her statement was not a response to his telling her to do something. Accordingly, I find that on that occasion Cordrey became impatient with her paperwork job for some reason and, in a fit of anger, told Supervisor Mininno that he could

<sup>115</sup> The question was asked as to which ones Cordrey knew were against the Union and she named those four. Conceivably, Cordrey mentally was not directing her testimony to the time of the investigation, although that was the subject matter of the inquiry. Moreover, I find it unlikely, as of January 30, 1980, a full month after the petition had been filed and in light of all the evidence regarding proUnion and proPurolator divisions among the employees in the plant, with leaflets having been passed out at the plant gate in early January, that Cordrey was not in fact mentally referring to the time of the investigation as well as expressly doing so. Although the record reflects that Sullivan and Bacon did not wear their Purolator Vote No shirts until some time after mid-February 1980, that fact does not mean they did not express themselves before the time. Indeed, Bacon testified that she had long been opposed to unions generally.

"shove it." She had been employed 8 years at the time of this early 1978 suspension (Tr. 2597).

None of the foregoing warnings by Respondent involved a suspension—except for Cordrey's. The angry "Go to hell" remark made by Wilkes direct to (MSA) Dolly Graham, and the Katie Chavis abuse to her MSA would both seem more serious than Naylor's profanity which was not directed toward anyone in particular. Moreover, only unit employees were present with Naylor, so it was not a matter of supervisory authority being questioned. David Patterson used abusive language toward his supervisor, yet he received only a written warning. Cordrey's "shove it" would certainly seem to constitute insubordinate conduct for which Respondent's policy guidelines (R. Exh. 113) specify a 3-day suspension. The policy guideline (Guide III.7.) calls for only a written warning for "abusive or threatening language." The record is clear that profanity is commonly used at the plant when employees become impatient with machines or whatever. Only when the profanity is directed toward someone, particularly a supervisor, does a problem arise. An example of this is found in the 3-day suspension given to mechanic Thomas N. Greb in November 1978 for insubordination (R. Exh. 99b). The text states, in part, "On 11/13/78 while being counseled about your performance by [Supervisor] W. Sellers, you responded by using profane language to Mr. Sellers. Your actions were insubordinate and will not be tolerated. This warning warrants three days off without pay."

I therefore find that a 3-day suspension of Naylor for her angry profanity, as a basis apart from the other two grounds, would be inconsistent with Purolator's past practice. Indeed, Respondent concedes at page 159 of its brief that there would have been no suspension simply for the abusive language. Purolator argues that it was the language in conjunction with the other action.

Even regarding the safety hazard ground, Respondent's past practice rarely reflects a suspension. Many warnings have issued for safety hazards to the warned employee and to his/her fellow employees. For example, Gail Contreras received a warning (R. Exh. 152g) for "carelessness on the job." "On 12-14-78, while acting in the capacity as Relief Operator, employee welded outer wire on air line no. 1 in such a manner as to be dangerous. The same wire injured Richard Hamel in the right hand requiring 4 stitches." Bacon's foot was not injured (but an eye could have been), yet Naylor was suspended while Contreras was merely warned. Unlawful disparity?

Ik Hyun Yu received a 3-day suspension in December 1978 because of his "willful failure to follow instructions and violation of safety policy." The suspension notice states (R. Exh. 101c):

On 12/2/78 Mr. Yu was observed standing inside the compactor in feed loader. He was attempting to force-feed broken pallets while the machine was running. This was observed by Sam Edge.

This is a serious safety violation in light of the danger involved. Mr. Yu has previously been instructed and *previously warned* that this practice will not be tolerated.

Further incidents will involve more serious disciplinary action.

This is a written warning with three days disciplinary layoff without pay. The days will be Monday, Tuesday, and Wednesday—12/11, 12/12, and 12/13/78. [Emphasis added.]

Does the fact that Yu received a prior warning on a very dangerous practice (apparently a life threatening one) show illegal disparity as to Naylor?

The list grows. Thus, Larry Finley received a warning for "VIOLATION OF ESTABLISHED SAFETY RULES & REGULATIONS." The text of the warning reads (R. Exh. 156aa):

On Wednesday, 5/5/76, this employee was observed leaving his fork truck unattended while the motor was running with the forks raised up and loaded with material. This is a *serious violation* of established safety rules and regulations and warrants a written warning. Another incident of this nature could result in more serious disciplinary action. [Emphasis added.]

When Finley did it again on August 31, 1979, he received—not a suspension—but another warning (R. Exh. 156a).

The discipline imposed on Jerry Edwards was a bit tougher than some of the others. He received a *final written* warning in lieu of a 3-day suspension because of his "willful violation of established safety rules." The warning text states (R. Exh. 156b):

This is a written warning for violation of Guide II: Rule 6—"willful violation of established safety rules"—of the Disciplinary Action Policy. This violation warrants a written warning and three days off without pay. On 6/22/76 you were using an air hose without a gun nozzle to blow off the marathon. You were using too much pressure causing paper particles to fly through the air.

You were verbally warned about this same type of incident on Monday, 6/14/76. In lieu of the three days off, this is a final written warning. Further violations could result in more serious disciplinary action.

Another employee who received a warning (but refused to sign it) in lieu of a suspension was utility relief operator Dora Woods. She was warned for a "willful violation of established safety rules." The text reads (R. Exh. 156g):

On Monday, 6/21/76, you were operating a welder without wearing safety glasses. This is a violation of Guide II: Rule 6—"willful violation of established safety rules." This violation warrants a written warning and three days off without pay. In lieu of the three days off, this is a final written warning. Further violations of this nature could result in more serious disciplinary action.

Yet another warning in lieu of a 3-day suspension went to Alonzo McCoy for "violation of established safety rules and regulations." He left his forklift on March 31, 1976 while the motor was running (R. Exh. 147).

Potential eye injuries from safety violations by employees welding without safety glasses net the perpetrating employee a warning as Respondent's Exhibits 152(o) and 84(f) reflect, and the record contains several warnings for employees not wearing safety glasses while performing certain work.

As earlier noted, Respondent even warns an employee after he injures himself where the injury resulted from a failure to follow safety procedures. Thus, Joseph L. Canady received a warning (R. Exh. 149) for a "willful violation of a safety rule resulting in a serious injury." The text reads:

On 5/14/74 at approximately 4:15 a.m., Joseph Canady was working on a changeover on #1 Oil Line printer. After being instructed not to have his fingers near the rolls or drums when pushing the job button because of the danger of the printer catching his finger, he deliberately disobeyed these instructions. This act resulted in a laceration and broken bone on his right hand, index finger. This is a written warning.

John T. Whittington received an even more serious injury, and he received a "written warning" for a "safety violation." The text states (R. Exh. 152t):

On January 24, 1980, you lost part of your index finger on your left hand when it was caught between sprocket and chain on Marathon. (See accident report.) You had removed the guard in order to perform your job, but failed to replace guard when you started running your samples. Although it's unfortunate that you lost part of your finger and lost time from work, I cannot allow any safety violation such as this one by anyone working my shift. Any further occurrence of this nature could bring more serious disciplinary action.

There are other examples (R. Exh. 94p). Indeed, alleged discriminatee MSA James Graham, Jr. received a warning for severely injuring his fingers in January 1980.

In any event, the record compels the inference, which I draw, that Respondent would have issued nothing more severe to Naylor than a warning (written or verbal recorded) if the safety hazard had been the sole ground.

That leaves the ground of deliberate damage of Purolator property. Policy Guide I.7 calls for termination when this offense occurs (R. Exh. 113). Under Guide II.8, "careless waste of material or abuse of Purolator tools and/or equipment," a first offense subjects the employee to a written warning and a 3-day suspension without pay.

It would appear from the record that Respondent has imposed stricter penalties on employees abusing company property than for transgressing safety procedures, and the exhibits introduced by Respondent reflect that several employees have been suspended for 3 days in such instances. Respondent calls attention in this respect to 3-

day suspensions issued to Ik Yu for spilling 50 gallons of adhesive on June 25, 1980 (R. Exh. 44); to Ricky Cordrey for damaging his forklift and an electrical switch-box and delaying over a weekend in reporting the accident when he hit a support post on November 2, 1979 (R. Exh. 49); to Preston Jackson for carelessly damaging nine buggies of wire on July 21, 1980, causing a great portion of wire to be scrapped (R. Exh. 84v); to Charlene Deese whose continual refusal to follow instructions caused 6 pounds of plastisol to be scrapped on June 28, 1979 (R. Exh. 84ii);<sup>116</sup> to Willie J. Newton for his "past record concerning carelessness" and for leaving his paper outside on the ramp in October 1976 (R. Exh. 101f); to Craven Johnson for negligently allowing his forklift to roll down a ramp on January 29, 1979, "doing considerable damage to an emergency door and wall and to the lift" (R. Exh. 111m); to Alonzo C. Hunt for spilling 400 to 500 gallons of plastisol on August 19, 1976, as a result of "not watching the job you were doing" (R. Exh. 156e); and to Rudolph Selby for carelessly causing an accident between his forklift and another on December 10, 1976, resulting in \$1500 damage to his forklift (R. Exh. 156gg). The record also contains warnings, without suspensions, where carelessness resulted in damaged property. Respondent's Exhibit 111q is an example. There Glenn McKeithan received a warning for carelessly operating his forklift on August 17, 1978, and causing damage to a switch which also caused machine downtime for mechanical repairs.

In his oral argument, CGC stresses that the value of the magnet was only 30 cents. The suspensions listed above seem to cover damage much more extensive than 30 cents. Accordingly, I find it highly questionable whether Respondent would have suspended Naylor for a first offense breaking of a 30-cent magnet. What compounds the question is the element of her almost deliberately breaking the magnet.

We therefore come to the critical questions. If none of the three grounds above would have resulted in anything more than a warning, can they, added together, total up to a suspension? The answer must be yes—if Naylor's union activities were not a motivating reason. There are no independent interrogations or threats directed toward Naylor to indicate that Respondent harbored animus against her because of her protected activities. The discipline issued to Naylor has been examined to ascertain whether there is anything inherently improbable in it. If so, an inference of improper motivation may be drawn.

While the issue is extremely close, I find the evidence insufficient to demonstrate anything inherently improbable in Respondent's deciding to suspend an employee

<sup>116</sup> Respondent cites 84(jj) and 111(r) in fn. 30, p. 157 of its brief. This clearly is an oversight since number 84 stopped at (ii) and 111(r) was not offered (Tr. 3321). Also cited are 84(l) and (m) and 99(f). Number 84 relates to a discharge for careless wasting of property after repeated warnings, and 99(f) is a recommendation for a transfer instead of 3-day suspension in 1977 by Supervisor Wilson Sellers of employee Kenneth Moody who caused "extensive damage" to a conveyor line with a forklift. The document reflects that Personnel Manager Grady treated Moody's transfer as voluntary and independent of Seller's recommendation. I therefore consider 84(l) and (m) and 99(f) to be of remote relevance to Naylor's situation.

for this combination of reasons. Respondent ascertained that Naylor had broken the magnet in a fit of profane anger. Moreover, Respondent's investigation revealed that Naylor's action was something more than an accidental breaking. The final question is whether the demeanor factor undercuts the (barely) plausible story of Respondent's witnesses. Elsewhere I have not credited Semmes and Supervisor Cordrey, and I do not credit them here. Nor do I credit Grady. I was not impressed by their testimonial demeanor regarding Naylor, whereas I was favorably impressed with Naylor's. I have not credited Bacon, Shaver, or Sullivan where their testimony is disputed by Naylor. Moreover, I find that Respondent was well aware that the dissension which existed on the line had been aggravated by the employees taking different sides on the union question—with Naylor being the only one, at that end of the line, favoring the Union. Finally, I find that it was the last consideration—Naylor's open stance favoring the Union—which caused Respondent to suspend her rather than to issue her a warning. Accordingly, I shall order that Respondent revoke the suspension and pay Naylor the backpay to which she is entitled.

d. *Naylor transferred February 12, 1980—violation*

Supervisor Babs Cordrey testified that she took a vacation the 1-week period of Monday, February 4, through Friday, February 8, 1980, and returned to work Monday, February 11 (Tr. 2518). While Cordrey was on vacation, MSA Joyce Shaver served as the acting supervisor and Susan Sullivan served as the acting MSA. Another employee was transferred from a different line to fill Sullivan's spot in the cutter-clipper operation on oil line 3. Carolyn Bacon testified that the substitute was inexperienced as a cutter-clipper and could not keep up. As a result, she had to stack a large amount of paper. Bacon testified that while she was trying to help the new girl catch up, Naylor just stood there with her hands at her side and watched Bacon work (Tr. 2328-2329).<sup>117</sup> By the end of Monday, February 11, Bacon was extremely aggravated and upset by the fact that Naylor was doing nothing. She went to tell Shaver what had happened during the day and informed her that she was not going to work that hard again (Tr. 2330).

Sullivan testified that on that same day she observed Naylor doing nothing to help out. When Sullivan went to Naylor and asked her to help Bacon, Naylor responded, "I am doing my job and I'm going to do my job only." (Tr. 2393.) Sullivan testified that "helping out" is part of the job (Tr. 2393). According to Sullivan, Debra Stump, an employee on oil line 3, told her that she had heard that Naylor had told her friends she was going to get back at the persons who caused her suspension. Later that day Sullivan went to Personnel Manager Grady and told him what Stump had said (Tr. 2394). Stump testified that she told Shaver about the report (Tr. 3299-3).<sup>118</sup>

<sup>117</sup> As earlier noted, counsel for the General Counsel did not offer rebuttal witnesses on any point.

<sup>118</sup> The evidence was offered and received not for the purpose of showing the truth of the report, but only to prove that the report was made to management (Tr. 3299-20).

Toward the end of the shift that day, Shaver went to the office of Manufacturing Manager John Semmes on several matters. While she was there, Personnel Manager Frank Grady came in and told them that Susan Sullivan had just lodged a complaint with him against Kathy Naylor. Shaver testified that she then told Semmes about the complaint she had just received from Carolyn Bacon about Naylor (Tr. 2426). Semmes testified that he then told Shaver to send everybody in the next morning so he could get all the facts (Tr. 3534).

There is no dispute that the following morning Semmes met with Shaver, Sullivan, and Bacon and obtained their reports. He then had Naylor brought in so that he had all four of them present. He told Naylor that her conduct could be interpreted as willfully hampering production. Semmes testified that, "I pulled out the Rule Book and I read to her what the Guide for the violation of that rule was." (Tr. 3534.)<sup>119</sup>

On cross-examination by the Charging Party, Semmes testified that Naylor said the other employee is a "new girl and if she can't keep up, that is her problem" (Tr. 3584).<sup>120</sup> Semmes testified that such remark was indicative of Naylor's bad attitude, and that Naylor could have assisted the new girl by picking up the overflow product which she could not process. On further cross-examination by the Charging Party, Semmes testified (Tr. 3585):

Q. [By Mr. Sarason] It is true that Kathy Naylor was good on the job?

A. When she wanted to be.

Q. She was a good operator on the clip machine?

A. That is debatable. "Good" in terms of whether or not she was capable; yes, she was capable, but it is not good if you come in three days out of the week and decide that you are not going to do your job, you are not doing me any good; you are causing more friction on the line.

When asked whether Semmes had investigated whether Naylor had helped out the new girl after being sent back to the line, Semmes testified that he did not so investigate. He conceded that Naylor might have assisted thereafter. In any event, Semmes testified that he had *already* made up his mind to transfer Naylor even *before* this particular incident, and that he was biding his time waiting for Supervisor Babs Cordrey to *return* from vacation to effect the transfer (Tr. 3584, 3587).

Shaver testified that in Semmes' office that morning, after Naylor had joined them, that Semmes asked Sullivan whether Naylor was in any way hindering production, whether she was doing her job. Sullivan responded that she did not think Naylor was doing her job or that Naylor was doing as good a job as she could. Naylor,

<sup>119</sup> At trial, Semmes identified R. Exh. 113, guide I, rule 6, "willful hampering of production," as the rule to which he was referring (Tr. 3534). Respondent's disciplinary policy guide, R. Exh. 113, calls for termination on the first offense of "willful hampering of production" under the offenses of Guide I. Employee Relations Manager Whit Collins testified that these policy rules have been posted for the attention of the employees since 1974 (Tr. 3634). This particular set was revised January 8, 1979.

<sup>120</sup> Naylor was not called as a rebuttal witness.

according to Shaver, replied that she was doing her job (Tr. 2428).

In Naylor's description of the meeting in the office of John Semmes with Susan Sullivan and Joyce Shaver, she did not list Bacon as being present (Tr. 399-11). Neither did Shaver (Tr. 2427). Indeed, Bacon testified that after she described Naylor's conduct of February 4 to Semmes, and he directed Shaver to bring Naylor to the office, she, Bacon, returned to the line (Tr. 2332). Naylor concedes that Semmes told her that she was hampering production and that Sullivan said she felt Naylor could do better because her attitude was bad and that Sullivan herself had had a bad attitude once but she was trying to correct it. In response, Naylor testified that she told them that she was doing her job. Shaver said that she felt that Naylor could do better. Naylor repeated that she was doing her job. Semmes then told her that hampering production was a first offense termination, for her to go back out on the line, and change her attitude and do her job (Tr. 389, 399-12). She testified that Semmes referred to the Rule Book and that in doing so he picked up a black notebook and said, "I go by the book." (Tr. 399-12.)

On redirect examination, Naylor testified that Semmes told her he had called her in because Carolyn Bacon complained that she was not doing her job (Tr. 399-32). Semmes, she said, explained the hampering production charge by telling her that some paper had been left on the buggy the day before, and if Naylor had put forth more effort she could have cleaned up the excess before quitting time (Tr. 399-34). Naylor testified that the paper was in fact cleaned up before the second shift arrived, that the paper problem was nothing new and no supervisor had ever said anything to her in the past about it (Tr. 399-34). Nothing was said, it seems, about a "new girl" on the line. I note that Debra Stump, called as a witness by Respondent, did not describe any problem on February 4 although she had been working on that line since January (Tr. 3299-16).

Naylor testified that she does not recall telling Semmes that she felt Supervisor Cordrey was not treating her fairly nor does she recall ever telling Semmes she felt that Cordrey was picking on her (Tr. 399-13). On the other hand, she testified that when Supervisor Cordrey told her that she was being transferred to oil line 1, Cordrey said it was because Naylor did not feel that she was being treated fairly (Tr. 399-13). This could well have been in relation to MSA Shaver, not Cordrey. Naylor did not hesitate to admit that she had complained about Shaver, and I perceive no reason for her to hide any complaint about Cordrey—particularly had it related to union activities. I therefore do not credit Semmes' testimony that Naylor complained that Cordrey was not treating her fairly.

Supervisor Babs Cordrey testified that when she returned to work Monday, February 11, Semmes called her into his office around 8 a.m. He told her that a couple of times Naylor had come to the front office and said she thought that Cordrey was pressuring her, picking on her, and discriminating against her because Naylor had announced that she was supporting the Union (Tr. 2519). Cordrey told Semmes that was not

true. She testified that they then decided it would be best to transfer Naylor from oil line 3 to another line to give her a fresh start with another supervisor. Semmes asked Cordrey what she thought about that possibility and Cordrey agreed. Cordrey testified that Semmes expressed the feeling that there was too much dissension on the line to keep it productive. Cordrey testified that they decided to transfer Naylor to Supervisor Roy Wilson on oil line 1, on the same shift at the same labor grade, and the same pay rate. The next morning, Cordrey informed Naylor of the decision. Naylor said she did not understand and did not think it was fair. Cordrey told her that Naylor knew she had been "arguing and bickering" and "quarreling with the other two ladies on the line." (Tr. 2520-2521.) She then escorted Naylor to Supervisor Wilson. Cordrey's version of her conversation with Naylor includes no reference to the alleged February 4 problem of the "new girl" on the line.

