

Nor-Cal Security, A Division of Master Security Services and Raymond P. Richmond and Darrel L. Perry and Scott Goebel, Cases 20-CA-17513, 20-CA-17550, and 20-CA-17588

14 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 7 February 1984 Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel submitted an answering brief to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 2 and renumber all subsequent Conclusions of Law accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Nor-Cal Security, a Division of Master Security Services, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent also has made a request based on the Equal Access to Justice Act for all costs and attorneys' fees that it incurred in connection with this case. For the reasons set out in *Euell Elevator Co.*, 268 NLRB 1461 fn. 1 (1984), we deny the Respondent's request as being premature.

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

³ In par. 2 of her Conclusions of Law, the judge finds that "[t]he Union is a labor organization within the meaning of Section 2(5) of the Act." In fact, while the Respondent's employees did discuss the possibility of forming a union, the record fails to establish that any particular labor organization was involved in this case. We shall modify the judge's Conclusions of Law accordingly.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried before me at Sacramento, California, on September 27 and November 3 and 4, 1983,¹ pursuant to consolidated complaints issued by the Regional Director for the National Labor Relations Board for Region 20 on December 27 in Cases 20-CA-17513 and 20-CA-17550, and on January 24, 1983, in Case 20-CA-17588, and which are based on charges filed by Raymond P. Richmond, Darrell Perry, and Scott Goebel, individuals, on November 8 and 3 and December 14, respectively. The complaint alleges that Nor-Cal Security, a Division of Master Security Services (the Company or Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent denies taking any actions which were violative of the Act and requests dismissal of the complaints.

Issues

Whether or not Respondent: (1) threatened employees with discharge as a reprisal if they continued to engage in union organizational activities and/or other protected concerted activities; (2) through admitted Supervisor Stewart Green coercively interrogated employees about their union organizing, activities, and sympathies or the union organizing activities and sympathies of fellow employees; (3) coercively threatened employees that they should not join a union without first seeking approval from management; (4) through Green coercively solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment; (5) through Green unlawfully announced a rule to the employees prohibiting all discussions of union organizational activities during working hours and at the worksite; (6) reduced scheduled hours of work and/or otherwise unlawfully discriminated against Richmond, Perry, and Goebel because they were engaged in protected concerted activities.

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

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that, as here pertinent, it is a Nevada corporation engaged in the provision of guard services for the United States Courthouse and Federal Building at Sacramento, California, having an office and place of business located in San Francisco, California. It further admits that during the past 12 months, in the course and conduct of its business, it has performed serv-

¹ All dates herein refer to 1982 unless otherwise indicated.

ices valued in excess of \$50,000 for the United States Government at the Federal Building at 650 Capitol Mall, Sacramento, California. Accordingly, it admits, and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Nor-Cal is a division of Master Security Services which contracted with the General Services Administration of the Government of the United States to provide guard services at several locations in northern California, including 650 Capitol Mall, Sacramento, California. The 650 Capitol Mall location is the site most immediately involved in this case. Another affiliate of Master Security Services is EGC Security (Carlson), which is also located in Sacramento. Curtis Bennett, vice president and general manager of Master Security, was responsible for all northern California operations. The immediate supervisor at 650 Capitol Mall was Stewart Green, who held the rank of lieutenant.

Green was a full-time employee of Sacramento County Probation Department working as a probation officer. His work for Nor-Cal as a part-time employee required him to supervise three locations in Sacramento which included two different Social Security offices and the U.S. Courthouse and Federal Building at 650 Capitol Mall. There was no record evidence about distance between these sites. Green testified without controversy that he spent 2 hours per working day at each location. Green was directly supervised by Bennett. Bennett maintained his office in San Francisco, California, and there was no showing that Bennett was ever at the work location involved in this proceeding. Respondent admits and, based on the evidence I find, that Green and Bennett are supervisors as defined in Section 2(11) of the Act and are agents of Respondent as defined in Section 2(13) of the Act.