Naylor testified that on the day she returned from her suspension (Monday, February 4, 1980), Purolator conducted a meeting with employees in which the Union was discussed. She testified that Collins addressed the meeting. In his remarks, Collins stated that the president of the Union was in jail (Tr. 388). At that point, Naylor asked Collins whether it was true that in fact the union officers were bonded and that the Union did not lose any money because of the embezzlement (Tr. 388). Collins admitted that such was true. Naylor testified that in the afternoon of that same day she was called into the office to see John Semmes and the next day she was transferred to her new job (Tr. 390).<sup>121</sup>

Naylor was not called as a rebuttal witness. Consequently, the story of Bacon-Shaver-Sullivan about the new girl having problems on February 4 had not been described in the testimony when Naylor left the stand. Most of Naylor's testimony about her meeting with Semmes and the others on February 5 came during cross- and redirect examination.

Naylor testified that the job she was assigned to on the back of oil line 1 was dirtier and more strenuous than the clipping job she performed on oil line 3. She explained that at the new position she had to bend from the waist down on a continuous basis, picking up and putting down oil filters. When the line is running good, she sweeps the floor. She described her former cutting and clipping operator job as requiring less exertion, and the materials she worked with were clean whereas in her new position on the back of oil line 1, the material she handles gets her clothes and hands dirty and in handling the painted filters she sometimes end up with blue and red paint on her hands (Tr. 399-42). It is clear, and I find, that the position to which Naylor was transferred on or about February 11, 1980, was indeed a more onerous and less desirable position than the cutter-clipper operator position she held on oil line 3.

However, the fact that the new job on oil line 1 was dirtier, more onerous and less desirable than the cutter-

<sup>121</sup> It is clear that Naylor merged a 2-week period into one because she testified it was Supervisor Babs Cordrey who told her that she was being transferred (Tr. 399-13). Thus, it is clear that she was not transferred until the following week when Cordrey returned from vacation.

clipper operator job on oil line 3 does not establish that Respondent violated Section 8(a)(3) of the Act as alleged in the complaint. Semmes testified that he transferred Naylor to the back of oil line 1 "where there was a vacancy." (Tr. 3535.) No rebuttal evidence was offered showing that in fact there was a similar job to the cutter-clipper operation available in the plant. Moreover, Supervisor George Hyde testified that operators on the line can be expected to perform any of many different operations and do so from time to time. While this apparently is true in some respects, it also begs the pending question.

As earlier noted, Semmes testified that he had decided to transfer Naylor even before the reports came in at the end of the day on Monday, February 4, regarding Naylor's indifference toward helping the substitute girl on oil line 3. Semmes testified that he decided to transfer Naylor after the magnet breaking incident because (Tr. 3532):

She was the cause of the problem. Kathy Naylor could not get along with Carolyn Bacon; she could not get along with Joyce Shaver; she could not get along with Vince Mininno; she could not get along with Susan Sullivan; and now she couldn't get along with Babs Cordrey.

Semmes further testified that he did not carry through with his decision to transfer Naylor because *at the time* Cordrey was on vacation and he wanted to wait for her return (Tr. 3532). The moment of Semmes' decision to transfer Cordrey is a bit ambiguous. If "at the time" of his decision refers to when he and Cordrey signed the 3-day suspension notice to Naylor, then Cordrey had *not* yet left for vacation, for both he and Cordrey signed on (Thursday) January 31, 1980 (R. Exh. 127). If "at the time" refers to while Cordrey was on vacation, then Semmes reached his decision at some point after Friday, February 1, and before the afternoon of Monday, February 4, 1980.

Bacon, Sullivan, and Shaver all testified that the attitude of the workers improved immensely and that the tension on the line decreased after Naylor was transferred (Tr. 2338, 2339, 2433). Bacon, Sullivan, Shaver, and Semmes all testified that as soon as Naylor's replacement was sufficiently trained, production began improving and production standards were met approximately four times each week (Tr. 2333, 2399, 2432, 3536).

Respondent argues that, although Naylor received a good wage review in August 1979,<sup>122</sup> the fact that she was creating problems did not actually surface until September 1979 at the meeting Semmes held during that month.

I find that Naylor's union activities were a motivating factor in her transfer of February 11, 1980. I further find that the unforgivable union activity Naylor engaged in

<sup>122</sup> She received a score of 46 points on that wage review (R. Exh. 107). She received a score of 7 points on attitude and cooperation with comments being "satisfactory." This review was by Supervisor Vincent Mininno who signed the review on September 4, 1979. The document will be discussed in more detail in relation to the allegation of an unlawful wage review in February 1980.

was to question Collins in the presence of assembled employees when he was delivering a presentation on the Union, including, as reported, that the union president was being paid his salary while he was in jail for embezzling union funds. If Semmes had reached the conclusion following the magnet-breaking incident that Naylor should be transferred, he could have discussed the matter then with Supervisor Babs Cordrey because she had not yet left for vacation. Therefore, it is clear that the timing of Semmes' decision came after Naylor returned to work. Two events that occurred that day. One was the conduct attributed to Naylor by Carolyn Bacon and Susan Sullivan regarding her not helping the new girl on the line. The other was the meeting by assembled employees to listen to the presentation from Collins. Semmes testified that the conduct of Naylor on the line did *not* prompt his decision because he had already reached it. As he did not learn of the conduct of Naylor on the line until the end of the first shift on Monday, February 4, and in view of the fact that Collins' presentation was made that morning, it is clear that Semmes reached his decision following Naylor's questioning of Collins at the morning meeting. The significant aspect about Naylor's boldness with Collins on February 4, 1980, was the fact that it could be perceived by both Respondent and employees as an example of how employees could stand up to management if they had a union supporting them. This, I find, was the key aspect of Naylor's union activities which prompted her transfer from a clean job to a dirty job.<sup>123</sup> The inference is strong, and I so find, that Naylor's questioning of Collins irritated Respondent and that this was what in fact triggered the decision by Semmes to transfer Naylor.

Respondent argues that even if I find Naylor's transfer to be based on her union activities, I should further find that Respondent carried its burden of showing that she would have been transferred in any event. This I decline to do. What I do find is that Naylor, with over 10 years of service (the last 4 years continuous), had been recognized for years as a very capable employee and had not received a single warning before she announced her support of the Union.<sup>124</sup> Semmes so recognized this—as his September-October 1979 decision (before the Union arrived) reflect. I do not credit his self-serving testimony, or that of Mininno, that Naylor would have received a low review in October had she not already received her review in August. Naylor obviously had a temper, but it is equally obvious that she did not acquire it overnight.

Spats among the line workers are nothing new, and Respondent was well aware of that. The problems on MSA Shaver's crew (and she was a significant part of the problem) were resolved by Semmes in September-October in the sense that Shaver and Sullivan—not Naylor—were found to be the problem. Although

<sup>123</sup> The result of Naylor's comments was similar to that of employee Pitts who made remarks at a similar meeting in *Capital Bakers*, 236 NLRB 1053, 1056-1057 (1978).

<sup>124</sup> This can be noted as something of a remarkable achievement, for if the instant record shows anything, it demonstrates that Respondent issued warnings to employees freely and frequently. Even key personnel, such as the MSAs (and under their earlier titles) receive them.

Semmes testified that the problem continued, and that he therefore transferred Supervisor Mininno in either October or November, Respondent introduced no documentary evidence, such as warnings or production reports, to substantiate this. I do not credit this testimony, and I find that Mininno was transferred for some unrelated reason.

Production figures were cited by Shaver-Sullivan-Bacon. According to them, and Semmes, productivity increased dramatically after Naylor was transferred and her replacement was trained. The problem with this testimony is that the one document of production figures offered by Respondent does not support the testimony. Plant Manager Thies, in testifying about the drop off in production after the February 8, 1980 strike, submitted the following comparison figures (R. Exh. 161):

*1979 Monthly Production*

January	6,214,105
February	5,974,046
March	6,316,005
April	5,446,839
May	5,729,977
June	6,074,807

*1980 Monthly Production*

January	6,489,333
February	5,574,081
March	5,360,341
April	5,766,527
May	5,050,570
June	4,721,624

Granted that the figures for the whole plant do not show what happened on that one line, the fact remains that the one document offered on production units shows the numbers steadily declining the first 6 months of 1980. While I do not base a finding on that exhibit, or lack of other exhibits, it tends to confirm, even if only remotely, my demeanor resolutions. Such demeanor resolutions are that I do not credit the Shaver-Sullivan-Bacon group, nor do I credit the Semmes-Grady-Cordrey management group. I was impressed with Naylor's manner of testifying, and I find that Respondent seized on a month-old rivalry between Naylor and Shaver-Sullivan-Bacon as a pretext to punish Naylor when she expressed her support of the Union in December 1979 and, particularly, on February 4, 1980. After Naylor's announcement and other support of the Union, Semmes then decided that the line troubles were caused by Naylor. I simply do not buy it.

Based on the foregoing, I find that Respondent, as alleged in paragraph 9(d), violated Section 8(a)(3) of the Act by transferring Naylor from her cutter-clipper position on February 12, 1980, and I shall order that Respondent offer her reinstatement to that position.

*e. Naylor's February 14, 1980 wage review—violation*

From my findings in the previous two sections, it is clear, and I find, that Cordrey gave Naylor a discriminatorily motivated wage review in February 1980.

Although the scheduled date for Naylor's semiannual review in the summer was August 27, 1979, Mininno apparently did not cover the matter with her until September 5, 1979, for that is the date she signed the document (R. Exh. 107). The February 1980 scheduled review date is shown as February 25, 1980. Naylor signed on February 14, 1980, as did Supervisor Babs Cordrey. MSA Joyce Shaver signed on February 1, 1980 (R. Exh. 12). The easiest way to see the difference in the two reviews is by the following chart which displays the points scored in the two reviews:

	9-5-79	2-14-80
Attendance:	5	0
Attitude & cooperation:	7	3
Quality of work:	8	7
Quantity of work:	6	5
Job knowledge:	10	6
Housekeeping:	10	3
	46 points	24 points

The subject of attendance is the objective factor and, although Naylor testified she was not aware that she had been absent that many times, she offered no evidence to disapprove the number of days shown in the evidence that she was absent. With respect to the subject of attitude, Supervisor Cordrey testified that this reduced score was a result of Naylor's constant bickering, her failure to help anyone else, and the incident in which Naylor threw a magnet and used abusive language (Tr. 2530). Respondent argues that no disparate treatment of Naylor is shown because in the previous round of reviews it was Sullivan (and Shaver) who suffered a reduction.

Respondent's Exhibit 79 is the October 1, 1979 performance review of Susan Sullivan. On this review she was given only 31 points whereas she had received a total of 51 points in her March 5, 1979 review. Under attitude, she received a total of 10 points in the March 5, 1979 review whereas in September 1979 she was given 3 points. Similarly, in the March 12, 1979 review for Joyce Shaver, she received a total of 58 points, but in her September 1979 review she was given a total of only 32 points. For her attitude, she received a total of 10 points in March 1979 and only 4 points in September 1979. In other words, it is clear that Respondent, based on its conclusion that the wrong people were blamed in September 1979, simply reversed the scores this time around.

In quality of work Naylor suffered only a one-point reduction. That one point would make the difference in whether she received no pay raise or one of 5 cents an hour. Supervisor Cordrey testified that Naylor's problem was that she did not always put forth the necessary effort (Tr. 2530). For quantity of work, Naylor again received one point less than her previous review. The explanation for this is that Naylor had a problem of not being productive during downtime. Supervisor Cordrey explained that, although Naylor knew her job, she was not given a score of 10 points for job knowledge as under the previous review because she did not always put that job knowledge to use (Tr. 2531-2532).

With respect to the final category of housekeeping, Cordrey testified that Naylor's interest in housekeeping had slipped drastically and instead of neatly stacking paper packs in the buggy, she would throw them in a box beside her. Sometime she would miss the box. Cordrey testified that she gave Naylor a verbal warning for housekeeping (Tr. 2532), but she did not clarify this. I credit the testimony of Naylor that this occurred around late December 1979 or early January 1980 and it involved Cordrey calling each of the line employees to her office and telling them to improve their housekeeping (Tr. 399-18). Nevertheless, there does not appear to be anything inherently improbable in Naylor's score in housekeeping so long as Respondent's version of events, through its witnesses, is credited.

Respondent argues that it is not unusual for the scores of employees to drop significantly between successive reviews. The parties stipulated that Respondent's Exhibit 164 represents a partial listing of employees who dropped 15 or more points during successive review periods (Tr. 3886). This list contains the names of 27 different employees. Eight of the employees on the list received less than 25 points and therefore no pay increase at all.<sup>125</sup>

As noted in the first paragraph of this section, because of my earlier credibility resolutions, it follows that the February 1980 wage review Cordrey gave Naylor is tainted and violative of Section 8(a)(3) of the Act. I find that Cordrey lowered Naylor's score enough on attitude (as it related to the other categories) to deprive Naylor of a 5-cent-per-hour raise.<sup>126</sup> I see no need to order Respondent to prepare a new appraisal of Naylor, but I shall order that it raise her pay 5 cents per hour retroactive to the time it would have been increased, pay her backpay, with interest, and expunge that review from her records.

<sup>125</sup> The record does not reflect what year or years these reviews covered, but just that they covered successive review periods. The General Counsel did not rebut the impact of the stipulation in any fashion such as showing that those who received the lowest scores were union supporters. Indeed, the review period for the 27 employees on the list could well have preceded the beginning of the organizing campaign.

<sup>126</sup> While it is possible that Naylor would have received a 10-cent raise had Cordrey prepared an unbiased review, it is likely that she would not have. First, she lost five points from her August 1979 review on attendance alone. That would reduce her August 1979 point total of 46 to 41. Second, it is likely that the magnet-breaking incident, even with just a warning rather than a suspension, would have cost her 2 points—reducing her score to 39 (based on her August 1979 score)—for a raise of only 5 cents.

## H. Walkout of February 8, 1980

### 1. Introduction

Paragraphs 11 and 12 of the complaint allege, as amended at the trial (Tr. 1030), that since on or about February 8, five employees ceased work concertedly and engaged in a strike which was caused and prolonged by the unfair labor practices of Respondent described in paragraphs 8, 9, and 10. The five strikers are MSA James H. Graham Jr.; his wife, inspector Shirley Graham; mechanic Lawrence F. Grenier; mechanic John H. Gearhart Jr.; and mold puller George Edward Stanbaugh. Allegations concerning offers to return to work and failure to reinstate are discussed below.

Respondent devotes 40 pages of its brief to the strike-related issues. Its central contention is that the strike was motivated by economic reasons and that the economic strikers were permanently replaced.

The General Counsel's position is set forth in the following paragraph from his oral argument:

On February 8, 1980, employees James Graham, his wife Shirley, Larry Grenier, John Gearhart, and George Stanbaugh all walked off their jobs because of continuous Company harassment which commenced after the Company had been made aware of their union activity, and after the Company brought in Supervisor Wilson Sellers from another shift to ride herd on those employees. The evidence clearly reflects that the walk-out was in opposition to the Company's *antiunion* harassment and was done in an attempt to get the Company to refrain from such illegal conduct. On the very same evening the employees walked off the job, they telephoned the Company before permanent replacements could be hired to take their jobs and said they wanted to return to work. Nevertheless, the Company would not take them back. [Emphasis added.]

The key phrase in the above argument, of course, is whether the General Counsel demonstrated that not only was there harassment, but that it was motivated by antiunion considerations *which were alleged in the complaint as unfair labor practices*. Thus, the question is whether the strike was an unfair labor practice strike or an economic strike.

At page 205 of its brief I, Respondent observes that only 5 of the more than 50 allegations contained in paragraphs 8, 9, and 10 of the complaint were even mentioned by the strikers during their testimony as matters which concerned them. The strikers were examined extensively during direct, cross-, redirect, and recross examination concerning the reasons they walked out the night of February 8, 1980. Respondent points out that of these five allegations, three involved warnings given to John Gearhart (compliant paragraph 9(b)), one involved the timing of employees during break periods (complaint paragraph 9(a)), and the final one mentioned the transfer

of Mary Louise Puckett from her seamer job.<sup>127</sup> As Respondent argues:

General Counsel has the burden of showing by a preponderance of the evidence that a causal connection exists between the walkout and the unfair labor practices committed by Respondent. *Pennco Inc.*, 212 NLRB 677, 679, 87 LRRM 1237 (1974). This burden is not met simply by showing the walkout coincided in time with unfair labor practices. *Tufts Brothers, Inc.*, 235 NLRB 808, 810, 98 LRRM 1204 (1978).

Brief I, page 205. See also *John Cuneo, Inc.*, 253 NLRB 1025 (1981).

Respondent contends that, except for John Gearhart, the strikers did not make an unconditional offer to return to work until March 24, 1980, when Union Representative Mike Krivosh sent a telegram to Plant Manager Thies making such an offer (G.C. Exh. 13).

It is undisputed that the strikers did not contact any union representative, such as International Representative Arnold Price, prior to the strike and consult with him about that course of action.

There is no evidence that the strikers discussed or considered any of the alleged unfair labor practices occurring after February 8, 1980. Indeed, the thrust of the General Counsel's evidence, touched on briefly in oral argument by CGC, is that the very same evening the strikers walked off the job, MSA James Graham, spokesman for the group, telephoned Employee Relations Manager Collins and told him they wanted to have a meeting to discuss matters and to see about going back to work. This was *before* permanent replacements were hired to take their jobs. Under this argument, the strike ended the same night it began. Therefore, any conduct occurring thereafter which is found to be an unfair labor practice has no bearing on the status of the strikers unless it is determined that the strikers, except for Gearhart, did not make an unconditional offer to return to work until the telegram by Union Representative Krivosh on March 24.

## 2. Preview of conclusion regarding strike

The record reflects that around the first of January 1980, Respondent moved Supervisor James Tew from the second shift to the first shift ostensibly for training, and moved Supervisor Wilson T. Sellers to the second shift. Approximately 9 of the 11 maintenance employees on the second-shift maintenance department had in the first week of December 1979 informed Supervisor Tew that they were organizing on behalf of the Union. These nine included MSA James Graham. The record reflects that Supervisor Tew employs a rather relaxed supervisory style, whereas Supervisor Sellers, Tew's opposite, utilizes a "by the book" style.<sup>128</sup>

<sup>127</sup> The only striker who mentioned this incident was Larry Grenier (Tr. 363). Earlier I found that the January 22, 1980 transfer of Puckett from her seamer job was not unlawful, and that par. 9(e) of the complaint shall be dismissed as to that event.

<sup>128</sup> According to Graham, Sellers had a longstanding reputation among 75 percent of the mechanics, including those on other shifts, for being unfair and for harassing the mechanics (Tr. 1342-1344). Larry

Counsel for the General Counsel requests that I infer that the change in supervisors were mere window dressing, or a cover, to hide Respondent's true motive of accomplishing a double objective. *First*, the change would neutralize any argument about disparity evidence in the form of past practice under Supervisor Jimmy Tew. *Second*, it would enable Respondent to replace an easy-going supervisor with a supervisor known to be tough.<sup>129</sup> Sellers' task under this theoretical argument would be to eliminate, through discharge or forced quits, the hard core group of union supporters in the maintenance department on the second shift; or absent elimination, to display them as the tortured example of what happens to union adherents. There is no specific allegation in the complaint regarding such a role for Sellers.

The problem with CGC's hypothesis is that it is a laboratory proposition unsupported by real evidence. CGC requests me to infer that the unlawful reasons are true. While such an inference may be a logical deduction, it is only *one* of at least *two* possible inferences. The other inference, and the one supported (on the surface at least) by documentary evidence, is the business justification advanced by Respondent.