During the weekdays from 8 a.m. to 4 p.m., there were two company guards on duty at 650 Capitol Mall. These guards worked 8-hour shifts divided into 4 hours on patrol and 4 hours in the office. The two guards rotated these assignments so each spent 4 hours patrolling and 4 hours in the office. From 4 to 10 p.m. and on weekends there was only one employee on duty. The guard in the office was to answer phones, monitor the alarm system, dispatch the Federal Protective Service (FPS) officers (FPOs), and provide an armed backup to the FPOs.

There is a dispute as to whether the guards on duty in the office were also responsible for performing administrative functions assigned by the FPS such as typing, filing, and making photocopies. The supervisory authority of the FPO's was admittedly a matter of dispute between the Company and the FPS at the time of the alleged unfair labor practices. The dispute was not resolved until December 10 when FPS Sgt. Russell S. Oase was appointed contract inspector and was directed to not supervise Respondent's employees. Based on this memorandum, the testimony of all employee witnesses

and Respondent's admission that there was confusion over the role of FPOs as supervisors, it is found that at all times here pertinent the discriminatees believed, with good cause, that they were subject to the supervision of the FPOs at times other than during emergencies. All parties agree the guards were subject to the direction of the FPOs during emergencies. Also, the FPOs were charged with making frequent inspections of the guards' uniforms to ensure compliance with the contract.

The guard on patrol was stationed in the lobby and scrutinized the public to ensure that no prohibited items were brought into the building. Also they were to periodically patrol the first, second, and eighth floors. While on patrol, the guards normally checked that all doors were locked, checked for suspicious occurrences, and responded to emergencies.

B. Events Occurring in October 1982

1. Employee meeting on October 27

Most of the facts are undisputed. On October 27, six of Respondent's employees, Raymond Richmond, Darrel Perry, Scott Goebel, Jim Stoup, Arthur Fisher, and Larry Meister, met at Richmond's house to discuss dissatisfaction regarding job-related matters such as inferior equipment and uniform shortages, late paychecks or paychecks that bounced, and the possibility of joining or forming a union as a method of alleviating these problems. Richmond organized the meeting. The meeting ended with the decision that Richmond try to contact unions to obtain representation.

2. Events of October 28

On or about October 28, Green received a call from Larry Meister and, after having his memory refreshed by affidavits, admitted asking Meister what had occurred at the organizing meeting. Meister, according to Green, told him they discussed gripes about the Company and having a union represent them.

According to Richmond, at about 10:30 a.m.,

Lieutenant Green called me on the radio and wanted to know where I was at. I told him I was in the lobby. He immediately came to me and very loudly wanted to know who the hell I thought I was. He wanted to know what my goals were, who was at the meeting. He wanted to make sure that there were no other meetings without his prior approval and unless he was himself invited. He said that he had taken care of all the company gripes before and that if I didn't like it I could get my mother f'ing ass out.² At that particular time, I reminded him that he, himself, had been representative of an organization for collective bargaining and so on, that I had the same right. . . .

He also said that anybody who wanted to join or vote in a union would not be around to do so. . . .

² It is noted that the transcript did not accurately replicate the testimony, at times an expurgated version was provided.

He stated there would be no employee conferences, no employee talks, that we did not have the right to talk about such things while we were on the job.

After again having his memory refreshed by review of his affidavit, Green admitted asking Richmond what the meeting was about and what his gripes were, and instructed Richmond that if he had any gripes he should go through Green first; and, if the employees wanted to organize, they could organize while off duty, not during working hours. The testimony is devoid of any references to breaktimes and lunch hours. Green did not specifically deny the other allegations made by Richmond and in his affidavit, dated December 16, 1982, admitted saying, "if anyone doesn't like the way things are, they can quit."

Green asserted that he counseled Richmond to refrain from discussing union activity during working hours because he heard from unidentified sources that Richmond had called them while on duty. Richmond's denial of this assertion is credited based on his demonstrated superior recall, candor, demeanor, and inherent consistencies in his testimony.

3. Events of October 29

About October 29, which was Perry's first day on duty after the October 27 meeting at Richmond's house, Green came into the office. According to Perry:

He [Green] was smoking a cigar and he said: I understand you had a meeting. And do you have anything to tell me?

And I said: No. I don't have anything to tell you. It wasn't that much of a meeting.

And he said: Well, things are really going to change. There's a lot of changes coming down the pike. He was puffing on a cigar. He said: There's going to be a—When the smoke clears, there's going to be no one here.

This testimony is credited based on demeanor, candor, facility to recall events, and inherent probabilities.

4. Events of October 30

When Perry came in to work, he experienced a change in working conditions; Green started quizzing him about work procedures. Perry had not been subjected to similar questioning in the past. Green did not claim this was standard procedure. Next, Green took Perry on a floor patrol, which was also unusual. They discovered an unlocked door on the eighth floor. Perry had difficulty locking the door. Also on this date there were some doors in the U.S. Marshall's suite of offices that were unlocked. Perry had difficulty locking the door for he evidently did not have the necessary key.

Green continued quizzing Perry, including the subject of control key procedures, while he was trying to lock

the door. Perry believed Green knew where the key³ was and asked him, "Would you be screwing around like this if someone was being murdered behind that door and we needed to get in?" Perry admittedly was very frustrated at the time and inquired if Green was "fucking around." Perry was not chastised or warned about this behavior at the time of the incident. The types of keys to be carried on duty is in dispute. Perry testified, without contradiction, that there were at least six building key rings that were not identical. There are also keys that are kept secured in the FPS office. These secured keys are not carried by Respondent's guards. On October 30, Perry had the "147" key which he described as the master key. Perry asserted this was the only key he needed, having been told by Green and the FPOs that if the "147" key did not work, he did not belong there. This assertion was not directly contradicted. Also not disputed is his testimony that he was never instructed to carry anything other than the "147" key while on duty.

Also about October 30, a Saturday, Perry had turned on an escalator to facilitate his making voluminous photocopies of a booklet pursuant to a request from Sgt. Oase. Perry was the only guard on duty that day. Green subsequently asked him to make a report about the photocopies, which he did. In the report, Perry noted that he came in the prior evening, while off duty, to start making the copies. It is contrary to work rules to be on the premises while off duty.

Perry believed it was part of his duties to make photocopies of FPS officers as well as file and type their incident reports. Green was aware that he performed typing duties for the FPOs for Green told Perry that his duties included typing for the FPOs, stating he needed a good typist. Perry took a typing course at Sacramento State specifically to meet this job requirement. Green did not contradict or otherwise directly dispute this testimony, which is found to be highly credible based on demeanor, corroboration by the other Charging Parties, inherent consistency and demonstrated superior recall.

Richmond convincingly corroborated Perry's testimony. He too was informed by the Company and FPOs that the "147" key was the master key and when he tried to determine what the other keys on the duty rings were for, since some were unmarked, he was told that he should only be concerned with the "147" key, that he was not authorized to go anywhere the "147" key did not fit. Richmond never received any instructions concerning keys from Green until October 31. The "147" key did not open all doors in the building. Green never asserted he instructed these or other employees about which keys to carry prior to this date. There was no showing that the Charging Parties should or could have acquired this information from any other source.

About October 30 there was an incident involving Richmond and Green. According to Richmond's uncontroverted testimony, Green approached him and said:

³ Green admitted in his affidavit of December 12 that the courtroom doors do not lock with a key and there is no claim that Perry was told or was otherwise responsible for knowing how they were locked.

. . . that a good employee would not engage in any such activities; that a good employee would be faithful and not try and stab him in the back by doing so.

Q. Did Mr. Green say what activity?

A. Yes, he did.

Q. What did he say?

A. He said union meetings.

Richmond then left on his rounds and, during this patrol, he was joined by Green. They found a set of bankruptcy courtroom doors unlocked. It took an unconventional key like an Allen wrench to lock it. There is no evidence as to where this key was kept. There is no claim that the key was normally on the keyrings carried by the guards. Richmond went back to the office to find the proper key and Green accompanied him. Once in the office Green brought out a control key book and asked Richmond questions about its maintenance, including updating and signout procedures. Green also asked about the keys in the control closet. Richmond was never previously subjected to similar questioning. Green also questioned him again about the October 27 meeting, asking what the employees' goals were, what they were hoping to accomplish, and who attended the meeting.