As will be seen, the only disparity evidence offered by the General Counsel is the difference between the *styles* of Supervisor Tew and Supervisor Sellers. That, of course, begs the question. No first-shift mechanic who worked under Supervisor Sellers was called to testify that Sellers conducted himself any differently on the first shift or at any time before the union campaign began. Accordingly, I am unable to find that the February 8, 1980 strike was caused by any unfair labor practices of Respondent. Instead, the evidence reflects that the strikers were motivated to walk out for various grievances, chiefly the conduct of Supervisor Sellers, much of which is not alleged to be an unfair labor practice, and none of which I find to be an unfair labor practice.

Respondent's failure to reinstate the strikers at their request is alleged to be unlawful because of their union activities. This is a broader concept than the specified causes of the strike. In general, I find merit to the allegation of an unlawful refusal to reinstate in timely fashion.

## 3. Respondent's reasons for moving Supervisors Tew and Sellers

Manufacturing Manager John Semmes testified that he made the decision to move Sellers to the second shift. He explained that the second shift was having production problems and he felt Supervisor Jimmy Tew could get more training on the first shift. Semmes testified that he decided to put Sellers on the second shift because he was the "most technically-proficient supervisor" and because he had in the past been moved to other shifts for

Grenier gave similar testimony, adding that he had heard that Sellers yelled at mechanics and, in individual conversations, cursed mechanics (Tr. 1195). Graham was so upset when he learned that Sellers was coming to the second shift that he went to Whit Collins and Steve Thies to express his concern.

<sup>129</sup> Counsel for the General Counsel, at p. 4 of his oral argument, describes Supervisor Wilson Sellers as being "well suited for his role of anti-union hit man."

similar reasons (Tr. 3570-3571). Paul Porter, the general supervisor over the entire maintenance department for all three shifts, testified that there had been complaints, even prior to the change in supervisors, that Graham was not able to get broken-down equipment running quickly enough and that valuable production time was being lost (Tr. 3155-3156). Porter stated that he had counseled Graham about this problem (Tr. 3155). Porter's testimony stands un rebutted.

Wilson Sellers testified that in July 1979, Roy Wilson, who was the second-shift maintenance supervisor at that time, was moved to the manufacturing supervisor's job. Jimmy Tew was then moved into the second-shift maintenance supervisor's job. Soon after Tew became the second-shift maintenance supervisor, Sellers began receiving calls at home from John Semmes and Paul Porter to come in and help with various problems. Sellers explained that the second shift was having equipment problems and Tew difficulty in directing the mechanics (Tr. 3020-3022).<sup>130</sup>

Sometime in the fall of 1979, Sellers began complaining to Semmes about being called in so often to help out the second shift. At that time, Semmes told Sellers that it might be necessary to move him temporarily to second shift to help get production up and to move Tew to the first shift for training purposes. Semmes asked Sellers if he would be willing to do this and Sellers said that he would (Tr. 3022-3023).

Sellers testified that, in December 1979, he, Semmes, and Porter met with Plant Manager Steve Thies to get final approval for the change in shifts. They looked at production graphs which showed that production on the second shift was down some 20 to 25 percent.<sup>131</sup> This loss of production was being recovered through overtime, which was extremely expensive (Tr. 3104-3107). At the beginning of January 1980, Sellers was moved to the second shift and Tew was moved to the first shift (Tr. 3023). Porter testified that shortly prior to this change actually being implemented, he met with both the first and second shift mechanics and explained that changes were being made to help improve production and to give Jimmy Tew an opportunity to train on the first shift (Tr. 3154).<sup>132</sup>

The record reflects that Sellers in the past has been moved from shift to shift for similar reasons. He testified that he had worked as a maintenance supervisor for 6 years during which time he had been moved back and forth among all three shifts. Immediately prior to Jimmy Tew becoming a supervisor, Roy Wilson was the second-shift maintenance supervisor. Sellers testified that at that time Roy Wilson was a new supervisor and was having problems. Consequently, Sellers was moved to the second shift for approximately 1 month to help straighten out these problems (Tr. 3019-3020, 3094, 3096). Semmes testified, without contradiction, that he periodically moved Sellers to other shifts to help out with problems (Tr. 3570).

<sup>130</sup> Jimmy Tew did not testify.

<sup>131</sup> The graphs were not identified or offered in evidence.

<sup>132</sup> Mechanic John Gearhart testified that the second shift had a lot of new employees and a lot of machine downtime (Tr. 1516).

Respondent contends in its brief that what the mechanics perceived as harassment was actually uniform treatment of employees and shifts by Respondent and in particular by Wilson Sellers. Respondent observes that Larry Grenier testified that Sellers had a longstanding reputation for not being well liked by employees (Tr. 1167), that Grenier had heard as early as June 1979 that Sellers was a tough supervisor, and it was his understanding that Sellers went "by the book" (Tr. 1195-1196). Grenier even went to General Supervisor Paul Porter and asked him if Respondent was bringing Sellers to the second shift to harass the mechanics. Porter replied, "No" but that Jimmy Tew needed to spend some time in the office for training purposes (Tr. 1226, Grenier).

Sellers testified that when he took over the second shift he formed the opinion that Graham was doing a poor job (Tr. 3029). In his testimony, Sellers described a number of incidents he considered work deficiencies on the part of James Graham. I see no need to detail these incidents inasmuch as this evidence is not disputed. On two of these occasions, on February 5 and 7, Sellers wrote a note (R. Exhs. 97 and 98, respectively) to Paul Porter, with copies to John Semmes, complaining, in effect, that Jim Graham's inexperience and poor judgment was causing Sellers to lose too much production. Sellers requested that Porter give Sellers some help on the matter.

#### 4. The *Weingarten* allegation—paragraph 8(m) dismissed

Sellers testified that when Jim Graham reported to work at 3 p.m. on Friday, February 8, 1980, he and Paul Porter sat down with Graham to discuss a performance problem that Graham had been having since he returned from a medical leave of absence on Monday, February 4, 1980. Porter showed Graham the memos that Sellers had written during the week, and also a similar complaint memo received from Sharon Tew, an MSA on one of the production lines, concerning Graham's performance (R. Exh. 96-98). Porter explained to Graham that he needed to improve his cooperation and needed to insure that production was being made. Graham said that he was doing his best (Tr. 3079-3080). Paul Porter corroborated the substance of this conversation (Tr. 3156). This testimony is undisputed.

Not long after this conversation, Sellers received a call that the dispenser on the front of oil line 3 had broken down. Sellers told Graham to check out the dispenser and get an electrician to fix it. Sellers testified that around 5:40 p.m. mechanic Don Curry, on oil line 2, complained to Sellers that Graham had not relieved him for break. Sellers paged Graham and told him to relieve Curry. When Graham came to relieve Curry, Sellers, who had observed Graham begin his break late at 5:15 p.m. rather than at the scheduled time, asked him why he had not followed his instructions concerning break periods. According to Sellers, Graham replied, "God-damn it, Wilson, I was on that goddamn Dispenser on Oil Line No. 3." Sellers told Graham not to cuss him. He then asked Graham why he had not telephoned in

the hourly production counts. Graham replied that he had called the office and talked to the first-shift supervisor. Sellers replied that Graham should always page him to report production counts (Tr. 3080-3083). Graham conceded on cross-examination that Sellers did ask why he had not given Sellers the production counts (Tr. 1354).

Sellers testified that he was upset because Graham had cussed him in front of other employees.<sup>133</sup> As a result, Sellers went to the office of John Semmes where he told Semmes and Paul Porter what had happened. They told Sellers to summon Graham.

A composite of the testimony of Sellers, Porter, and Semmes is as follows. When they and Graham were assembled in the office, and Graham had been told what Sellers' version of the story was, Semmes asked Graham to give his side. Graham basically told the same story except he denied directing profanity at Sellers. Instead, he claimed that he simply cussed the machine. Semmes informed Graham that he should work more with his supervisor and he would be expected to call in the production counts. Semmes explained that this was necessary in order to spot problems at an early stage. Graham replied that he understood but had 10 million things to do. Semmes stated that he also had a number of things to do but calling in the number of production counts was the first priority. Semmes then told Graham that Sellers and Porter had not been satisfied with his performance and that he expected him to improve. At that point, Graham stated, "If you are not satisfied with my work, just take me off the job." Semmes replied that his purpose was to help Graham correct his problems and that he expected him to support his supervisor. During this part of the conversation, Graham began looking around the office, apparently not paying attention. Semmes then asked Graham if he trusted him, to which Graham replied that he did not trust and he believed that Semmes would do whatever he wanted to do. At this point, Semmes concluded that he was wasting his time and told Graham to go back to work (Tr. 3086-3087, Sellers; Tr. 3158-3159, Porter; Tr. 3553-3555, Semmes). Moments later the walkout occurred.

According to Graham, when he reported to work Sellers told him to stay with the dispenser on oil line 3 until it was repaired. Later, as Graham finished his break (out of schedule) with his wife, Sellers came and told Graham to relieve Don Curry on the back of oil line 2. Sellers and Curry had argued apparently, and it appears that Curry was to report to Sellers in the office. However, Graham testified that Sellers followed him to the back of oil line 2 and asked him why he did not get the counts from the back of the air lines as instructed. Graham replied that it was because Sellers had told Graham to stay with the dispenser. Sellers said that was "no damned excuse" and then turned around and walked away (Tr. 1316-1317). Graham testified that he then sent Don Curry to the maintenance office where Sellers was sup-

<sup>133</sup> The record reflects that, although other employees, including Grenier and Gearhart, and possibly Stanbaugh, observed the animated conversation between Sellers and Graham on this occasion, they could not hear what was said because of the machinery noise.

posed to be. Moments later, Sellers came back with a clipboard in one hand and told Graham to go to John Semmes' office.<sup>134</sup> Graham asked what it was about and Sellers repeated his instructions that Graham should go to Semmes' office. Graham told him there was (no mechanic) on the back of the oil lines. Sellers said he did not care and again told Graham to go to Semmes' office.

Graham testified that he then began walking toward Semmes' office and that Sellers took off in front of him. Graham apparently lagged behind because he testified that Sellers had to come back and again tell him that he was to go to Semmes office. At this point, Graham testified that he stated (Tr. 1316, 1318):

I said I want a witness. He said, "you will get no witness."

Graham then went to the office of John Semmes. Nowhere in his testimony, however, does he state that he requested a witness during the conversation which ensued in the office. According to Graham, whose version I credit, more supervisors were present in the office: John Semmes, Paul Porter, Jimmy Tew, and Wilson Sellers. Graham testified that Semmes asked him about the problems and Graham answered that he could not do the extra jobs Sellers was assigning and do the count at the same time. Graham protested that it appeared that everyone for the Union is somehow doing something wrong. Semmes told him that he had a legal right to be for the Union or against the Union, but that if Graham could not do his job then Respondent would have to get someone to replace him. Graham replied that, "If that is what you want." (Tr. 1318.) At that point Semmes told him, "You are dismissed" which Graham testified was military slang for an instruction to return to work.

I credit Graham's testimony that he asked for a witness on being instructed to go to Semmes office (and Sellers denied the request) because he felt he was going to be disciplined. He had been criticized previously by Sellers and had been told by Union Representative Arnold Price that if they thought anything was going to happen to ask for a witness who was prouning (Tr. 1320-1321). This is sufficient to invoke the rule of *NLRB v. Weingarten*, 420 U.S. 251 (1975), where otherwise applicable, inas the request need not be repeated at the interview. *Lennox Industries*, 244 NLRB 607, 608 (1979), enf. 637 F.2d 340 (5th Cir. 1981). Because the *Weingarten* protection does not extend to supervisors, at least in

<sup>134</sup> I credit the testimony of Grenier (Tr. 1156) and Gearhart (Tr. 1556) that on this occasion Sellers did have a clipboard in his hands and was shaking it about shoulder height while speaking to Graham. However, I further find that the sequence of events was more in line with that given by Sellers and that the conversation all occurred at one time rather than in two segments. Striker George Edward Stanbaugh, a mold puller, testified that the night of February 8 he observed Sellers shaking his finger at Graham while they were at the back of oil line 3, but that Sellers had nothing in his hand (Tr. 1803, 1810-1811). Although this apparently was the same event Gearhart and Grenier observed, I credit the testimony of all three. Stanbaugh's testimony is not inconsistent with the others for the reason that none purported to describe every detail of the encounter. Thus, I find that part of the time Sellers was shaking a clipboard in one hand, and at another moment was pointing and shaking his finger at Graham (possibly using a different hand).

the circumstances presented here, I shall dismiss paragraph 8(m) of the complaint which alleges that on this date Respondent, acting through Supervisor Sellers, denied the request of James Graham to be represented by a representative of his choosing during an interview which he had reasonable cause to believe would result in disciplinary action.

#### 5. Reasons the strikers walked out

##### a. *Wilson Sellers mostly—the cafeteria meetings*

Graham testified that after he left John Semmes' office he walked to the back of the air line and told mechanics John Gearhart and Larry Grenier that he was going home or there would be a fight between him and Sellers. He told his wife that he was leaving, and walked to the timeclock. Gearhart and Grenier met him at the clock and said they were going with him. His wife shortly thereafter walked out as did mold puller George Edward Stanbaugh who left with her (Tr. 1324).

It is clear from the testimony of MSA Graham and the two mechanics, as well as of Shirley Graham, that the principal cause of the walkout and of the dissatisfaction of the strikers was what they perceived to be *harassment* of the mechanics by supervision, particularly by Supervisor Wilson Sellers. The next item listed by the strikers are the *warnings* issued to mechanic John Gearhart, particularly the first warning pertaining to his crawling over a moving conveyor in December 1979.<sup>135</sup> The next item of dissatisfaction over perceived harassment pertains to paragraph 9(f) of the complaint which alleges that Respondent in December 1979 began *timing* employees on breaks (G.C. Exh. 9; Tr. 1187). The next item of perceived harassment involves the fact that Supervisor Sellers instituted a new procedure of *scheduling breaks* at regular times contrary to the practice under Supervisor Tew. Moreover, Sellers strictly enforced this schedule. Thus, Graham testified that if a mechanic, at the time of his scheduled break, kept working on a machine in order to get it fixed and back in production, he would just simply lose his break under the Sellers system (Tr. 1325).

Scheduling of breaks by Sellers is not alleged in the complaint as an unfair labor practice. Another item complained of by the mechanics was that Supervisor Sellers had air line mechanic Gearhart clean up plastisol which had been spilled on the line, and that this had never been done before except when the mechanic himself spilled it. Graham testified that Gearhart complained about cleaning up the plastisol mess left by production operators (Tr. 1328). The mechanics, and also Shirley Graham, complained about supervision beginning to stand and watch the mechanics starting about a week after the mid-January 1980 preelection hearing in the representation case.<sup>136</sup>

<sup>135</sup> Although Gearhart received four warnings, only three are alleged to be unlawful in par. 9(b) of the complaint. Counsel for the General Counsel stated that he was not offering evidence regarding the fourth warning as an attempt to amend the complaint or to establish a violation (Tr. 1485).

<sup>136</sup> Neither this conduct nor the plastisol cleanup requirement is alleged as an unfair labor practice in the complaint.

Gearhart testified that one of the things that bothered him was a January 7, 1980 remark by Sellers. On that date Sellers summoned Gearhart to his office and told him that if the Union came in Gearhart would have to stay on his air line and not move around (Tr. 1460). He further testimonially complained about cleaning up the plastisol (Tr. 1473); that the mechanics were told to change the cardboard that catches glue whereas this previously had been done by the palletizer (Tr. 1474); of an unprecedented inspection of his tool box by John Semmes and Wilson Sellers (Tr. 1475); of the warnings to him (Tr. 1527); and of Sellers watching the mechanics (Tr. 1546). As noted, the fourth warning regarding failure to report an accident is not alleged by the General Counsel to be a violation (Tr. 1485).<sup>137</sup>

At the time of the walkout, Gearhart testified that Graham told him that he was going to have to walk out and see if they could not get something done with Wilson Sellers. Gearhart told Graham that he was going with him. Gearhart testified that the reason he walked out was to protest the conduct of Wilson Sellers (Tr. 1522). This was about 6:30 p.m. Gearhart testified that it was because of the harassment by Sellers of the people who were for the Union and that maybe if they walked out the right people would help them get their jobs back and maybe put a supervisor there who could work with them or straighten Sellers out and leave him there (Tr. 1523). Gearhart also listed one occasion in which he called Sellers over to show him some work problems and Sellers told him that Gearhart should come to Sellers. Gearhart testified that he felt this cut him down in front of employees and that he considered this part of the feeling of harassment (Tr. 1530).

Larry Grenier listed other items which he considered harassment: Sellers' telling Graham to look busy; Respondent giving Graham a warning when he injured his fingers cleaning up a printer while trying to look busy (Tr. 1169), and giving Vernon Tew a warning for using the wrong ink in a printer (Tr. 1165). Grenier also itemized the fact that he had to climb a monorail, which gave him a back problem, as another reason for his dissatisfaction (Tr. 1261). Finally, he listed the movement of Louise Puckett from her seamer job (Tr. 1263). Grenier testified that he observed that the harassment was just against the union supporters and not against the antiunion employees (Tr. 1275).

Grenier testified on cross-examination that he assumed that Sellers went by the book, but he did not hear that (Tr. 1196). He testified that in the summer of 1979 he heard that Sellers would yell and cuss at employees (Tr. 1195) and that Sellers was considered to be "tough" to work for (Tr. 1195). Grenier described Jimmy Tew as a decent supervisor (Tr. 1196).

Grenier testified that the mechanics had discussed walking out at two different meetings in the cafeteria. The first meeting occurred during the first week in January after Sellers had been on the shift for a few days,

<sup>137</sup> Respondent announced that it would cross-examine with respect to the fourth warning only with respect to the background and animus for which it was offered and not with respect to defending against an unfair labor practice (Tr. 1486).

and second meeting occurred about a week before the walkout.

Grenier admitted on cross-examination that Collins spoke to a safety meeting of the mechanics before the walkout and explained that Gearhart had received a warning for crossing the conveyor belt because Gearhart has a bad back and the insurance company had paid out money on it (Tr. 1237). Grenier testified that on redirect examination that the safety meeting was held in mid- or late January 1980 (Tr. 1259).

Grenier testified that even after he learned from Employee Relations Manager Collins at the January safety meeting that Gearhart had a bad back prior to being written up, he still felt the December warning to Gearhart was unfair because he was being singled out while others were able to cross the conveyor without being warned (Tr. 1237).

The safety meeting was 2 weeks before the walkout (Tr. 1279). Six of the mechanics decided to walk out: Tommy Cain, Don Curry, Ashley Edge, John Gearhart, MSA James Graham, and Grenier (Tr. 1259, 1278). On recross-examination, Grenier testified that Graham may not have been at the first cafeteria meeting because he may have been out on his medical leave at that time (Tr. 1291).

In the cafeteria meetings, Grenier testified that the employees discussed that a union was needed to work with their problems (Tr. 1270), including such problems as disregard of seniority, needing higher wages, unjustified warnings, to eliminate the mandatory requirement of overtime (a longstanding condition) as well as the harassment by Wilson Sellers.

Shirley Graham testified about a separate item regarding herself. Her job was that of a routine line inspector and she worked for Supervisor Donna Ogg on the second shift. The General Counsel offered, for background purposes only (Tr. 1382), testimony by Shirley Graham that on the night shift following her attendance at the January 16, 1980 opening day of the preelection hearing, Supervisor Donna Ogg came to Graham's inspection station and told her that she could no longer leave the line anymore except for breaks and lunchtime (Tr. 1377, 1440). Moreover, she was the only one restricted because not only did the other inspectors tell her they had not been so instructed but Graham could observe them and see that they were not restricted (Tr. 1440-1444). Graham complained to MSA Vivian Royal about this. Later, at least one inspector came up later and protested to Graham that now the others could not leave the line (Tr. 1446).

At trial, counsel for the General Counsel's motion to delete from paragraph 9(d) of the complaint the allegation that Respondent assigned Shirley A. Graham on or about January 16, 1980, to more onerous and less desirable work was granted (Tr. 1380-1381). Counsel for the General Counsel later announced that the deleted allegation was different from the testimony concerning the January 16, 1980 restriction of Graham (Tr. 1455). As the evidence regarding the restriction placed on Graham by Supervisor Donna Ogg was offered only for background purposes to show animus, it is clear that such evidence is of little value even if credited.

Shirley Graham admitted that several months before the union campaign began she was told by quality control Supervisor Donna Ogg, Line Supervisor Bobby Sweat, and Supervisor Leon Turner that she was not to tell the other employees what to do and that her job did not require her to give instructions to other employees (Tr. 1399-1400). Graham conceded that this event involved an employee named Elizabeth Smith and that Graham had apologized to her (Tr. 1400). Graham also testified that in January, Supervisor Donna Ogg again spoke to her concerning a mold pulling incident in which Ogg said that Supervisor Tony Guin had told her to talk to Graham (Tr. 1401). Supervisors Guin and Ogg told her on this occasion that she was paid to inspect air filters and they did not want her doing anyone else's work and she was to do her own job (Tr. 1401).

Quality Control Supervisor Donna Ogg testified that about mid-January 1980 she did in fact have to ask Shirley Graham to stay at her inspection station because Graham was leaving her station and talking to different people on the line all the way down to the palletizer while, during her absence, filters coming from the oven for inspection had to be "stacked." (Tr. 2738.) Ogg told Graham that the particular times she could leave the line were at break or supper time or if an MSA assigned her to some other work while the line was down. The reason that Ogg so instructed Graham was because Ogg had received complaints in January from Line Supervisor Tony Guin about Graham's habit of leaving the line to talk to employees who were trying to work (Tr. 2739-2740). Guin told her that some of his line employees complained that Graham was disturbing them while they were trying to work. Following this episode, Ogg observed Shirley Graham pulling molds while the mold puller was doing her inspecting job. On this occasion Supervisor Donna Ogg told Graham she would have to take further disciplinary action (Tr. 2740). Ogg made out a written warning but was unable to present it to Graham because she walked out on strike before Ogg had prepared it (Tr. 2741).<sup>138</sup>

Supervisor Ogg testified that she had seen Shirley Graham go off her line and talk to a couple of people on several occasions but that she had "not really" ever talked to Shirley Graham about this before the mid-January instruction to her (Tr. 2743).

Supervisor Tony Guin testified that two of his employees, Mabel Hunt and Lila Scott, had complained to him that Shirley Graham was giving them instructions on how to do their jobs. Guin was also told by his MSA that Graham was leaving her work station to talk to other employees. As a result of these reports, Guin spoke to Donna Ogg sometime in early January about the problems with Graham. Ogg told them that she would talk to Graham (Tr. 2794-2796). Shortly thereafter, Supervisor Guin was out on the floor when Graham called him over and told him that if he had any problems with her he should bring them to her rather than to Supervisor Ogg.<sup>139</sup> Guin responded that if she would stay at

<sup>138</sup> This warning was not offered in evidence.

<sup>139</sup> Graham conceded this on cross-examination (Tr. 1401).

her work station and not bother other employees there would not be any problems (Tr. 2797).

Respondent called employee Mabel Hunt to the stand to testify about Graham's work habits. Hunt testified that she worked on air line No. 5 with Shirley Graham. According to Hunt, Graham had an almost daily habit of coming up to her and telling her that she was not doing her job correctly. If Hunt did not follow Graham's instructions, Graham would engage in what Hunt referred to as "spite-work." Hunt explained that instead of sending one floater down the line at a time, Graham would send stacks of floaters down the line. This would make it necessary to stop the machine to straighten everything out. Hunt testified that incidents such as this would happen sometimes as often as three times per week (Tr. 2659-2662). The General Counsel offered no rebuttal to this testimony. I credit Hunt, and I find that the restrictions placed on Graham related to her disturbing employees trying to work.

Mold puller George Edward Stanbaugh worked on the same air line with Shirley Graham. He testified that the main reason he walked out was because Sellers (not Stanbaugh's immediate supervisor) told him not to laugh on the line (Tr. 1785, 1815). His testimony reveals that the chief reasons he walked out with the others were (1) Sellers told Stanbaugh the night of February 8 that he did not have time to laugh while working (Tr. 1787);<sup>140</sup> (2) 5 weeks earlier MSA Vivian Royal had yelled at him, in a disrespectful tone, not to use the telephone; and (3) the supervisors were "hassling" him and other union supporters.

There is no complaint allegation regarding the February 8 laughing incident nor is there one respecting the telephone incident 5 weeks earlier. As for the hassling of Stanbaugh, such appears to be nothing more than his own job performance problems (Tr. 1803-1807) for which he has received warnings, with the first one (R. Exh. 29) having been issued to him in late October 1979 for carelessness—before the union activity. Indeed, there is no evidence that Stanbaugh engaged in any union activities prior to the February 8 walkout.

The union supporters to whom Stanbaugh referred apparently meant Shirley Graham, and to a very limited extent, James Graham. Stanbaugh had a close working relationship with Shirley Graham and it upset him when she told him that her MSA had instructed her to stay in her own work area and not relieve Stanbaugh when he got behind or went for a drink of water (Tr. 1787, 1818, 1819). On February 8, Stanbaugh, as noted earlier, observed Sellers pointing his finger at James Graham. Following the walkout, Shirley Graham drove Stanbaugh to the latter's home and then she proceeded to join the others who had assembled at the Graham home.

At page 206 of its brief 1, Respondent contends that Stanbaugh's failure to join the others at the Graham home to discuss matters after the walkout demonstrates

that he was not concerned about the perceived problems of the others. I reject this theory. The more probable explanation for Shirley Graham's dropping Stanbaugh off at his own home is the fact that Stanbaugh, to a minor degree, has a special problem communicating. I observed this at the trial, and all counsel alerted me to such fact in an off the record conference at the bench as Stanbaugh was about to testify. Despite this problem, I find Stanbaugh to be an honest, sincere, and credible witness.

I credit Stanbaugh's testimony that on February 8 he informed MSA Royal he was walking out, and that he did not say he was quitting (Tr. 1796). Semmes, I find, told Stanbaugh as the latter was walking out that if Stanbaugh walked out he would never again work at Purolator.<sup>141</sup>

b. *Gearhart's three warnings—timing of breaks—paragraphs 9(b) and 9(f) dismissed*

Paragraph 9(b) of the complaint alleges that Respondent violated Section 8(a)(3) of the Act by issuing warnings to John Gearhart on December 17, 1979, and twice in late January 1980. Paragraph 9(f) of the complaint alleges that Respondent violated Section 8(a)(3) of the Act by beginning in December 1979 to time employees on breaks (Tr. 1187; G.C. Exh. 9).

With respect to the three alleged warnings given to John Gearhart, the record reflects that the December 17, 1979 warning (R. Exh. 160) was issued to him because he climbed across a *moving* conveyor belt in the presence of Supervisor Wilson Sellers and General Supervisor Paul Porter. Gearhart admitted that he did so (Tr. 1463, 1492-1493). There is no doubt that this act constituted a serious safety hazard. MSA James Graham and Gearhart testified that uncovered chains pulled the motor and a person crossing the conveyor could get caught in the chain if he fell. Larry Grenier testified that crossing a moving conveyor belt was a known safety hazard and a person could fall on the conveyor and actually end up in an oven (Tr. 1234-1236). Testimony in the record about a frequent practice of mechanics climbing over conveyor belts with the knowledge of supervisors had to do with conveyor belts which were *not* moving. Moreover, one such incident involved Bobby Bridges and Bobby Davis, two first-shift mechanics. Graham conceded that they wore union buttons (Tr. 1350).<sup>142</sup>

Respondent offered into evidence numerous warnings showing that it is extremely safety conscious and that it has warned employees for every conceivable safety violation, including warnings issued to employees for crossing moving conveyors. Respondent, it is clear, followed its past practice.

Moreover, it is apparent that a large factor in the decision to give Gearhart the December 17, 1979 warning

<sup>141</sup> I find this to be the sense of Stanbaugh's testimony, "He told me that if I was to walk out, that I wouldn't be going back to work at Purolator." (Tr. 1789.)

<sup>142</sup> There is some evidence in the record that union buttons were not made available until after January 1, 1980. Aside from the question of whether Bridges and Davis were wearing union buttons on that occasion, it is clear that General Supervisor Porter observed them crossing a stationary conveyor belt and told them to stay off moving conveyors (Tr. 3153-3154, Porter).

<sup>140</sup> Stanbaugh apparently had laughed quite loudly after Shirley Graham told him a joke. Sellers heard the noise as he was coming out of his office after James Graham had just been counseled by Semmes. According to Sellers, he simply asked Stanbaugh what the problem was and whether he was hurt. I credit Stanbaugh who impressed me as a more believable witness.

was the fact that he had previously had serious medical problems, including back problems. He missed 3 months of work in 1979 because of medical problems, part of which were related to his back (Tr. 1489). When Larry Grenier complained to Collins at a January safety meeting about the warning, Collins told him that Grenier did not understand the circumstances. He then explained to Grenier that Gearhart had prior back problems and that Respondent's insurance company had spent a lot of money on him and that the warning was for his own benefit. Under the circumstances, it is clear, and I find, that the December 17, 1979 warning issued to Gearhart had nothing to do with his announcement in early December to Supervisor Jimmy Tew that he, along with most of the other maintenance mechanics, was organizing on behalf of the Union. I shall therefore dismiss paragraph 9(b) with respect to the December 17, 1979 warning allegation.

The two warnings in late January 1980 to Gearhart were not, I find, unlawful. The first January warning (R. Exh. 26) was issued to Gearhart by Supervisor Sellers on January 23, 1980, and pertains to his taking an extended lunchbreak of 41 minutes on January 22 from 7:54 p.m. to 8:35 p.m. The record reveals that there was nothing unusual in the conduct of Supervisor Sellers (nothing unusual for him, at least) timing employees on break since he had been supervisor. This issue also brings into focus paragraph 9(f) of the complaint regarding the allegation that Respondent unlawfully began timing breaks in December 1979.

Respondent introduced into evidence numerous documents showing that prior to December 1979 employees had been timed on breaks and had been warned for taking extended breaks. Manufacturing Manager John Semmes testified that he periodically had break audits conducted. One of these audits, conducted June 13, 1978, was introduced into evidence as Respondent's Exhibit 154. A second audit conducted in May 1979 was received in evidence as Respondent's Exhibit 153 (Tr. 3561-3564). Respondent's documentary evidence included over 40 warnings given to employees prior to December 1979 for taking extended breaks. It is clear from the foregoing that Gearhart was not discriminated against when he was given a warning for taking an extended break. Moreover, when Sellers first came to the second shift he established scheduled break periods for employees to adhere to strictly. Accordingly, I shall dismiss paragraph 9(b) of the complaint with respect to this warning, and I shall dismiss paragraph 9(f) regarding timing of breaks.

The third warning was issued to Gearhart on February 1, 1980, and pertains to his failure to carry out Supervisor Sellers' instructions to clean up a plastisol spill underneath the dispenser on air line No. 4. Sellers had assigned the project to Gearhart on January 22 and on January 25 discovered that the job still had not been done. Gearhart told Sellers he did not have the Speedy Dry cleaning material. Sellers told him that someone else had already put Speedy Dry down on top of the mess and it had been like that for 2 days and that he was dissatisfied with Gearhart's failure to follow instructions. Gearhart admitted that he was given the work order to clean up the

plastisol, and that he did not do it. He excused his delay on the basis that there was no Speedy Dry in front of the maintenance office where he is accustomed to finding it before taking it out to the lines, and that he was unaware that it was maintained in the forklift shop (Tr. 1507). I do not credit his testimony that he told Sellers on the two previous nights after receiving the work order that there was no plastisol and asking Sellers if any had arrived and Sellers telling him "no" (Tr. 1506). Moreover, Sellers noted that he had observed Gearhart engaging assembler Wanda Baine in what appeared to be idle conversation on numerous occasions after the work order had been issued, and for that additional reason Sellers felt that Gearhart was derelict in his duty. I find no violation in this warning and I shall dismiss paragraph 9(b) of the complaint with respect to this warning also. Such dismissal eliminates all three allegations in paragraph 9(b) pertaining to John Gearhart.

#### 6. Conclusion—economic strike

All the other complaints listed by the strikers in their testimony as their reasons for walking out pertain to matters not alleged as unlawful by the General Counsel. These items relate to the inspection of Gearhart's toolbox and to various other matters.<sup>143</sup> As earlier noted, CGC did not adduce testimony from first-shift mechanics or third-shift mechanics showing disparity of treatment or that Sellers had never issued warnings in the past.

Indeed, Respondent offered warnings which Sellers in fact had issued in the past: Respondent's Exhibit 99(a) was issued to Joseph Canady, apparently a first-shift employee, for taking an extended break on February 17, 1979. Another, Respondent's Exhibit 99(b) is a 3-day suspension notice issued to Thomas N. Greb for insubordination on November 13, 1978, for "using profane language to Mr. Sellers" while being counseled by Sellers about his performance. On August 1, 1977, Sellers prepared a "Matter of Record" for the file of Leonard Groves reporting that on June 30, 1977, Sellers counseled him for unsatisfactory performance in that his work was too slow and that improvement would have to be made (R. Exh. 99-d). On December 7, 1979, Sellers issued a written warning to employee William Maiden, a first-shift mechanic, for reading a book on the line during working time on December 7, 1979. Finally, in October 1977 Sellers recommended a 3-day disciplinary layoff for employee Kenneth Moody Jr. for damaging a conveyor on an oil line with the operation of his forklift. Moody voluntarily returned to the second shift as a palletizer in lieu of the suspension (R. Exh. 99-f).

Although recognizing that the record does raise a suspicion that Respondent sent Sellers to the second shift for the purpose of harassing union supporters, I am com-

<sup>143</sup> With respect to the toolbox, Semmes testified that the toolboxes used by the mechanics are owned by the Company. On the occasion in question, Semmes and Sellers were taking a housekeeping tour of the maintenance area when they noticed two toolboxes which were extremely messy. Semmes told Gearhart that the toolboxes looked like pigpens and he told Sellers to have the mechanics clean up the toolboxes. Semmes and Sellers then continued with their tour (Tr. 3034-3036, 3559). All of these additional matters relate to the different supervisory style of Sellers in that he is a supervisor who operates "by the book."

pelled to find that the evidence on the point does not rise above a suspicion, and that the evidence in support of the business justification inference predominates. Accordingly, I find that the cause of the strike was economic in nature and not based on unfair labor practices committed by Respondent. In the following section I find that the strike ended the same evening it began, February 8, 1980. Thus, it was not prolonged by any conduct of Respondent. I therefore shall dismiss paragraph 12 of the complaint which alleges that the strike was caused and prolonged by illegal conduct of Respondent.

*I. Strikers' Unconditional Offer to Return to Work—  
Backpay a Compliance Matter*

1. Chronology of events

After Shirley Graham dropped Stanbaugh off at his home, she and the other three strikers assembled at the Graham home to discuss their situation. They decided that Graham would be the spokesman for the strikers and that he would call Employee Relations Manager Whit Collins to see about going back to work, and also to see if anything could be done about the problems being created by Supervisor Sellers. Collins was not at home when Graham telephoned, but Mrs. Collins said she would have Collins call.

MSA Graham testified that when Collins returned his call around 10 p.m. the night of February 8, he took the call in the kitchen of his home in the presence of his wife, Shirley, and mechanics John Gearhart and Larry Grenier. Collins asked what the problem was. Graham answered that he would like to have a meeting with Collins in reference to their jobs regarding whether they could go back to work and that Graham would be the spokesman for the group (Tr. 1332, 1358). Graham testified that Collins told him that he would have to check his schedule at his office the next day and would have to call him back on Monday, February 11, to set up a meeting. When the conversation with Collins was concluded, Graham told the others in the kitchen that Collins would call back Monday to set up a meeting to talk about the jobs and the problems. On cross-examination, Graham testified as follows (Tr. 1359):

Q. In other words, you wanted to get Mr. Collins or somebody to give you all some relief, isn't that right?

A. That is right.

Q. You wanted some relief before you went back to work, is that true?

A. That is a fact.

Graham testified that Collins called him back on Monday evening, February 11, 1980, around 9 or 10 p.m. and they arranged an appointment to see Collins on Thursday, February 14 at 10:30 a.m. On Thursday, February 14, Graham, his wife, Grenier and Stanbaugh went to see Collins. When Collins came out of his office he told Graham to come on in. The others remained outside Collins' office and waited. Graham credibly testified that he asked Collins, "What is the situation on our jobs, can we go back to work?" (Tr. 1334.) Collins told him that

"You have not been fired, you haven't quit, you have been replaced." (Tr. 1359.)<sup>144</sup> Graham then asked when they could go back to work and Collins replied when Purolator needed people of their caliber (Tr. 1334, 1363). Graham's testimony, being somewhat sketchy at this point, reflects that Graham then expressed thanks, left the office, reported to the others, and they left. Graham testified that Purolator has not offered him a job since the walkout.<sup>145</sup>

Mechanic Lawrence F. Grenier testified that he was in the kitchen when Collins returned the call around 10 p.m. Friday evening, February 8, 1980, and that he could hear Graham's end of the conversation (Tr. 1175). According to Grenier, Graham told Collins that he would like to have a meeting where he "could talk to him about our problems and see about getting our jobs back." After the conversation Graham reported that Collins said he would get back with them and set up an appointment and "listen to our problems." (Tr. 1175.) According to Grenier, Graham said that Collins stated that he supposed Graham was spokesman for the group and Graham replied yes (Tr. 1176). On cross-examination, Grenier testified that the group in the kitchen decided to let Graham do the talking for them, and at that time they did want to go back to work (Tr. 1215). He also conceded that they were seeking to have a meeting with Collins to talk about the problems that caused them to walk out (Tr. 1216).

Shirley Graham testified that when Collins called back the evening of February 8 she heard her husband's end of the conversation and heard him speaking about getting their jobs back, that Graham would be the spokesman for the group, and about arranging an appointment (Tr. 1393). On cross-examination she confirmed that when the group arrived at the Graham home they designated MSA Graham to be their spokesman (Tr. 1422). When asked on cross-examination as to what had changed their minds in the short time that they had walked away from their jobs to now seeking to get their jobs back, the testimony was as follows (Tr. 1423):

Q. What had occurred during that period of time to change your minds from wanting to walk out to getting your jobs back?

A. We didn't really want to walk out, we were forced to go.

She testified further as follows (Tr. 1425-1426):

Q. [By Mr. Miles] When you all were sitting at the table your husband was still hot wasn't he?

A. Yes, sir.

Q. Did he want to go back to work right then?

A. No

<sup>144</sup> Tr. 1334 reflects that Graham on direct examination quoted Collins as saying, "You have quit . . ." This statement conflicts with the other record evidence, including Graham on cross-examination, and I find that it is either an error in the transcript or Graham simply misspoke.

<sup>145</sup> The others have been offered jobs. "Jim Graham was not offered reinstatement. The lawfulness of this course of action depends on whether or not Graham is a supervisor. If he is a supervisor, his actions were not protected and Respondent acted within its rights in not offering him reinstatement." (R. Br. I, p. 204.)