5. Events of October 31

On this date, while Richmond was in the office, Green, in the presence of Oase and Perry, asked Richmond why the desk blotter indicated there were 41 sealed keys. Richmond replied he merely restated what was previously indicated. Green asked Richmond to count the sealed keys. Richmond asked Oase if he should, and Oase indicated it was a good idea. Richmond then counted the keys. Next Green asked what the procedure was in the event a key was lost. Richmond asked Oase since he never received instructions in the matter. Richmond also tried to tape record this conversation which Green stated was not allowed; Richmond replied with a threat to contact the Labor Commission and to initiate a suit against the Company. Richmond was not warned that this conduct could or would result in disciplinary action. Green then took keys to the freight and judges' elevators and asked Richmond if he knew how to operate them. Richmond replied that he did not. Richmond's version of these conversations are credited for they are corroborated in part by Perry, his demeanor was forthright and candid, and he exhibited an ability to recall far superior to Green's. Green admitted to poor recall of dates and several times had to be shown his affidavit to refresh his memory about facts. Also, there was no showing that any of the employees who testified were ever instructed about the keys prior to these events. Inherent probabilities also favor Richmond's version for if the keys were sealed in envelopes, there was a possibility that more than one key was in an envelope, a fact that was not shown to be readily ascertainable by examining the sealed envelopes. There is no claim the guards were authorized to open the envelopes. Perry corroborated Richmond's testimony, stating that he was not instructed to count the keys which were in sealed envelopes, and he never did.

C. Alleged Discriminatory Action Against Perry

Perry commenced his employment with the Company in December 1981. About November 8, he was handed the following missive entitled "Suspension Notice":

Officer Perry, on Saturday, October 30, 1982, I accompanied you on your building patrols. I observed that the court rooms located on the eighth floor were unlocked. You did not know how to lock them when I questioned you. In fact, I noticed that the only building key you were carrying was the #147 key. I observed six building key rings in the key locker. You were unaware of what these keys were for and did not express any interest in finding out. While during a floor patrol, I observed that you did not test the door handles by "shaking" them. In fact, I had to show you how to twist a door handle to see if it was locked. You thought it very funny and amusing that the doors had to be tested. You did not check the telephone closets and did not know of any reason why you should have to. You obviously have never checked or "shaken" any of the doors while during floor patrols. Your lack of knowledge concerning the building leads me to wonder if you have ever made any floor patrols on a regular basis or any patrols at all. You also did not lock any of the unlocked doors on the floors you checked. I checked the guard log and noticed that you had patrolled the U.S. Marshal's area at 1335 and found all of the doors to be unlocked. Your explanation was that someone had told you not to lock the doors. You have been informed many times as to who the job supervisor is and who can give orders. Evidently, you do not know who to take orders from. While conducting my inspection, you made the comment that I was playing 20 questions and that I was "fucking around." The security of the U.S. Courthouse is serious business and you think your job is a joke.

I have been informed by several Deputy U.S. Attorneys that you have [been] asking them for legal advice. You are not to solicit legal advice from Deputy U.S. Attorneys. That is not their function. You have been filling out job applications while on duty and doing personal typing. While checking on your job performance, I have discovered that most of your duty time is involved in personal matters, and not in doing the job you are paid to do. I have noticed that you get involved in lengthy verbal discussions with anyone at anytime. I have warned you several times not to shoot the breeze with the public and to pay attention to your job. You are not to discuss NOR-CAL business or your own personal business with U.S. Attorneys or F.P.O.'s. I have also received [sic] memos from you typed on Federal Protective Service letterheads. F.P.S. stationery is not to be used for company business or personal business.

Officer Perry, you do not take any interest in your job. In fact, you are constantly filling out job applications and seeking other employment. In view

of your poor job performance and behavior, I have two options available to me. One option is to discharge you, the other option is to suspend you from employment with NOR-CAL Security. I choose to suspend you at this time. You will contact me on November 22, 1982, for your work schedule.