Q. Did he want to go back next week, or next month, or after he had gotten these problems resolved or what?

A. He wanted to call and talk to Whit about going to work, not that night, not in the condition he was in.

Q. Did he want to go back the next day?

A. Yes.

Q. He wanted to go back the next day?

A. Yes, that's why he called Whit, we all wanted to go back.

Mechanic John H. Gearhart Jr. testified that he was present in the kitchen when Collins returned the telephone call around 10 p.m. the night of February 8 (Tr. 1480). He testified that Graham told Collins that "we had to walk out" and that they wanted to talk to him about their jobs and getting back to work. Graham also said they wanted to talk to him about Wilson Sellers. On hanging up the telephone, Graham told the group that Collins said to telephone Monday morning for an appointment to come down and see him (Tr. 1481, 1532). On cross-examination, Gearhart testified that the group decided to call Collins in the first place because he "had been very open, and we wanted to call him and tell him what had gone on and see what we could do about being reinstated with our jobs, and so we called him." (Tr. 1531.) Gearhart testified that Collins returned the call around 10 p.m. and that he heard Graham tell Collins that they had walked out and they wanted to speak to him about getting their jobs back and having some understanding between us and Wilson Sellers. He heard Graham say that he would call on Monday.

Gearhart testified that they tried telephoning Collins Monday but were told that he was tied up in meetings and that he would call them around 8 p.m., Monday evening. Gearhart testified that Collins did call around 7:30 p.m. and that he was there when Graham spoke to him over the telephone. The conversation was very brief and he heard Graham say "yes" and "no" a couple of times, heard him tell Collins they had not quit; heard him tell Collins they wanted to speak with him as a group; and then he hung up. Graham then told the group that Collins had told him over the telephone that they were considered as not having quit, had not been fired but had been replaced, and that Collins had told him that he would talk with them "one on one" and that the rest of them present had until the next day to call and make an appointment to come by and see Collins (Tr. 1534).

The next day Gearhart did call and made an appointment for the day after Graham was to meet with Collins (Tr. 1535). When Gearhart met with Collins he sat down and said, "Whit I'd like to have my job back." Collins told him that he had not been fired, had not quit but had been replaced and that he would call him whenever something opened (Tr. 1535).

Collins testified that when he returned the telephone call around 11 p.m., Friday night, February 8, Graham informed him that he and the others had left the plant that night and he said he would like to set up a meeting in Collins' office between Collins and all the group. Collins told him that he would have to wait until he got to

his office Monday morning to ascertain what his schedule was and to call him back on Monday morning (Tr. 3645). Collins further testified that he was in roundtable meetings all day Monday, but left a message to be delivered to Graham when he telephoned that Collins would call him Monday evening around 8 p.m.<sup>146</sup> In that second, or Monday night, telephone conversation, Collins told Graham that the earliest he could see him would be Thursday morning at approximately 10 a.m. Collins testified that he could not give Graham an earlier date because he had roundtable meetings scheduled weeks in advance through Wednesday of that week regarding the union campaign (Tr. 3646). Collins told Graham that if he preferred not to wait he could contact Plant Manager Steve Thies to arrange to meet with him. Graham said he wanted to speak with Collins. Collins testified that on Wednesday evening of that week John Gearhart telephoned him and said he would like to set up an appointment to see Collins as soon as possible. They arranged to meet Friday morning at 11 a.m.

At the 10 a.m. meeting on Thursday, February 14, Collins walked into the lobby and spoke to the Jim Graham group there and asked Jim Graham to come into his office. Just the two went into the office (Tr. 3648). In the office, Graham asked Collins what his situation was at Purolator and Collins informed him that at this point he had been replaced. Graham asked if that meant he had been fired and Collins told him absolutely not, that he had not been terminated, that he had not quit but that he had just been replaced. Graham then asked if that meant he could receive a form from the personnel department to file for unemployment compensation and Collins told him no because he had not been terminated nor had he quit, that he had just been replaced. According to Collins, Graham then said (Tr. 3649):

Well, I guess there is no use talking to you any further. I had come to talk to you about the problems that I was having with Wilson Sellers.

Graham continued on and told Collins that he had only worked for Sellers approximately 8 days and that Sellers had told him that he was not doing the job. Graham said he had an ego and he just could not take it. He thanked Collins for his time and said that was all that he had to talk about. Collins asked him what he wanted to do about his tools and Graham replied that he would send a note through Irvin Farmer to pick them up that night or the next day. Collins asked him if his wife Shirley wanted to come in and Graham replied no that that was it as far as he was concerned (Tr. 3649).

The following morning John Gearhart came in, discussed the Purolator racing program a few moments, and then he asked what his situation was at the plant and Collins told him he had been replaced, that he had not been terminated nor had he quit. Gearhart asked what

<sup>146</sup> It is unclear what "roundtable" meetings Collins was referring to, for the roundtable meetings with the MSAs did not begin until after the February 27 Decision and Direction of Election by the Acting Regional Director.

did it require for him to get a job back at Purolator and Collins informed him that as soon as an opening occurred for which he was qualified Collins would contact him. Collins asked him what he wanted to do with his tools and Gearhart said he would leave them at the plant, that he had some other tools at home he could be working with (Tr. 3650).

Collins specifically testified that in the previous conversations none of the strikers, including James Graham, had said anything to him about getting their jobs back. Collins testified that in the initial conversation with Graham on the evening of Friday, February 8, all Graham said was that he wanted to set up a meeting with Collins at the earliest convenience (Tr. 3651).

In its brief, Respondent contends that except for John Gearhart, the strikers did not make an unconditional offer to return to work until March 24, 1980, when Union Representative Mike Krivosh sent a telegram to Plant Manager Thies making such an offer (G.C. Exh. 13). Respondent asserts that MSA James Graham and John Gearhart were the only two strikers who discussed their jobs with any company official, and that Graham did not ask about the status of his job until he met with Whit Collins on February 14. Even that, Respondent contends, did not constitute an offer to return to work, and even if it did it was not unconditional because it was based on wanting something done about Supervisor Sellers. Citing *Atlanta Daily World*, 192 NLRB 159 (1971), Respondent quotes the Board's language, "It is well settled that any request for reinstatement which is conditioned on removing the cause of the strike is not an unconditional offer." (Br. I, p. 204.)

Respondent asserts that when John Gearhart met with Collins on February 15, he, unlike Graham, made no mention of Supervisor Sellers or any other alleged cause of the strike and specifically asked what he needed to do in order to get his job back. Collins told him that he would call Gearhart when an opening occurred. Respondent contends that at this point "Gearhart had clearly abandoned the strike and made an unconditional offer to return to work." (Br. I, p. 204.)

The record reflects that the jobs of all the strikers were filled by replacements at the time the second-shift operation resumed on Monday, February 11, 1980. Plant Manager Thies testified that in mid-February 1980 sales began softening and that on either February 12 or February 13 all hiring ceased. No new employees were hired until September 2, 1980. During the summer months, Respondent asked employees to volunteer for layoffs. Approximately 35 employees volunteered to go on layoff and did not work during the summer months (Tr. 3776-3779). Respondent's Exhibit 161, a chart showing the monthly production for the first 6 months of 1979 and 1980, reflects that production at the plant did decline significantly from February to June 1980. During the summer months, a certain amount of attrition occurred. In addition, Respondent obtained a major contract with Ford Motor Company. In August, Respondent made plans to recall the walkouts as well as the other employees who were on layoff (Tr. 3681, Collins).

## 2. Analysis and conclusions

I credit the testimony of Graham and the other strikers that on the evening of Friday, February 8, 1980, in his telephone conversation with Employee Relations Manager Collins, Graham did express to Collins not only that he was the spokesman for the group but that he wanted to set up a meeting to talk about getting their jobs back and to discuss what could be done about Supervisor Sellers. I further find that the reference to Supervisor Sellers does not render the offer by Graham to return to work conditional. The request to talk about Sellers was merely incidental to the request to return to work. Graham's response, on cross-examination, that the strikers wanted relief before they returned to work does not overcome the more affirmative actions of the strikers indicating an absence of any condition on their February 8 offer to return to work. It is well settled that the Board does require an "artistic request for reinstatement" but rather, in each case, determines whether the facts warrant the conclusion that an individual desired reinstatement. *Flatiron Materials Co.*, 250 NLRB 554, 560 (1980). Moreover, if Respondent felt the offer was ambiguous in any way, it had the burden to request clarification. *Haddon House Food Products*, 242 NLRB 1057, 1058 fn. 6 (1979), enfd. in relevant part 640 F.2d 392 (D.C. Cir. 1981). See also *Decker Foundry Co.*, 237 NLRB 636 (1978). (A request to return to the same job and same pay rate does not render application unconditional.)

Based on the foregoing analysis, it is clear that Respondent had a duty to reinstate the economic strikers as of Friday evening, February 8, 1980. Instead, as I find, Respondent stalled the strikers while rapidly arranging the replacements on the second shift for Monday, February 11. It is clear, and I find, that Respondent did not undertake this operation in good faith, but instead choose to ignore the plea of the economic strikers to return to work in order to replace them and thereby leave five union supporters stranded out in the February cold as a calculated display of its economic power for the benefit of its many employees who would soon be voting in the March 27 election.

I therefore find, as alleged in paragraphs 15, 18, 21, and 22 of the complaint, that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate the four nonsupervisory strikers on their unconditional application to return to work on February 8, 1980.<sup>147</sup>

I shall dismiss complaint paragraphs 18, 21, and 22 to the extent that they allege Respondent violated the Act by failing to reinstate MSA James Graham. As MSA Graham was a statutory supervisor, and because I have not found that Respondent's failure to reinstate Graham

<sup>147</sup> The complaint paragraphs relating to this matter allege that the unconditional offer to return to work was made on February 14 and 15, 1980, by James Graham on behalf of all strikers and by John Gearhart individually. While I credit the testimony of James Graham and John Gearhart concerning their application on February 14 and 15, and therefore find that they made unconditional offers on those dates, I have found that MSA James Graham made an unconditional offer on behalf of all strikers the evening of February 8. This is close enough in proximity to the date alleged in the complaint so as not to constitute a surprise to Respondent nor a variance from the complaint allegations. Moreover, the matter was fully litigated.

was an integral part of an overall pattern aimed at discriminating against union supporters, it follows that it would be improper to order his reinstatement.

I therefore shall order that Respondent offer the strikers, except MSA James Graham Jr., immediate and full reinstatement to the positions they held on February 8, 1980. I find that the backpay period begins on Monday, February 11, 1980, rather than 5 days after February 8, 1980, in view of Respondent's February 11 conduct to avoid having to reinstate the strikers, and in light of the fact that the usual 5-day period would not have been utilized by Respondent for good-faith efforts to reinstate them.

Although the record contains some evidence of reemployment offers to the nonsupervisory strikers, the evidence is less than complete. As the backpay issue may be considered in the compliance stage, I shall include the usual order for reinstatement offers and backpay, and defer resolution of the backpay issue to the compliance stage.

*J. Summary of Disposition of Complaint Allegations*

The list set forth below shows the disposition I have made of the basic complaint allegations:

Complaint Paragraphs	
<i>Violation</i>	<i>Dismissed</i>
8(a) [major part.]	8(a) [one count.]
8(g) [in part.]	8(b)
8(i) [in part.]	8(c)
8(j)	8(d)
8(l)	8(e)
8(n)	8(f)
8(p)	8(g) [in part.]
9(a)	8(h)
9(c)	8(i) [in part.]
9(d)	8(m)
9(e) [in part.]	8(o)
10 [in part.]	8(q)
13-18. [failure to reinstatement strikers.]	9(b)
	9(e) [in part.]
	9(f)
	10 [in part.]
	12
	20

V. THE POST ELECTION ISSUES

*A. Introduction*

As the background of the preelection, election, and postelection events are covered in the first several pages of this decision, I shall not redescribe those matters here.

*B. The Challenged Ballots*

1. The February 27, 1980 Decision and Direction of Election

On February 27, 1980, the Acting Regional Director for Region 11 issued his Decision and Direction of Election in Case 11-RC-4817. That portion pertaining to the MSAs reads as follows:

The parties are in dispute as to the unit placement of the following categories: Petitioner would include and the Employer would exclude approximately 70 supervisory assistants which include manufacturing supervisory assistants, maintenance supervisory assistants, receiving supervisory assistants, and distribution supervisory assistants, all of which are referred to throughout the record by the letters MSA. Petitioner would exclude and the Employer would include three material planners and three production schedulers.

The Petitioner contends that the supervisory assistants are leadmen without supervisory authority and should be included in the unit, while Employer contends that they are supervisors within the meaning of Section 2(11) of the Act.

The employees in the four classifications, manufacturing supervisory assistant, maintenance supervisory assistant, receiving supervisory assistant and distribution supervisory assistant, have essentially the same responsibilities, even though the actual work performed is different in some respects. The Employer's Manager of Manufacturing Assembly testified that the leadership concept for this classification (MSA) was accomplished in 1978 when the job description was rewritten to incorporate the duties that the utility operators were already performing. The labor grade was elevated and the job duties were formalized at that time. The designation supervisory assistant (MSA) was formalized in August 1979 and was conferred in December 1979. The evidence shows that these employees have possessed and exercised the same authority regarding employees under them for about four or five years. The evidence indicates that each department supervisor has working under him a number of supervisory assistants, varying from one to five, depending on the length of the assembly line and the amount of work involved. The supervisory assistant relieves each of the employees under him for a ten-minute period in order that each employee may have a rest break, morning and afternoon.

The record evidence shows that each supervisory assistant possesses and exercises authority as follows: He has authority, without prior approval, to transfer an employee from job to job within the department, to assign an employee to a specific job on the assembly line, to issue verbal and written warnings, and to write up the performance evaluation of the employees under him. This performance evaluation determines whether the employee receives a raise in pay. If an employee is absent, for any reason, the supervisory assistant must obtain a replacement from another line, or from the labor pool, and he needs no prior approval to accomplish this task. The supervisory assistant is authorized to sign the timecards of the employees under him. He thereby approves overtime work, excuses a tardy employee, or permits an employee to leave work early. Some of the supervisory assistants have been performing the foregoing supervisory tasks for as

long as five years, but were working under the job designation of utility operators. If additional employees are needed due to acceleration of the assembly line, the supervisory assistant is authorized to go to an adjoining line or to the labor pool and get them. If a mechanical breakdown idles a number of employees and there is an "over-crew", he is authorized to send the idle employees home. He generates work orders for machine repairs and is responsible for orientation of new employees on his line. He has been told by his supervisor that he is a supervisor and the employees under him have been told that he is their supervisor. He attends production staff meetings with his department supervisor and with other staff personnel. He distributes employee paychecks and substitutes for the department supervisor when the department supervisor is absent due to vacation or illness. He has authority to determine if overtime is needed and can approve overtime by signing the employee timecard. He is responsible for the safety of the employees under him, regulates the product flow on the assembly line and instructs those under him as to their job duties and as to what is expected of them on the job.

The Board has held that the indicia of supervisory status set forth in Section 2(11) of the Act are to be taken disjunctively in that the possession of any one of these indicia is sufficient to confer supervisory status. *Research Designing Service, Inc.*, 141 NLRB 211, 213. The evidence shows that the supervisory assistants described herein exercise independent judgment and that such judgment is not of a merely routine or clerical nature. I find that the supervisory assistants possess indicia of supervisory authority within the meaning of Section 2(11) of the Act and I will exclude them from the unit as supervisors.

I have reviewed the preelection hearing record, and I concur with the Acting Regional Director's analysis and conclusion. As described below, I also find that the evidence presented before me on this subject, covering some 6000 transcript pages, plus exhibits, changes the original finding only in a few instances.

## 2. Positions of the parties

The basic contentions of the parties have been described at the beginning of this decision. Additionally, it should be noted that Purolator contends here that the MSAs are skilled and experienced workers who are non-supervisory leadpersons; that these MSA leadpersons exercise no independent judgment; and that they serve as mere *conduits* between statutory supervisors and employees. (Br. II, pp. 4, 6.) Respecting the MSAs' job functions, which Purolator concedes to be important duties, the Employer nevertheless describes them as being *routine* in nature. (Br. II, p. 6.)

Respondent's references to "routine" functions and lack of "independent judgment" are based on the statutory language. Section 2(11) of the Act defines the term "supervisor" as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11) of the Act, Congress recognized the distinction between leadpersons and true supervisors:

[T]he committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. [S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).]

The Union's position is described further at page 20 of its brief II:

The Union believes the Company's original brief in the representation case adequately dealt with the precedents for finding that all of the supervisory assistants are supervisors within the meaning of the Act. The Union also believes that if the Administrative Law Judge and the Board do not want to deal with the question concerning company witnesses invalidating the testimony of company witnesses at the original hearing, the record at the consolidated hearing contains enough evidence to find that all of the supervisory assistants were supervisors within the meaning of the Act at the time of the election. The Union does not believe each supervisory assistant must be discussed since the admissions by the company witnesses at the consolidated hearing and/or the original record contains evidence which establishes the supervisory status of all the assistants.

Union counsel also sets out a series of additional points he relies on.

## 3. Plant layout

Purolator's Fayetteville, North Carolina plant is a 633,000 square foot building which covers 14 acres under one roof (R. 21, Semmes). The building includes manufacturing and warehousing facilities along with offices and laboratories. The entire area of the plant is utilized by Respondent in the operation of its business. The plant had been in operation for approximately 10 years in January 1980 and has facilities for production of many of the major components used in the Company's filters as

well as facilities for assembling those components into finished products.

The assembly functions are all located in the central part of the plant, with the component, warehousing, and receiving areas located around that. Within the assembly area, there are production lines for the various filters assembled and packaged by the Company, including three oil filter assembly lines, five air filter assembly lines, one gas filter assembly line, and a gas filter packing line.

Not only is the building large, being one-third of a mile from one corner to another (R. 21, Semmes), but the manufacturing lines extend long distances. For example, an oil line is 320 feet long (in a direct line, apparently), and about 50 feet wide (R. 21). Actually, since the line operates by a series of conveyors, with employee stations spaced at intervals, the actual conveyor length is 1541 feet. A person at one end cannot see the other end of the line (R. 22). Similarly, Semmes described an air line as being 320 feet long and 60 feet wide (R. 138).

Understandably, the warehouse area is very large. Former MSA (RSA) Lexie A. Powers, a discharged supervisory assistant who had worked as the second shift RSA in the receiving department for Supervisor Vincent Mininno, testified that the area is so large, containing racks extending to the ceiling, that his four employees could simply disappear among the racks. Powers had to spend some of his time walking among the racks to make certain the employees were working (R. 586-588).

#### 4. Sketch of management—supervision

At the preelection hearing, John Semmes, manager of manufacturing, described the Employer's managerial structure (R. 14). Reporting to Plant Manager Stephen M. Thies are the managers of several departments. These include Semmes as manager of manufacturing (the department employing the great majority of unit employees); Martin Chambo, manager of production control (which includes the receiving department, in the warehouse, where the RSAs are employed); and, of course, Whit Collins, director of employee relations. Although Semmes did not list William E. McKibben, it also appears that McKibben, as manager of the distribution center (also a warehouse operation, and where the DSAs are employed), reports to Thies.

The plant operates two full production shifts plus a limited third shift. Each department manager has several supervisory personnel reporting to him. As Semmes' department apparently has nearly 600 workers out of the 663 (not counting MSAs) eligible to vote in the election, he has a general supervisor with jurisdiction over each shift and who in turn has several line supervisors reporting to him. More than a dozen supervisors work in manufacturing-maintenance under Semmes. Each production line is divided into two sections with an MSA in charge of each section. A typical line is as described at the January 1980 hearing by MSA Sharon Tew. She testified that she normally supervises nine employees, but that number frequently increases to as many as 25 employees depending on the product and on the equipment used to produce it (R. 279).

At the time of the election, the distribution center, under McKibben, had a general supervisor, 4 department

supervisors (2 for the first shift and 1 each for the second and third shifts), 9 DSAs, and about 51 rank-and-file employees for the three shifts.

The receiving department, under Chambo (who also has responsibilities for certain matters outside the unit), has a day-shift supervisor, Ray Tityk, and an second-shift supervisor, Vincent J. Mininno. At the time of the election, Tityk had three RSAs plus six rank-and-file employees. At the time of the preelection hearing, MSA Lexie A. Powers was Mininno's RSA for the second shift. Powers testified that he worked with four employees (R. 556).

In a few instances, such as the receiving department in the large warehouse area, an RSA may have jurisdiction over but one or two employees. As Respondent observed at page 40 of its February 15, 1980 preelection brief to the Regional Director:

However, even where there is a ratio of one employee to one supervisor, supervisory status may exist. *Great Atlantic & Pacific Tea Company*, 121 NLRB 1193, 42 LRRM 1538 (1958). As noted above, however, each supervisory assistant supervises several employees. Moreover, if the supervisory assistants are not considered to be supervisors, then there would be a disproportionately high number of employees, spread over a huge area, per supervisor.

#### 5. Purolator vested MSAs with supervisory authority—postelection evidence shows no withdrawal of authority

##### a. *Difference in preelection and postelection witnesses*

As is seen in the discussion below, the overwhelming weight of the preelection hearing evidence is that Purolator had vested the MSAs with supervisory authority well before December 1979, but certainly no later than the formal conferring of the MSA title in December 1979.

Of great significance is the fact that Respondent's preelection evidence came from key management officials, such as Manager of Manufacturing John Semmes and Personnel Manager Frank Grady. The gist of their testimony is that the Company had granted the MSAs substantial supervisory authority. While Purolator's top management official at Fayetteville, Plant Manager Stephen M. Thies, did not testify at the preelection hearing, he conceded in his postelection testimony that he had attended the January 1980 on a "couple of occasions" (Tr. 9282). In view of his testimony, earlier noted, that he was in charge of Respondent's resistance campaign,<sup>148</sup> I can only presume that the evidence Purolator presented at the preelection hearing, certainly with respect to the testimony of Semmes and Grady, and including the Employer's documentary evidence, was the voice of the corporation's top management in Fayetteville. Respondent presented MSA witnesses whose testimony was consistent with that of management officials. When Purolator

<sup>148</sup> In his postelection testimony he stated that he was the person "calling the shots" for Purolator in the campaign (Tr. 9281).

tor was precluded by the hearing officer from offering further MSA testimony, on the basis that it was cumulative, the Company made an extensive offer of proof of the matters some 14 named MSAs were prepared to testify to (R. 511-514). Three of those did testify later in the hearing.

In no instance in the proceeding before me did Purolator's *management* officials testify, or submit documentary evidence, that the supervisory authority of the MSAs had been withdrawn. Nor did they seek to repudiate their preelection testimony. Actually Semmes appeared before me only in relation to the "C" case, and Plant Manager Thies' testimony in the postelection is devoted almost entirely to the Employer's objections.

Testifying in the postelection portion, Director of Employee Relations Whit Collins explained that acknowledged supervisors (such as the line supervisors who are salaried) enjoy a few more fringe benefits than do the hourly paid MSAs. He testified that they are distinguished in several respects. Except for a brief moment on cross-examination, Collins did not seek to repudiate the testimonial and documentary evidence which Respondent adduced in January 1980 concerning the supervisory authority Purolator had granted to the MSAs. On cross-examination Collins was asked, in relation to the impact of the MSAs' role in the evaluation and job bidding process, whether it is correct that the MSA has better knowledge than anybody else in the area as to how the employees perform. (Tr. 9268.) Collins replied that the MSA had vital knowledge because he (or she) works directly with the employees and is the "eyes and ears" of the supervisor, but he could not say the MSA had "better" knowledge. Union counsel Sarason then asked Collins whether he had testified in January 1980 that the MSAs had "better" knowledge than anybody in the area (about employee job performance). Collins replied (Tr. 9268):

It's a very broad statement. I don't know what I meant by better than anybody else in the area. My point was that it is vital because they work hand in hand with those employees who are being reviewed by the supervisors.

And (Tr. 9269):

Q. As I understand it, they don't have better knowledge than the supervisor, is that correct?

A. I don't say they have better knowledge than the supervisor. I thought I said they had vital knowledge to the supervisor, as to who would get job bids or promotions through our job bidding procedure.

When Collins was shown his preelection testimony (R. 633),<sup>149</sup> he stated that it refreshed his recollection and

<sup>149</sup> Collins' testimony was as follows:

Q. Thank you, Mr. Collins. Moving to a second area, I'd like to address it just very briefly. Mr. Collins, there has been some talk about bid, bid jobs, this sort of thing. I would like you to tell us very briefly what role in bid jobs the performance evaluations play, how those points tie in to the bidding procedure.

that he had testified truthfully at the January 1980 preelection hearing. Not content with that, the Union counsel persisted:

Q. And so the MSAs then (have) better knowledge than anybody else in the working area?

A. In that particular section, yes.

In response to a question about knowledge of employee attitudes, Collins replied (Tr. 9270):

I don't know what you're trying to do to confuse. I say that an NSA will probably have better knowledge in that particular area of [a] person's abilities in a job bid procedure.

Considering the manner and demeanor of Collins, and his words, I find that he in effect reaffirmed his January 1980 testimony, and to the extent he sought to reduce the impact of his earlier testimony by using the word "probably" (Tr. 9270) before me, I do not credit him.

In any event, testimony about the knowledge of the MSAs only indirectly relates to the fact that Respondent at no point indicated it had withdrawn, revoked, or repudiated the supervisory authority it earlier had vested in the MSAs. Counsel for Respondent phrased it as follows at page 29 of its February 15, 1980 brief to the Regional Director:<sup>150</sup>

The Company has vested day-to-day control over its operations in the supervisory assistants. They are responsible for the operations of their assigned areas.

Another assertion, typical of Respondent's preelection position, is (Br. 30):

The MSAs in the instant case exercise a tremendous amount of discretion in meeting their responsibilities for daily operations.

At brief page 31:

A. It's probably the most important function as to an employee going into a bid position, because it relates that employee's performance, attitude, and cooperation, attendance, dependability, quality of work and quantity of work.

Q. So the points that an individual earns on his/her performance review does play a role in getting other jobs, promotions, this sort of thing?

A. A very major role.

Q. What if any role do the MSAs play in the bidding procedure, Mr. Collins?

A. A very vital function. First, in our policy pertaining to the job bid procedure, our policy states that we try to make every effort to promote people from within the department when the opening occurs prior to going outside of the department and/or other shifts.

Q. What role does the MSA play in that proceeding?

A. The MSA spends eight hours a day and lives with those people in that particular department and they have *better knowledge* than anyone else in the area how that employee performs, what their attitudes are towards not only their supervisors but their fellow employees, the quality of their work, the quantity of their work, their dependability. [Emphasis added.]

<sup>150</sup> To the extent that counsel's assertions need to be designated as admissions, they are precisely that. *Ablon Poultry & Egg Co.*, 134 NLRB 827 fn. 1 (1961).

The Company has granted the supervisory assistants tremendous authority in the area of assigning work.

At brief page 36:

In the instant case, there is substantial testimony to indicate that the Company relies heavily, if not exclusively, upon the evaluations of employee performance conducted by the supervisory assistants. This reliance is mandated by the fact that the department supervisors have so little direct contact with the employees.

Finally, and more to the point, brief page 38:

In addition to actually including supervisory status or duties within the job description, the same result was achieved by management when it informed the supervisory assistants of their status. Similarly, admissions by corporate officers, such as those of Mr. Semmes, Mr. Collins and Mr. Grady, can indicate supervisory status.

At the hearing before me, Respondent presented the testimony from line supervisors and MSAs (including DSAs and RSAs) describing the actual work habits and procedures of both the supervisors and the MSAs. A significant portion of the testimony might support a conclusion that many of the line supervisors have reserved unto themselves the exercise of all supervisory functions, and that the MSAs operate merely as leadpersons. Aside from the credibility aspect of the testimony, it is apparent that such evidence is not controlling. It is the possession of even one of the indicia of statutory authority which is the governing factor. *NLRB v. Pilot Freight Carriers*, 558 F.2d 205 (4th Cir. 1977); *Turner's Express v. NLRB*, 456 F.2d 289, (4th Cir. 1972); *Mid Allegheny Corp.*, 233 NLRB 1463, 1465 (1977).

As Respondent wrote at pages 28-29 of its February 15, 1980 brief to the Regional Director:

Moreover, it is the existence of the powers defined in the Act, and not the regular and routine exercise of them which determines whether or not an employee is a supervisor. [Citations omitted.]

The evidence in the instant case establishes conclusively that the supervisory assistants possess the various indicia of supervisory authority. They possess the authority, inter alia, to: transfer employees within their departments and between departments; effectively reprimand employees; assign work to employees, responsibly direct the work of employees in their departments; grant time off; authorize overtime; sign time cards; effectively recommend promotions and wage increases for employees; evaluate and participate in evaluating employees; enforce plant and safety rules; and, in general, run their departments from a production and quality standpoint.

Although Respondent's position is, in effect, one of contending that more detailed evidence was presented in the postelection proceeding than was adduced at the

preelection hearing, the fact remains that Purolator has presented no evidence that it has withdrawn the supervisory authority it vested in the MSAs.

b. Job descriptions

Aside from Respondent's admissions in its preelection brief, there is documentary evidence showing the vesting of supervisory authority in the MSAs. One such item is the job description applicable to the positions of MSA, DSA and RSA. The job descriptions are part of the preelection evidence. Personnel Manager Grady testified that their revised versions (slightly different to reflect the job differences of the MSAs, RSAs, and DSAs) were made effective around August 1979 (R. 251) and communicated to the MSAs (including DSAs and RSAs) in mid-December 1979 (R. 254).

MSA Sharon Tew's revised job description (Emp. Exh. 17) reflects that she signed the three-page document on December 14, 1979. Some of the 23 duties and responsibilities listed are:

1. Assumes total responsibilities for their area in absence of the supervisor.
2. Responsible for the quantity and quality of work performed by the employees under their supervision.
3. Plans, schedules and coordinates with supervisor, the placement of labor pool employees to production jobs as necessary; allocates manpower as necessary to meet production staffing needs; has authority to temporarily transfer their employees to other areas.
4. . . . .
5. Plans, coordinates and administers the relief of production employees during scheduled break periods; has the authority to grant permission for employees to leave the work area.
6. . . . .
8. Instructs, trains, and reports on progress of new employees, as well as controlling and monitoring the performance of existing employees. Participates in the evaluation of employees in their respective sections and responsible for signing the performance evaluations of those employees.
9. Responsible for maintaining order in the work areas. Makes recommendations to supervisor for disciplinary action, up to and including discharge, as well as responsibility for signing disciplinary action.
10. . . . .
11. Detects and corrects production problems in assigned areas, exercising independent judgment as required.
12. . . . .
17. Responsibility for selection of individual employees for overtime work as needed.
18. . . . .
19. Authority to recommend employees for commendation, promotion or increases in pay.
20. . . . .

23. Initials and approves time card errors and over-time, insure proper out-punching of employee badges toward correct cost center.

*c. Supervisory training*

Reference already has been made to the comprehensive supervisory training the MSAs received in December 1979. Although Grady testified that the initial training began in September or October 1979 for the MSAs regarding their duties and obligations under the Act as supervisors (R. 258), the comprehensive course was not given until December.

The program outline consists of some 2 dozen pages (Emp. Exh. 6). Significant excerpts are as follows:

**INTRODUCTION**

A program of supervisory development has been planned to give you instruction and training on how to become a better supervisor. The purpose of this program is to answer questions concerning your duties and to provide you with the tools to do your job better and more effectively.

You as supervisory assistants are a part of the management team at Purolator and this training program is designed to help you develop good supervisory skills which will benefit *you* and the company.

**SESSION I**

.....

**IV. Your Part in Purolator's Management Team**

[Includes a two page listing of points on how to be a good supervisor.]

**SESSION II**

**SUPERVISORY ASSISTANT TRAINING PROGRAM**

December 14, 1979

- 9:00—12:00—Your Role as a Manager  
 12:00—1:00—Lunch  
 1:00—2:00—Your Role as a Manager (continued)  
 2:00—2:30—Your Duties and Obligations as a Supervisor  
     Under the National Labor Relations Act  
 2:30—2:45—Afternoon Break  
 2:45—4:00—Review of Job Description  
 4:00—Conclusion

.....

**YOUR DUTIES AND OBLIGATIONS AS A SUPERVISOR UNDER THE NATIONAL LABOR RELATIONS ACT**

1. *Legal Definition of a "Supervisor"*
2. *"Supervisors" as Agents of the Company*

"Supervisors", as defined in the National Labor Relations Act, are considered agents of the com-

pany. In that respect, everything that is said and done by a "supervisor" may be binding on the company.

Based on the duties that you perform, you are a "supervisor" and a part of the management team at Purolator. Because of this, you are an agent of the company and what you say and do is binding on the company.

**3. Avoiding Unfair Labor Practices**

.....

**CHECK LIST OF WHAT SUPERVISORS CAN AND CANNOT SAY AND DO DURING A UNION CAMPAIGN**

Below is a list which clarifies what the supervisor can say and do, followed by a list of what he cannot say and do. The DO's and DON'Ts will serve as guidelines in your day-to-day dealings with employees working under your supervision.

.....

**SESSION III**

**ORIENTATION & TRAINING OF EMPLOYEES/SAFETY**

December 17, 1979

**Part I - Orientation & Training [Of new employees.]**

.....

**SESSION IV**

**THE PERFORMANCE REVIEW SYSTEM**

**PURPOSE:**

To provide a consistent method of evaluating an employee's job performance for purposes of increases in pay or promotional considerations.

**I. Evaluation System**

.....

**II. Methods of Assigning Employees**

.....

- (3) Supervisory assistant and supervisor should share in evaluation process.

.....

**IV. Coverage of Review with Employee**

.....

- (3) Reason for signing review.

.....

SESSION V  
EFFECTIVE  
COMMUNICATION/MOTIVATING  
EMPLOYEES  
December 19, 1979

Part I—Effective Communication

*Introduction*

Communication is “bread and butter” to a supervisor. A supervisor by increasing the effectiveness of his communication efforts can become a more capable leader of his group in motivating them to higher levels of output, reduce costs, avoid dissatisfactions and grievances, obtain employee cooperation in solving day-to-day operating problems, and maintain an effective, efficient, smooth-running unit. The precise and accurate flow of information between top management and employees, so essential to the success of the business, can only be achieved when all intermediate levels of management possess the necessary skill to communicate adequately with those of whom they report, and those who report to them.

.....

Part II—Motivating Employees

1. *The Job of Supervision*

Leadership is the art of getting the job done with the greatest amount of satisfaction of all involved. This definition contains two major elements common to the job of all supervisors. *One*, a specific set of responsibilities has to be carried out. *Two*, the supervisor has to have the *willing cooperation* of his employees in this joint effort. Thus, not only does the supervisor have to know the technical aspects of his job, he also has to behave in such a way that his employees will do what needs to be done efficiently and effectively. What type of supervisory behavior gets this kind of employee results?

2. *Ways of Getting the Job Done*

In general, there are two major ways of building employees cooperation, the negative and positive approaches.

.....

SESSION VI  
DEALING WITH DISCIPLINE, RULES AND  
COMPLAINTS  
December 28, 1979

Grady testified that the second session was a 1-day seminar given at the Bordeaux Convention Center by Capital Associates Industries, Inc. (R. 259.) The attending MSAs were given a dated certificate, suitable for framing, signed by Thies and a representative of Capital Associated, and reading (Emp. Exh. 16):

CAPITAL ASSOCIATED INDUSTRIES, INC.

In Recognition of  
The Successful Completion of  
*A ONE-DAY SEMINAR ON LABOR  
RELATIONS MANAGEMENT*

hereby confers this

Certificate upon

*Sharon Tew*

One of the many examples of Respondent’s holding the MSAs out to the employees as supervisors and members of management was the announcement to the employees in Purolator’s newspaper that the MSAs were absent on December 14, 1979, because they were attending a seminar to improve their supervisory skills (C.P. Exh. 13). This notice has been quoted earlier in this decision in part V,D. Another “holding out” example is the February 28 bulletin board notice (C.P. Exh. 71) from Thies to all employees informing them of the Acting Regional Director’s Decision finding the MSAs to be supervisors. Thies expressed the position that the finding of supervisory status was “As we had anticipated . . . .”

d. *Examples of authority exercised in fact*

Contrary to the evidence of management officials, and of some MSAs, in the preelection hearing, the line supervisors testifying before me gave evidence that, in effect, they reserved to themselves all but routine decisions and functions. Even were I to credit them, I would conclude that they simply have not understood that a managerial decision was made, announced and implemented in which supervisory authority was vested in the MSAs.

While some MSAs appear less than assertive, other MSAs do exercise their statutory authority. In the area of performance reviews, all MSAs sign or initial such reviews, and this normally is done before the employee signs. As discussed earlier in this decision, employees are evaluated each 6 months in six categories. Each category receives a score of 0 to 10. A total score of 40 through 60 points earned a pay raise of 10 cents per hour, and 25 through 39 earned 5 cents. No pay raise was given for scores below 25.

Several MSAs attend the performance interview. A few examples of those who attend are MSAs Ruby Mitchell (Tr. 5349) and Steve Ellis (Tr. 7179). MSA Cloetta Canady “sometimes” attends (Tr. 7373). Some are called on by the supervisor to explain to the employee why the employee scored only so many points in a certain category. MSA Peggy Hines so testified (Tr. 7419-7420). Indeed, Hines credibly testified that Supervisor Roy Wilson adopted her point recommendations in the January 31, 1980 review (C.P. Exh. 64) they prepared for and gave to employee Hilda Hicks (Tr. 7442).<sup>161</sup>

<sup>161</sup> Only once did Supervisor Wilson ever fail to accept her recommendation, and that was when he gave an employee a “7” in one category rather than the “8” she recommended (Tr. 7409).

Supervisor Wilson testified that the opinions of his MSAs on performance reviews had no bearing on the evaluation he gave, and that he listens to them only because it is Purolator policy (Tr. 8161). According to Wilson, he recorded Hick's scores based on his own observations of her performance (Tr. 8128-8132). Wilson did not impress me as a believable witness and I do not credit him. Moreover, he apparently was in MSA Hines' area much less than the 85-percent to 90-percent figure he gave as being on the plant floor (Tr. 8116). MSA Hines testified that when things were running smoothly Wilson would just tell her to page him if she needed him. When the machinery broke down, he might be there all day (Tr. 7410). It seems clear, however, that on such days Wilson was occupied with solving breakdown problems rather than with observing the performance of the 43 employees (plus 5 MSAs) who worked on his oil line 1.

MSA Lora Duncan, who also worked for Supervisor Wilson, participated in the performance review conference by voicing her opinion to the employee confirming the points and conclusions she and Wilson had agreed on (Tr. 5480, 5498).

Many MSAs draft a proposed performance review and submit it to the line supervisor. At that point, the practice of the line supervisors varies, but most discuss the review with the MSA and they agree on the points and comments. The MSAs were quick to say that the supervisor had the "final" word on what went into the review.