When I entered the U.S. Courthouse on Saturday, October 22, 1982, I observed the first, second floor escalators turned on. I inquired why they were running. You told me that you had made 1000 zerox [sic] copies for F.P.S. Sgt. Oase on the second floor using the court clerks xerox machine. I observed the xerox copy machine key on the desk in the F.P.S. office. This key is to be used in the G.S.A. xerox machine and is where copies are to be made. You disregarded instructions that the G.S.A. xerox copy machine is to be used and the xerox key provided for it. I later discovered that you had entered the U.S. Courthouse Friday, October 29, 1982, at 1830, while off duty. You used the G.S.A. Xerox machine to make copies of something. You are not authorized to enter the building while off-duty, let alone authorized to use G.S.A. xerox or other U.S. Government equipment, while off-duty.

About November 22, Perry was told by Green and Bennett that they did not have any openings at that time. Green stated in his affidavit that he had to hire a replacement in order to comply with the GSA contract. This explanation was never given to Perry or Richmond when they sought reinstatement. Bennett did say there was a 5-hour-a-week supervisor's job in Modesto, California, but he was not willing to pay Perry mileage or supervisor's pay. Perry had worked 40 hours a week prior to November 8.

Prior to November 22, according to Perry's unrefuted testimony, Green told him five or six times that "anyone who wasn't loyal to him he was going to can, he was going to fire." Also prior to receiving the "suspension notice," Perry insisted on signing in to prove he reported for work and Green told him he was fired, but to report back on November 22, he was suspended.

Respondent asserts that it disciplined Perry for good cause, for the reasons stated in the suspension notice.

D. Alleged Discriminatory Action Against Richmond

Richmond was employed with Respondent on two occasions, August to September 1981 and April to November 4, 1982. Richmond was relieved of duty on November 2. On that date, Green, for the first time in Richmond's work history, subjected Richmond to a uniform inspection and asked why he was wearing his own gun and holster, carrying 18 rounds of ammunition instead of the designated one pair, and wearing a bullet-proof vest. Green also asked him to lift his pant leg to determine if he was wearing the prescribed color socks and asked him to go into the bathroom and remove the bullet-proof vest for Green's inspection. Richmond asked Green to put that order in writing for it would require him to leave his post unsecured. It is undisputed that Richmond carried his own weapon during his entire employment and

wore the vest for approximately 1 month before the November 2 inspection. Richmond always carried 24 bullets, 6 in his gun and 18 in speed loaders. He also always wore two sets of handcuffs. The Company never issued him any bullet pouches, holster, gun, and other items mandated in the contract with GSA. According to Richmond's uncontroverted testimony, Green had remarked on the vest a month earlier, asking how much it cost and the name of the manufacturer.

Richmond reported for duty on November 4, and Green did not permit him to sign in; rather he took him to a lunch room, handed him a suspension letter, and said, "I am suspending you and I want you to follow the instructions in this letter." The suspension notice stated:

Subject: Insubordination—unacceptable employee performance and behavior

Officer Richmond, on Saturday, 10-30-82, after you started duty at 1400 hours, I asked you a series of questions regarding the security of the U.S. Courthouse. You ignored these questions and did not answer any of them. I also gave you instructions to check the main doors at the front entrance to the courthouse. You ignored my instructions. I then accompanied you on a floor patrol and observed that you were not familiar with the keys on the duty ring. I then asked you if you knew how to operate the Judges elevator and the frieght [sic] elevator. You replied "yes." I then asked you to demonstrate and operate the two elevators. You were unable to operate either of the elevators. You were also unable to show me how to lock the courtrooms on the eighth floor, which were unlocked.