MSAs do make effective recommendations which are followed by the supervisors. Thus, MSA Brenda Cordrey testified that her supervisor (Roy Wilson), has moved up or down a point depending on her recommendation since she is the one who works closely with the employees (Tr. 5037-5038). Respondent argues that such evidence as this is immaterial because a point difference has no impact on an employee's wage review in view of the testimony that some supervisors will grant an extra point on the overall score anyway when it means the difference in whether an employee receives an extra 5-cent raise.<sup>152</sup> But that argument, which pertains to total points, is misapplied, for the MSAs (or many of them) recommend points on five of the six categories.<sup>153</sup>

<sup>152</sup> Distribution Supervisor James Knox so testified (Tr. 7900), as did Supervisor Steve Shorter (Tr. 8206). On the other hand, Supervisor Babs Cordrey gave Katherine Naylor only 24 points in her February 1980 performance review (R. Exh. 12) when just one more point (for 25) would have meant the difference between no raise and a 5-cent-an-hour raise. And Supervisor Mickey Turlington admitted that he has not given the extra point or so on a couple of occasions until the employee protested (Tr. 7812). Indeed, employee Sharion McCargo had to appeal to Semmes that she should have received 10 cents rather than the 5 cents Turlington had given her (Tr. 8977, 8983). Although McCargo could not recall the precise point difference (Tr. 8985), it is clear that the difference was small since McCargo was protesting only her score on housekeeping (Tr. 8978, 8988). Turlington changed the points and McCargo received a 10-cent raise. Moreover, Emp. Exh. 18 (preelection) contains the October 26, 1979 review by Turlington of Diane Marie Jacobs of 39 points—one point short of a 10-cent raise.

<sup>153</sup> Their recommendations are not needed on the first category, attendance, since Purolator applies a sliding scale of points to that category based on absenteeism.

A difference of 2 points in each of the five categories can add to a significant spread of 10 points. Even allowing for a compromise total of 5 points, the MSA's recommendation can mean the difference of 5 cents an hour—a matter of substantial importance to Purolator's employees. I do not credit Supervisor Steve Shorter's testimony that nothing the MSAs have to say helps him determine the point score because he already knows what he is going to give (Tr. 8250). Aside from not crediting Shorter because of his demeanor, I note that before the election Shorter, besides having part of a general supervisor's duties, had 6 MSAs plus some 50 to 70 employees (the number varied) on three lines and the blister pack. MSA Sybil Carol Craig credibly testified that Shorter asked her recommendation on the points of each category (except attendance) because she is "with them more than he is." (Tr. 6168.) They each suggested numbers, and when they disagreed they split the difference (Tr. 6168).

MSA Craig also recommended to Shorter that employee Christa Melvin receive a merit raise for her good work in holding down the scrap count and her initiative in helping other workers (Tr. 6176, 6201).<sup>154</sup> Shorter agreed and suggested that she write one. Craig wrote a paragraph and Shorter rewrote it and submitted the recommendation (C.P. Exh. 47). Although the recommendation, dated February 8, 1980, was over Craig's name, Shorter also signed. Melvin subsequently received a 15-cent-per-hour pay raise. I do not credit Shorter's testimony that the idea of the merit wage for Melvin originated with him (Tr. 8225).

It also is significant that the MSAs are evaluated on the same six topics as employees, and the MSAs, therefore, are scored on how they have achieved the goals of Purolator in the section the MSAs are in charge of. Thus, if the MSA does not see that her employees do a good job of keeping the line clean, the MSA will be penalized on her own evaluation. For example, in January 1980, MSA Craig lost one point on her own evaluation under the housekeeping topic for not demanding a higher standard from her employees (C.P. Exh. 48).

We already have seen that MSA James Graham effectively recommended that mechanic James Gearhart receive no more than a 3-day suspension in December 1979 for crossing a moving conveyor.

MNSA James L. Suggs assisted Supervisor Larry Mercer in being in charge of some 25 mechanics on the third shift (Tr. 6646a). Suggs switched the mechanics from job to job (Tr. 6669), approved changes in their breaktimes (Tr. 6646h), determined whether they could work through lunch (Tr. 6654), and assisted Mercer in completing the performance reviews (Tr. 6657), and was in charge when Mercer was on vacation (Tr. 6684).

DSA Rochell Smith worked for Supervisor Willie Johnson before the election. Smith would either see Johnson, or talk to him over the intercom, only four or

<sup>154</sup> The minimum pay for MSAs (grade level 3) is as much as 14 percent more than the minimum pay of employees they are in charge of (R. Exh. 192). This could amount to 50 cents an hour or so. Thus, if the minimum wage for an assembler (grade level 8) was \$3.45 per hour in January 1980, the MSA minimum rate would have been about \$4 per hour.

five times a day (Tr. 6917). If her employees were running short of work, she would assign them to helping her with inventory (Tr. 6928) or to straighten up different areas of the warehouse (Tr. 6932).

MSAs use their own discretion either in rotating the order in which their employees take breaks, or in leaving it to the employees to decide among themselves. This discretionary decision obviously can have an impact on employee harmony and work productivity.

Some MSAs evaluate the excuses of tardy employees and mark the timecards "excused" or not and then inform their supervisor. MSA Richard Hamel so testified (Tr. 4611) as did MSA Carol Craig who explained that Supervisor Shorter told her to use "common sense" in evaluating the excuses (Tr. 6159, 6198).

Although it does not appear that personnel matters are discussed in the periodic production meetings the manufacturing department holds with supervision, some of which the MSAs attended, the practice is different in Distribution Manager McKibben's department where such matters are considered (Tr. 6921, DSA Rochell Smith; Tr. 7023, DSA Annie Deloris McNeill). They also are discussed in maintenance supervisory meetings (Tr. 6656, James Suggs).

In light of all the foregoing, and the combined record, I would find the MSAs, MNSAs, and DSAs to be statutory supervisors. *Spotlight Co.*, 188 NLRB 774, 775-776 (1971), *enfd.* in pertinent part 459 F.2d 880, (8th Cir. 1972). A mixed result obtains for the RSAs, discussed below.

#### 6. Mixed results for RSAs

As close as the supervisory question is regarding MSAs and DSAs, it is even closer with respect to the RSAs. The principal factor tending to show that there may be a substantial difference between the MSAs-DSAs and the RSAs is the supervisor-employee ratio.

During the January-March 1980 preelection period, Manager Chambo's receiving department consisted of first-shift Supervisor Ray Tityk, three RSAs (Larry Johnson, Leroy McCoy, and Clark Russ), and eight employees. At the preelection hearing, RSA Johnson testified that he had three employees, one being James Robinson, that Clark had two and McCoy none (R. 644, 649). Between then and the election, Robinson was transferred to work with RSA McCoy (Tr. 6500, McCoy) leaving Johnson with two employees (Tr. 8632, Tityk). If the first-shift RSAs are statutory supervisors, then the shift would have 4 supervisors (not even counting Chambo) for 5 employees, or almost a 1-on-1 ratio—an abnormally high ratio of supervisors to employees. Otherwise, the ratio would be 1 supervisor (Tityk) for 8 employees—a more realistic situation.<sup>155</sup>

<sup>155</sup> Based on my findings herein, there would be a supervisor-to-employee ratio about 7.3 to 1 employee for the unit, assuming about 20 line supervisors and 71 MSAs supervising 665 unit employees. If the MSAs were not supervisors, the ratio would be 1 to 36.8 (20 line supervisors for 736 unit employees), an abnormal ratio. Writing in its March 12, 1980 Statement In Opposition To Petitioner's Request For Review, the Employer, p. 8, states that roughly 10 percent of the work force are supervisors. "That results in a ratio of one supervisor for every nine or 10 employees. In a high-speed manufacturing operation such as that of this Em-

Although the receiving department covers a very large area, extending around two sides of the manufacturing floor (R. 648, Johnson), it appears that Supervisor Tityk circulates a lot through the area observing. The RSAs spend most of their time actually working, pulling orders, operating forklifts, and the like. McCoy appears to spend nearly all of his time operating a forklift on the receiving dock. All the first-shift employees are experienced, the last one being hired over 5 years ago.

The RSAs do draft performance reviews for Supervisor Tityk. Unlike the MSAs and DSAs, however, Tityk testified that his RSAs do not sign warnings, or progress reports as they are called (Tr. 8628). In view of these facts, and particularly the supervisor-employee ratio factor, I would find the first shift RSAs to be nonsupervisory leadpersons.

Although Manager Chambo testified at the preelection hearing, his testimony related to other job categories in dispute outside the receiving department. Supervisor Tityk did not testify there. Second-shift receiving Supervisor Mininno did not testify either the preelection hearing or the postelection portion (although he did in the "C" case portion). Second-shift RSA Lexie A. Powers, one of the alleged discriminatees herein, testified at the preelection hearing regarding his duties.

RSA Powers worked with four employees plus Mininno (R. 556). Thus, there would be a ratio of one supervisor per two employees if Powers is a supervisor, and one for five employees if he is not. On the second shift, Powers, as the only RSA, was responsible for a much larger area than any day shift RSA and was in charge of twice as many employees. In about November 1979, Mininno, the new second-shift supervisor, told the second-shift employees that they were to give Powers the same respect they gave him and that they were to do what Powers told them to do (R. 606). In these circumstances, I would find that RSA Powers was in fact a statutory supervisor.

#### 7. Miscellaneous MSAs

Two employees classified as MSAs, Yongok (Richardson) Choi (38), and Jacqueline Shew (69) have no employees. Shew is the scrap auditor who performs the work of a plant clerical for Manufacturing Manager Semmes.

Choi is the day-shift tool crib attendant who works for maintenance General Supervisor Paul Porter. She reports for work at 7:30 a.m. and leaves at 4 p.m. (Tr. 5506). Susie Chandler, the second-shift tool crib attendant, reports at 2:45 p.m. and leaves at 11:15 p.m. Margaret Boldig, the third-shift tool crib attendant, reports for work at 11:15 p.m. and leaves at 7:15 a.m. (Tr. 8704.) Clearly Choi has no employees to supervise. Porter, whose office adjoins the tool crib (Tr. 5530, Choi, Tr. 8704, Porter), is the supervisor of the tool crib attendants, and during the hours he is not present the maintenance supervisors from the second and third shifts over-

ployer, any greater dilution of that ratio would be highly detrimental to the Employer's business, especially since some of the ratios would rise to as high as one supervisor for 65 employees."

see the tool crib (Tr. 5506, Choi; Tr. 8709, Porter). Although Choi signed a letter of counseling issued by Porter to Boldig for poor attendance (C.P. Exh. 44), Choi's only role was to sign the document. I would find Choi to be a unit employee and overrule the challenge to her ballot.

### C. The Objections

#### 1. Union's objections

Of the Union's 20 objections, plus an extra "other acts" clause, numbers 1 through 16 are coextensive with complaint allegations; 17 through 20 were withdrawn with the Regional Director's approval; and the Regional Director overruled the "other acts" ground at page three of his June 4, 1980 Supplemental Decision.

Based on my earlier findings, I recommend that Objections 1, 2, 7, 8, 10, 12, 13, 14, 15, and 16 be sustained. The following chart illustrates my findings and recommendation:

Objection	Complaint Paragraph	
	Violation	Dismissed
1	Yes...8(a)	
2	Yes...8(n), (p) .....	8(b)
3	.....	8(c)
4	.....	8(d)
5	.....	8(e)
6	.....	8(f)
7	Yes...8(i)	
8	Yes...8(j)	
9	.....	8(k)
10	Yes...8(l)	
11	.....	9(b)
12	Yes...9(a)	
13	Yes...9(c)	
14	Yes...9(d), (e)	
15	Yes...10	
16	Yes...15, 18 (as to failure to re-instate).	

If it becomes necessary to open and count any challenged ballots, should the revised tally of ballots reflect that the Union has not won then I recommend that the election be set aside and a second election directed based on the foregoing objectionable conduct of Purolator.

#### 2. Purolator's objections

##### a. Introduction

Of the Employer's 29 objections, plus an "other acts" clause, a hearing was ordered as to six: 7, 15, 17(b),<sup>156</sup> 23, 27, and 28.

At page 404 of its brief, Part II, Respondent states as follows regarding its objections pending before me:

<sup>156</sup> Although 17 is not enumerated with an "a" and "b," it so divided here to indicate that the second portion of 17 was the part included for this hearing.

The Objections that must be decided can be broken down into the following union conduct: (1) distributing literature that substantially mischaracterized Board documents and implied that the Board had found Respondent guilty of unfair labor practices; (2) photographing employees who refused to take union literature; and (3) promising employees jobs if they would vote for the Union. Respondent concedes that no evidence was presented on the third category. Evidence, however, was presented on the other Objections.

Objections 7, 27, and 28 are grouped in the first category; 15 and 23 in the second category; and in the third category, no evidence was presented in support of 17(b). Except for 17(b), which has been abandoned, the remaining objections will be grouped and discussed in the two categories shown above.

#### b. Distribution of literature—Objections 7, 27, and 28

##### (1) Language of objections

These objections read as follows:

7. Throughout its election campaign, the union made oral statements and distributed literature that expressly or impliedly stated that the United States Government and the National Labor Relations Board had found the Employer guilty of violating the National Labor Relations Act, as amended. The above statements were falsely and materially stated and were issued at a time and under such circumstances that the Employer was not able to adequately reply.

27. The union and/or its agents materially misrepresented the law regarding strikers and an Employer's ability to replace strikers.

28. On several occasions, the union and/or its agents materially misrepresented the legal significance of the Board's decision to issue an unfair labor practice complaint, particularly as regards the supervisory status of two former supervisory assistants not presently employed at the plant. These misrepresentations were made orally and in the form of handouts distributed to employees, and occurred at a time and under such circumstances that the Employer had no adequate opportunity to reply.

##### (2) The Union's handbills of March 24 and 26

Respondent first complains of two handbills which came into the Employer's possession on Monday, March 24 and Wednesday, March 26. Before considering their contents, we should note that the initial consolidated complaint issued in this case on March 12, 1980, and alleged numerous violations of Section 8(a)(1) and (3) of the Act as well as two 8(a)(4) violations (G.C. Exh. 1-o). The March 12 complaint did not contain any allegations about the February 8 strike.

The parties stipulated that the two handbills (R. Exhs. 186 and 187) were prepared and distributed by the Union (Tr. 9233). Plant Manager Steve Thies testified that he

received a copy of Respondent's Exhibit 186 2 or 3 days prior to the election (Tr. 9278). Thies explained that he had instructed Respondent's supervisors to bring him copies of literature that the Union was distributing (Tr. 9277-9278). In addition, numerous employees often brought copies of literature to Thies. As a result, Thies received copies of all literature shortly after it became available to the employees (Tr. 9290).

Michael Krivosh, staff representative for the Industrial Union Department of the AFL-CIO, testified that Respondent's Exhibit 186 was first distributed to employees at a meeting held on Sunday, March 23, 1980 (Tr. 9356). This basically coincides with Thies' testimony that he received the handbill on Monday or Tuesday, March 24 or 25 (Tr. 9278). I shall describe it as the March 24 handbill.

Respondent Exhibit 186 reads as follows (I have numbered the paragraphs for reference):

#### IN-PLANT ORGANIZING COMMITTEE FACT SHEET

1. The Company has spent a lot of time trying to convince Purolator workers that they will be permanently replaced "if the Union calls a strike." First of all, there can *never* be a strike unless the strike is authorized by a two-thirds (2/3) majority vote by the workers voting by secret ballot at a well-advertised meeting. Secondly, over 97% of all union contracts are settled through peaceful negotiations . . . NOT STRIKES!

2. Most importantly, the National Labor Relations Board has accused Purolator of massive unfair labor practices. **THAT MEANS THAT IF A STRIKE SHOULD HAPPEN, NO STRIKERS COULD BE PERMANENTLY REPLACED. EVEN IF PART OF THE REASON FOR THE STRIKE IS ECONOMIC, THE STRIKERS WOULD BE CLASSIFIED AS UNFAIR LABOR PRACTICE STRIKERS.**

3. Take a look at what the National Labor Relations Board has to say about unfair labor practice strikes:

"Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged no[r] permanently replaced." (Source: "A Guide to Basic Law and Procedures Under the National Labor Relations Act", a United States Government publication)

#### CAN YOU EVER BELIEVE THE BOSS AGAIN?

Respondent objects to the second paragraph and argues that it: improperly injects a Board document (the March 12 complaint) into the election; in conjunction with the third paragraph, falsely implies that Purolator had been found guilty of committing unfair labor practices; paints a false portrait of reinstatement rights of strikers; and draws the Board's neutrality into question

by reprinting a section (in the third paragraph) from a Board publication so as to give the deceptive appearance that the Board supports both the Union's message regarding strikes and its mischaracterization of the complaint. Plant Manager Thies testified unpersuasively that he felt there was insufficient time to reply because the issue was complex and the Company's schedule for the week already was planned (Tr. 9278).

The March 26 handbill lists certain wage rates of a nearby unionized plant of Kelly-Springfield, gives notice of a union meeting the night of March 26, and adds this final paragraph (R. Exh. 187):

#### FLASH FLASH FLASH

We have just been informed that the Regional Office of the NLRB has enough evidence to indicate that Purolator violated the Law, when they replaced Jim Graham, Shirley Graham, Larry Grenier, and John Gearhart. **AS UNFAIR LABOR PRACTICE STRIKERS THESE EMPLOYEES CAN NEITHER BE FIRED NOR REPLACED. PUROLATOR MUST REINSTATE THESE WORKERS OR PAY THEM FOR EACH DAY THEY ARE OUT OF WORK. THE NLRB HAS FURTHER DETERMINED THAT MSA S JIM GRAHAM AND LONNIE POWERS ARE NOT SUPERVISORS AND THEREFORE HAVE THE PROTECTION OF THE LAW!**

Thies testified that he first received a copy of Respondent's Exhibit 187 immediately after the start of the second shift on Wednesday, March 26, the day prior to the election (Tr. 9279-9280). According to the credited testimony of Michael Krivosh, this handbill was distributed to second- and third-shift employees at midnight on March 25, 1980, and then to the first-shift employees leaving work the afternoon of March 26, 1980 (Tr. 9358-9359).

The parties stipulated that two voting periods were conducted for the election of March 27, the first one being 6:30 to 8 in the morning and the second one held 2 to 5:30 p.m. in the afternoon (Tr. 9235). Further stipulating, the parties agreed that on March 25 Board agent Gary Stiffler informed Krivosh that Region 11 was going to issue a (second) complaint alleging that James Graham, Shirley Graham, John Gearhart, Larry Grenier, and George Edward Stanbaugh were unfair labor practice strikers and also would allege that James Graham and Lexie Powers were employees, and that agent Stiffler gave the same notice to Respondent's attorney the following day (Tr. 9234). The second consolidated complaint issued April 4, 1980, and included allegations that the February 8 strike was caused by Respondent's unfair labor practices (G.C. Exh. 1-v). Powers is referred to as an employee in the second complaint, but the document inexplicably does not list the names of the February 8 strikers.

Respondent contends that the March 26 handbill is calculated to mislead employees to believe "that the Board had convicted Respondent of unfair labor practices whereas, in fact, only unproved allegations had been

made." (Br. II, p. 411.) Respondent also contends that the reference to Graham and Powers is incorrect and, in any event, the Company only told employees, in answer to their question, that Graham and the other strikers had been replaced and that Respondent had not distributed any literature concerning Graham or Powers. Finally, Respondent observes that none of its campaign literature contains any reference to the Board or its processes while discussing strikes.

In its brief II, the Union observes that the Company's campaign emphasized strikes and stressed that strikers would be replaced. Plant Manager Thies' March 22 letter to all employees devoted the entire 1-1/2 pages to a discussion of strikes, strike violence, and strike replacements (C.P. Exh. 774). It contains a statement that economic strikers can be permanently replaced and such replaced strikers "HAVE NO RIGHT TO RETURN TO THEIR JOBS AND GET THEIR JOBS BACK FROM THE PEOPLE WHO TOOK THEIR JOBS—EVEN WHEN THE STRIKE HAS FINALLY ENDED." The Union contends, brief II, that its leaflets were designed to give a more complete picture of strikes and that its March 24 handbill was distributed to show that workers "will not always be permanently replaced during a strike." (Br. II, p. 9.) It further argues that any initial ambiguity in the March 24 leaflet is clarified by a clear definition of unfair labor practice strikers.