On Saturday, 10-31-82, I asked you if you had counted the sealed keys. You had typed an entry on the log that you had. Your reply was "no." You stated that everyone knew there were 41 keys in the sealed key box and did not have to count them. I then ordered you to count the keys. You then asked FPO Sgt. Oase if you had to count the keys. You ignored my orders and it was only after Sgt. Oase told you to count the sealed keys that you did. When I questioned you about your attitude, you promptly displayed a tape recorder. I informed you that tape recorders were not allowed and that listening to music or whatever was not permissible [sic]. You then threatened to contact the Labor Commission and sue NOR-CAL.

11-2-82, Tuesday, at 1000 hours, I performed a inspection of your equipment. I observed that you were wearing eighteen bullets instead of the required twelve. You were also wearing two pairs of handcuffs. Also, you were wearing some type of bullet-proof vest which was exposed through your clothing. I asked to inspect this vest. You refused to allow me to inspect it or remove it for inspection. At this time, I noticed a tape recorder on the desk. I had previously given you a direct order not to bring tape recorders to the job site. Due to your insolent behavior and insubordination regarding my direct orders, I relieved you of your duties at 1015

hours, and sent you home. At this time you threatened me by saying you would see me in court.

Officer Richmond, you have been verbally reprimanded and been advised as to your attitude problems. You have ignored your supervisors on numerous occasions. You have been insubordinate and ignored direct orders. I have the option to terminate your employment or suspend you. At this time, I will place you on suspension until November 18, 1982. You will contact me at that time for your work assignment and schedule.

As can be seen from this notice, the exact dates the various events occurred are not clear; Green admitted to a poor recollection of dates, which may account for the confusion.

On November 18, Green contacted Richmond who told him he was to report to work the next day, November 19, at the Modesto Social Security office and asked if he was going to refuse the assignment. Richmond replied no, he would be glad to accept. This assignment lasted one day. Green also instructed him to call Bennett, which he immediately did. Bennett was not in, so Richmond gave Bennett's secretary his name and telephone number so Bennett could return his call. Bennett never returned the call. Bennett did not explain why the call was not returned. Green indicated in his above-described affidavit that he hired a replacement employee for Richmond prior to November 18, but never told Richmond.

E. Alleged Unlawful Discharge of Goebel

Goebel commenced working for Respondent in the beginning of September 1982. On November 2, Richmond and Goebel sent to the Federal Protective Service a complaint against Green. The complaint was typed on Federal Protective Service letterhead and stated:

On Thursday October 7, 1982, from 1100 hours til 1145 hours Lt. Stewart Green had officer Goebel and myself in the cafeteria for conference about the FPO's.

He told us that we were his ears and eyes against the FPO's. He told us that it was our job to see to it that he got a copy of all important reports, memo's and what ever else we thought he should be aware of.

He told us that he was not going to cooperate with the FPO's on anything, and neither was anyone that worked under him. If anyone got caught helping, cooperating with or following their orders, someone would get fired.

He told us that he was sick of FPO's bullshit, and that he wasn't going to put up with it any more.

He told us that if the FPO's wanted to get into a pissing contest that they'd better be prepared to be out-gunned by someone that had more brains than all the FPO's put together.

Lt. Green made it quite clear that we contract security officers were to be a spy for him against the Federal Protective Service and the FPO's; their activities and actions, et cetera.

He repeated himself several times, and reminded us if we didn't tell him everything that went on in the building and he found out about it second hand that someone would also get fired!!!!

On November 22, Green asked Goebel to accompany him into the cafeteria and asked Goebel why he was keeping track of Green's hours. Goebel was monitoring Green's hours on an FPS form. Initially Goebel denied the activity and then stated that he was doing it as a mere statistical exercise. At trial, Goebel admitted he was keeping track of Green's hours as part of his duty to observe and report any actual or potential crimes. Green also asked him about the November 2 letter he and Richmond wrote. Goebel stated that Richmond wrote the letter, he merely signed it to confirm the account of the meeting. Green then told him that he was cutting his hours to 3 days a week, just after he was informed his 4-day-a-week schedule was extended to a 5-day workweek. The admitted extension of working hours belies any claim of poor performance at that time.

Goebel then asked if the reduction in hours was disciplinary because if it were he was going to protest. Green then became very upset, used a lot of profanity, and told Goebel he was throwing himself "out of the frying pan into the fire. And that I was making the same mistake as those other assholes Richmond and Perry made. . . . The reason he gave me for the cut in hours was that he couldn't trust me anymore." Green did deny these allegations. As noted above, Green was not a credible witness, admitting to poor recall. Green's testimony lacked candor, his demeanor was not forthright, and his affidavit contradicted some of his testimony.

Goebel admitted having an unauthorized tape recorder at the worksite. Also Goebel wore white socks, not black as required in the contract. He was never issued any socks by the Company nor was he told that he had to wear a uniform, and failure to comply with that requirement would result in the Company being fined. Goebel, like Richmond and Perry, was not issued all the equipment called for in the Company's contract with GSA.

On November 23, Green told Goebel he was having difficulty finding room for him on the work schedule and was transferring him to an affiliated company, Carlson Security. When Goebel reported to Carlson Security, it was unprepared for him and he was told to fill out an application. Goebel took the application home to complete the form for it requested work histories and other information he did not carry on his person. He returned the application the following week. Green never testified that he made arrangements for the transfer with anyone at Carlson Security.

Goebel was never handed a notice. Green asserts he mailed one to him but Goebel stated he never received the correspondence. The notice stated:

Sunday, November 14, 1982, a tape recorder was found in the guard desk drawer in the Federal Protective Service Office, 650 Capitol Mall, Sacramento. The tape recorder was found by an on-duty Security Officer, who immediately informed his super-

visor, Lt. S. Green. During the following week, you admitted that the tape recorder was yours, but you were unable to identify it. You explained that Officer R. Richmond had prior possession of the tape recorder and had been using it in the office. Officer R. Richmond had not worked since November 4, 1982. You were aware of the fact that possession of a tape recorder was unauthorized while on duty, and the reasons why. You are also aware of the fact that an employee had been suspended, partly because of possession of a tape recorder while on duty.

November 21, 1982, Sunday, a GSA Form 239, Officer and Inspectors Register, was found hidden in the back of the guard desk top drawer by the on-duty Security Officer, who informed Lt. S. Green. Lt. Green questioned you and you denied at length that you had filled out the times and dates on the form. When Lt. S. Green confronted you with the fact that the handwriting was yours, you finally admitted that you were keeping a time and date check of your supervisor. You were unable to explain why and for whom you were keeping track of your supervisor, Lt. S. Green.

During the week of November 16 thru 19, 1982, you had been taking GSA Forms #3155 home and writing reports when off-duty. Taking documents out of the office and doing reports or other job related tasks off-duty is forbidden without permission of Lt. S. Green. When your supervisor questioned you as to the reason why, you stated that FPS Officer Wilson and Sgt. Oase wanted the reports, so you took them home. Lt. Green asked Sgt. Oase about the incident and Sgt. Oase explained that at no time did he instruct you to take any reports home and he did not instruct you to even use a GSA Form #3155.

Officer Goebel, Lt. Green has advised you on numerous occasions [sic] concerning your job performance. On the last occasion [sic] that you were counseled by Lt. Green on November 23, 1982, you made the statement that you could do whatever you wanted to do as the supervisor was not on the job site all the time and could not watch you all the time.

Your attitude and job performance is unacceptable. However, instead of terminating your employment, I am recommending that a sister company, EGC Security, find you a slot. You are young and immature, hopefully you will become mature and wiser as you get older and acquire more experience.

When asked about the allegations contained in this letter, Goebel admitted possession of the tape recorder, asking for its return and filing a stolen property report with the FPS against Green when he failed to return it. He also admitted taking blank GSA report forms home to complete. While much was made of his uniform deficiencies at trial, they are not mentioned in the letter.

III. ANALYSIS AND CONCLUSIONS

A. Preliminary Matters

Respondent's brief only addresses the alleged unlawful discharges and assertion of promulgation of an unlawful no-solicitation rule. The other alleged independent violations of Section 8(a)(1) of the Act are not mentioned. This failure will not be construed as an abandonment of position and all allegations will be considered on their merits.