Union further observes that on March 24 it also distributed to employees copies of a letter of such date from Union Representative Price to Plant Manager Thies (Tr. 9356, Krivosh). In the legal-size letter-handbill, Price offers to debate the campaign issues with Thies and challenges Purolator to prove that any of six statements are untrue, the stated reward being \$5000. Item two of the six reads:

2. Any strike that would be authorized at this time would be an unfair labor practice strike, and strikers could not be permanently replaced or discharged.

A two-page company letter (C.P. Exh. 75) of March 24 to employees, setting forth questions and answers, contains the following statement:

When there is an economic strike, you get no pay from the Company. You can draw no unemployment pay from the State of North Carolina. You could lose your job to someone else by being permanently replaced.

Respecting the March 26 handbill, the Union contends that the phrase "has enough evidence to indicate" in the first sentence clearly shows that Purolator has merely been accused. Union Representative Krivosh credibly testified that at the union meeting the evening of March 26 he told the assembled employees that if Purolator did not agree to settle the issues with Region 11, a complaint would issue scheduling a trial before an administrative law judge (Tr. 9360-9361).

The Union further points to its two page leaflet distributed to employees about March 17 (Tr. 9362, Krivosh; Tr. 9299, Thies). This handbill (C.P. Exh. 77), bears an image of Uncle Sam under headline words of

"F\*L\*A\*S\*H F\*L\*A\*S\*H." The opening statement, referring to the complaint of March 12, asserts, "Uncle Sam *Accuses* Purolator Products." (Emphasis added.) It states that the complaint alleges certain acts, and proceeds to summarize 17 complaint allegations and informs the employees that more charges are pending. Toward the end of the leaflet the Union gives "A Fair Warning To Supervisors," telling them that certain supervisors have already been named in the NLRB complaint, and "If you don't want to be on the U.S. Government 'hot seat' *when the trial starts*, DON'T VIOLATE THE LAW!" (Emphasis added.)

Plant Manager Thies conceded that he answered employee questions on the subject to the effect that the NLRB had made no findings that Purolator was guilty of violating the law (Tr. 9300-9301).

Regarding the reference in the March 26 handbill to Graham and Powers, the Union cites the above stipulation regarding the message from the Board agent that a second complaint would issue (absent settlement, of course). Krivosh informed over 125 employees of this information and that a trial would be required at meeting on March 26 (Tr. 9348). Further defending, the Union cites the February 28 notice posted from Thies to all employees about the Region's "Decision" in which the "Labor Board held" that all MSAs, DSAs, and RSAs are statutory supervisors (C.P. Exh. 71).<sup>157</sup>

In fact, of course, the General Counsel's primary theory in this case is that Graham and Powers were employees at all times and not supervisors. The Petitioner argues that the Region's decision to issue a complaint, and to proceed on the basis that Graham and Powers were employees, is "a type of determination." (Br. II, p. 16.)

### (3) Conclusion—overrule Objections 7, 27, and 28

In the context of the campaign literature, the oral positions expressed to the unit employees, and the language in the March 24 and March 26 handbills Respondent objects to, I find that the Board's neutrality was not compromised. The cases cited by Respondent do not require a different finding.

And in light of all of the information given to employees by both parties about replacement of strikers, I find that any ambiguity in the leaflets did not rise to objectionable conduct.

Finally, I find nothing objectionable, or even inaccurate, in the March 26 reference to Graham and Powers having been determined to be employees by the Regional Office.

Accordingly, I shall recommend to the Board that Purolator's Objections 7, 27, and 28 be overruled.

### c. *Photographing employees—Objections 15 and 23*

#### (1) The objections

Objections 15 and 23 read as follows:

<sup>157</sup> The notice is quoted earlier in this decision at fn. 86.

15. The union and its agents engaged in other acts of coercion and intimidation against employees in order to compel them to support the union.

23. During the campaign, union representatives and/or agents took photographs of employees leaving the company parking lot as they passed through a group of union adherents distributing literature at the plant entrance. Said photographs were taken of only those employees who refused to accept the literature and was intended to coerce and intimidate them in making their decision on the union representation issue.

## (2) Facts and positions of the parties

At page 418 of its brief II, Respondent contends that the Union interfered with the election by taking pictures, or giving the appearance of taking pictures, of employees who refused to accept the Union's literature. Michael Krivosh, staff representative for the Industrial Union Department of the AFL-CIO, was subpoenaed as a witness by Respondent. Krivosh testified that during the weeks immediately preceding the election he went to the entrance of Respondent's plant for the purpose of distributing leaflets (Tr. 9337-9338). He admitted that he took a camera to the plant on two or three occasions and that he took pictures of handbilling activities to use in the Union's newspaper. Krivosh further admitted that employees were coming and going during the time that he had his camera at the gate (Tr. 9337-9340).

Although Krivosh credibly denied taking any pictures of employees who refused to take literature, or of being aware of any employee there with a camera (Tr. 9340-9341, 9356),<sup>158</sup> Respondent contends the evidence shows that he and Mary Louise Puckett, an employee of Respondent (and, Respondent argues, an agent of the Union), at least created the impression in the minds of employees that their pictures were being taken. MSA Deborah McFayden testified that when she came to work during the week prior to the election, people were handing out literature. She also observed a white, bearded male with a camera.<sup>159</sup> On one occasion as she turned the corner to enter into Respondent's parking lot, the bearded man pointed his camera at her. McFayden accepted the literature being handed out, but later she crumpled it and threw it away. When McFayden arrived inside the plant, she mentioned the incident to John Semmes and Whit Collins. They told her that they did not know why the Union was taking pictures but that they would take care of it (Tr. 9384-9388). She admitted that she was opposed to the Union (Tr. 9388).

MSA Linda New testified that she also observed people handing out literature at the plant entrance during the week prior to the election. On one occasion when

<sup>158</sup> Krivosh admitted that on one occasion he loaned his camera to Ricky Cordrey so that Cordrey could go onto plant property and photograph some signs Respondent had placed on three Cadillac cars (Tr. 9367). The signs asked employees if the Union would take their dues and use the money to buy big cars for union representatives (Tr. 9367). Krivosh also testified "no" to the question whether he recalled pointing his camera without taking a picture (Tr. 9366).

<sup>159</sup> Krivosh is a white male with dark hair and a beard. I observed that he stands about 6 feet 1 inch and weighs about 185 pounds.

New drove into the parking lot with her car window rolled up she refused to accept any literature. At that time, Mary Louise Puckett allegedly pointed a camera at New in a manner that suggested she was taking New's picture. New testified that at the time of this incident she thought that a large, bearded man was also handing out literature but that she did not observe him taking pictures (Tr. 9375).<sup>160</sup> New also told her supervisor, Leonard Barber, about the incident and asked him why pictures were being taken. She testified that she could not recall his response (Tr. 9373). New admitted that she was not for the Union (Tr. 9372).

Respondent argues that Michael Krivosh and Mary Louise Puckett at least gave the appearance of taking pictures of employees while union agents and supporters were attempting to hand out literature. It contends that the issue presented for decision is whether this (appearance) conduct is objectionable.

Puckett testified that she attended union meetings, passed out leaflets, and wore a union hat, union pin, and a union T-shirt (Tr. 1033-1037, Puckett; Tr. 9354, Krivosh). Krivosh testified that Puckett was considered a member of the Union's In-Plant Organizing Committee (Tr. 9363).

Respondent contends that even if Puckett was not an agent of the Union with respect to all of her acts during the campaign, her acts while she was distributing literature on behalf of the Union were attributable to the Union. It contends that New testified that Krivosh was present when Puckett took her picture (Tr. 9375). "Thus, Puckett's use of the camera during the handbilling activities was ratified and condoned by the Union." (Br. II, p. 421.) Respondent further contends that the conduct had a tendency to influence the outcome of the election because of the concern of McFayden and New and because New expressed her concern to her coworkers. On this latter point, the transcript does not support Respondent's interpretation. New testified that when she went into the plant after the incident, she sat in the cafeteria and talked with her friends until work time when she reported the incident to "them"—whom she identified as Supervisor Barber (Tr. 9372-9373). She did not testify that she told her friends about the incident, although perhaps such would be more probable than not.

Union contends that Krivosh only took photographs of employees accepting literature; that Puckett is not an agent of the Union; and even if Puckett were an agent, and Krivosh discredited, the incidents would not constitute objectionable conduct.

## (3) Conclusion—overrule Objections 15 and 23

I recommend that Purolator's Objections 15 and 23 be overruled. In the first place I have found MSAs McFayden and New to be statutory supervisors, so any appearance of photographing them would be immaterial.

Although I credit McFayden's testimony regarding Krivosh taking a photograph of her, it was an occasion

<sup>160</sup> On redirect examination, in response to a leading question, New testified that she thought the bearded man was out there the week before the election (Tr. 9376).

when she accepted literature. She told only management representatives of the event. The Union intended to use the photographs for its newspaper. I find nothing improper in Krivosh's conduct.

New did not testify in a persuasive fashion and I do not credit her. Moreover, her testimony lacks the ring of truth. Had the incident occurred as she described, it would seem that she could recall what Supervisor Barber had to say in response to her report. I conclude that the event did not occur.

Under these circumstances, I shall recommend that Respondent's Objections 15 and 23 be overruled.

#### *D. Summary and Recommended Disposition of the Representation Case*

I have recommended that the challenges to the ballots of most of the MSAs be sustained and that the challenges to the ballots of the following 11 employees be overruled:

1. Yongok (Richardson) Choi (38)
2. Larry Johnson (33)
3. Leroy McCoy (49)
4. Clark Russ (30)
5. Jacqueline Shew (69)
6. And the six employees named in part III of Appendix "A" attached hereto, to wit: Glenys Ho-  
vermale, Helen B. McCoy, Paek Won Myong,  
Chong Sun Smith, Linda Snedaker and Charlie  
White.

In light of the resolution I recommend regarding the challenged ballots, and as the March 27, 1980 tally of ballots reflects a 19-vote margin in favor of Petitioner (326-to-307), it is clear that the foregoing 11 ballots would be insufficient in number to affect the results of the election.

Although I have found merit to certain objections filed by the Petitioner, and recommended that Purolator's objections pending before me be overruled, it is appropriate for me to recommend that the above-listed 11 challenged ballots not be opened or counted. The Petitioner having received a majority of the ballots cast, I recommend that a certification of representative be issued.<sup>161</sup>

On the basis of the foregoing findings of fact and on the entire record, I make the following

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

<sup>161</sup> The February 29, 1980 Order amending the Decision and Direction of Election designated the appropriate unit to be:

All production and maintenance employees employed at the Employer's Fayetteville, North Carolina plant, including warehouse distribution center employees, truckdrivers, time keepers, roving inspectors and floor inspectors assigned to the quality control department, excluding all office clerical employees, material planners, production schedulers, laboratory technicians, print clerk, layout and gauge inspector, receiving clerk, guards and supervisors as defined in the Act.

3. Respondent has violated Section 8(a)(1) of the Act by interrogating employees about their union activities; engaging in conduct tending to create the impression among employees that their union activities were under surveillance; interfering with their right to engage in union activity by various acts; threatening employees that if the Union came in they would no longer enjoy the right of being able to confer with supervision and that certain privileges would be revoked; and by discharging and failing to reinstate Dorothy Diane Godwin and Lexie A. Powers.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by discriminating against Mary Katherine Naylor, Mary Louise Puckett, and Marilyn A. Raeford; by discharging and failing to reinstate Sin Ung Yu and by failing to reinstate economic strikers Shirley Graham, John Gearhart, Larry Grenier, and George Edward Stanbaugh.

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

6. The strike of February 8, 1980, was not caused or prolonged by any unfair labor practices of Respondent.

7. Respondent has not violated Section 8(a)(4) of the Act.

8. Other than as found above, Respondent has not engaged in unfair labor practices within the meaning of the Act.

9. Respondent has engaged in preelection misconduct by virtue of its acts described above in Conclusions of Law 3 and 4.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to grant Mary Katherine Naylor a 5-cent-per-hour raise retroactive to when it would have been made effective and pay her backpay with interest; pay Marilyn A. Raeford backpay, with interest for her 3-day suspension in January 1980; pay Mary Louise Puckett backpay, plus interest, for her 3-day suspension in February 1980, expunge the suspension notice from her personnel records and notify her in writing that it has done so; pay Mary Katherine Naylor backpay, plus interest, for her 3-day suspension of January 30, 1980, expunge the suspension notice from her personnel records and notify her in person and in writing that it has done so; offer to reinstate Mary Katherine Naylor to the cutter-clipper operation from which she was transferred on February 12, 1980; offer to reinstate Mary Louise Puckett to the gasket table position she occupied when unlawfully transferred on February 14, 1980; offer reinstatement to Dorothy Diane Godwin, Lexie A. Powers, and Sin Ung Yu, and pay them backpay, with interest, and offer reinstatement to Shirley Graham, John Gearhart, Larry Grenier, and George Edward Stanbaugh, and pay them backpay with interest. The backpay period for the latter group of four former strikers shall begin on February 11, 1980. Backpay shall be computed in the manner established by the

Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

APPENDIX A

ABSTRACT OF THE 83 CHALLENGED  
BALLOTS

I.

The following 68 individuals were challenged by the Board agent on the basis that the person was classified as a DSA, MSA or RSA.<sup>1</sup> In addition, five MSAs are listed below in group IV-B. This gives a total of 73 MSAs to be resolved.

<i>Name</i> <sup>2</sup>	<i>Classification</i>
Virginia Akins (56)	MSA
Bill Baggett (63)	MSA
Mary E. Benedict (17)	DSA
Maria Molnar Bennett (81)	MSA
Roger Brisson (26)	DSA
Mabel Bynum (46)	MSA
Ilse Callahan (55)	MSA
Cloetta Canady (80)	MSA
Sally Cashwell (60)	MSA
Gloria Caulder (53) <sup>3</sup>	MSA
Yongok [Richardson] Choi (38)	MSA
Brenda Cordrey (45)	MSA
Sybil Craig (29)	MSA
Ae Cha DeMartini (83)	MSA
Lora Duncan (41)	MSA
Rosemary Durhan (48)	MSA
Steve Ellis (76)	MSA
Olive Faircloth (51)	MSA
Kathy Foos (73)	MSA
Dolly Graham (61)	MSA
Ernestine Grisson (36)	MSA
Richard Hamel (64)	MSA
Deloris Hargett (32)	MSA
Peggy Hines (44)	MSA
Mary F. Horton (68)	MSA
Mattie Jackson (50)	MSA
Larry Johnson (33)	RSA
Sylvia Johnson (16)	MSA
Franklin Jones (43)	MSA
Mary Jones (47)	MSA

<sup>1</sup> DSA: Distribution Supervisory Assistant; MSA: Manufacturing (or Maintenance) Supervisory Assistant; RSA: Receiving Supervisory Assistant. For convenience, and as noted in Section III-A of this decision, they are referred to generally as MSAs.

<sup>2</sup> The number in parenthesis after the names indicates the numerical place where the person's name appears on the Challenge List attached to the June 4, 1980 Supplemental Decision, Direction, and Order Consolidating Cases issued by Regional Director Reed Johnston in Case 11-RC-4817. If the pagination of the Supplemental Decision's 18 pages continued through the attachments, it would have a total of 47 pages, and the Challenge List would begin at p. 26.

<sup>3</sup> Six of the MSAs did not testify before me: Gloria Caulder, Ernestine Grisson, Larry Johnson, Elizabeth Smith, Henry Sports, and Sharon Tew. Of these six, Elizabeth Smith also did not testify at the January 1980 preelection hearing, but the other five did.

Bertha King (37)	MSA
Euna Leslie (52)	MSA
Tae Ui Luckey (82)	MSA
Deborah McFadyen (58)	MSA
Leroy McCoy (49)	RSA
Josephine McElvine (42)	MSA
Helen D. McKoy (67)	MSA
Ernest McLaurin (23)	DSA
Barbara McNeill (70)	MSA
Delores McNeill (79)	DSA
Margie Melvin (77)	MSA
Ruby Mitchell (34)	MSA
Eusebia Money (57)	MSA
Linda New (74)	MSA
Joann Packer (65)	MSA
Joung "Ruby" Patten (40)	MSA
Paleitha Patterson (35)	MSA
Jack Roberts (22)	MSA
Nash Roberts (20)	MSA
Vivian Royal (75)	MSA
Clark Russ (30)	RSA
Cecilia Sanders (28)	MSA
Peggy Schaffner (54)	MSA
Joyce Shaver (31)	MSA
Jacqueline Shew (69)	MSA
Carolyn Shook (21)	DSA
Ella R. [Hammonds] Shorter (66)	MSA
Thomas Simmons (62)	MSA
Elizabeth Smith (78)	MSA
Rochell Smith (25)	DSA
James Spearman (24)	DSA
Henry Sports (27)	MSA
James Suggs (18)	MSA
Sharon Tew (72)	MSA
Nancy J. Williams (59)	MSA
Rusty Williams (71)	MSA
Dora [Allen] Woods (39)	MSA

II.

At the hearing on the consolidated cases, the parties stipulated (Tr. 11, vol. 1; Tr. 3959, vol. 22) that the challenge should be sustained to the ballot of the following individual, and that his ballot should *not* be opened on the basis, in effect, that he was no longer an employee at the time of the election.

<i>Name</i>	<i>Challenged By</i>	<i>Reason</i>
Ronnie L. Baskett (5)	Board	Not on list (terminated)

III.

The parties further stipulated at the hearing (Tr. 3957-3958, v. 22, and Tr. 6413, vol. 31) that the following six named employees were in fact eligible to vote and that

the challenges to their ballots be overruled and their ballots *opened* and counted:

<i>Name</i>	<i>Challenged By</i>	<i>Reason</i>
Glenys Hovermale (10) <sup>4</sup>	Company	MSA
Helen B. McCoy (14) <sup>5</sup>	Board	Not on list
Paek Won Myong (13)	Board	Not on list
Chong Sun Smith (12)	Board	Not on list
Linda Snedaker (9)	Union	MSA (supervisor)
Charlie White (1)	Union	Supervisor

<sup>4</sup> The stipulation to Hovermale was unnecessary, for the Regional Director overruled the challenge to Hovermale's ballot at p. 2 of his June 4 Supplemental Decision.

<sup>5</sup> The parties further stipulated that McCoy's name is misspelled on the Challenged List as McKay (Tr. 6413, v. 31).

<sup>6</sup> MSA James H. Graham, Jr. was one of those who walked out the evening of February 8, 1980. Purolator has refused to offer him reinstatement or reemployment because he was a statutory supervisor. In effect, MSA Graham has been terminated.

IV.

In the final category are 8 individuals who had been terminated prior to the election and the legality of whose discharges was litigated at the trial. As five of these were MSAs, the 8 are divided into the two groups shown below:

<i>Name</i>	<i>Challenged By</i>	<i>Reason</i>	<i>Testified? Volume</i>
<b>A. Employees</b>			
1. Katie M. Chavis (6)....	Board .....	Not on list (terminated).	2
2. Marilyn A. Raeford (11).	Board .....	Not on list .....	3
3. William Whitley (7) ...	Board .....	Not on list .....	1
<b>B. Discharged MSAs</b>			
1. Diane Godwin (15) ....	Board .....	Not on list .....	6
2. James H. Graham (3).	Board .....	Not on list (terminated) <sup>6</sup> .	7
3. Virginia E. Peoples (4).	Board .....	Not on list (terminated).	4
4. Lexie A. Powers (8)...	Board .....	Not on list (terminated).	4
5. Betty Roberts (2).....	Board .....	Not on list (terminated).	5, 6