B. Alleged Violations of Section 8(a)(1)

Section 8(a)(1) of the Act protects employees from interference, restraint, or coercion in the exercise of rights guaranteed them in Section 7 of the Act where to join or assist labor organizations or to refrain therefrom or to engage in "other mutual aid or protection." Thus the threshold issue is did Respondent interfere with these rights.

1. Interrogation

The General Counsel alleges Green unlawfully interrogated Perry and Richmond about the October 27 meeting, which Green admitted. It is uncontroverted that the meeting was held to discuss grievances and acquiring union representation.

The admitted or credited evidence is that Green asked Richmond who attended the meeting what occurred at the meeting; what the employees sought to accomplish; that good employees would not engage in such activities; "Who the hell [Richmond] thought [he] was"; and that Green had taken care of all the company gripes and if Richmond did not like it, he "could get . . . out." Such meetings were described by Green as a "stab in the back." Green also asked Perry if he had anything to tell him about the meeting.

The question is whether these actions by Green are violative of Section 8(a)(1) of the Act. The General Counsel asserts such inquiries are violations of the Act, but cites no authority for this position. In fact, despite a specific request that citations be given by the parties to support any position, the only citations in the General Counsel's 21-page brief deal with the no-solicitation rule and alleged unlawful discharges.

"The test of interference with the right of self-organization is not whether an attempt at coercion has succeeded or failed, but whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their Section 7 rights." *NLRB v. Berger Transfer Co.*, 678 F.2d 679, 689 (7th Cir. 1982). Accord: *Jay's Foods v. NLRB*, 573 F.2d 438, 444 (7th Cir. 1978), cert. denied 439 U.S. 859 (1978). The questioning to be violative must have a reasonable tendency to coerce an employee. "It must be viewed and interpreted as the employee must have understood the questioning and its ramifications." *NLRB v. Gogin Trucking*, 575 F.2d 596 (7th Cir. 1978), quoting *Hughes & Hatcher Inc. v. NLRB*, 393 F.2d 557, 563 (6th Cir. 1968). Also remarks must be considered under the totality of the circumstances in order to evaluate their meaning for the workers. *NLRB v. Kaiser Agricultural*

Chemicals, 473 F.2d 374, 381 (5th Cir. 1973). Accord: *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir. 1980). Generally, five factors have been utilized in analyzing the totality of the circumstances to determine if questioning was coercive. These factors include: (1) the background of the employer-employee union relations; (2) the nature of the information sought; (3) the questioner's identity; (4) the place and method of interrogation; and (5) the truthfulness of the reply. *NLRB v. Rich's Precision Foundry*, 667 F.2d 613, 624 (7th Cir. 1981).

The application of these criteria requires a finding that the questioning was indeed coercive. Green stated he, as supervisor, had a right to know the employees' gripes. This is found to be an inadequate attempt to legitimize the questioning. The atmosphere under which the questioning occurred was charged with hostility and threats of reprisals, rather than giving assurance against reprisal. No assurance against reprisal was given *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965), cert. denied 342 U.S. 926 (1965). There was no valid reason given for the request, no need shown to know who attended, and the information was sought in a formal, intrusive atmosphere. Thus it is concluded no legitimate reason was advanced for the questioning and it is coercive in violation of Section 8(a)(1) of the Act.

C. No-Solicitation Policy

Green admitted telling Richmond that employees could not organize during working hours. This is a presumptive violation of Section 8(a)(1) of the Act for it prohibits solicitation even during nonworking times. *Essex International*, 211 NLRB 749 (1974). See also *Our Way, Inc.*, 268 NLRB 394 (1983). Respondent failed to justify such a broadly drawn rule since there was no indication that the employees' job duties, breaktimes, and/or mealtimes were so arranged that, when cojoined with other necessary job strictures, warranted the imposition of such a broad rule. On the contrary, the only reason advanced for its imposition was Green's interpretation of his supervisory duties necessitating his need to know employees' gripes. The rule was also imposed with the additional stricture that he know of such meetings in advance and be afforded the opportunity to attend. Supervisory attendance is a well-recognized method of stifling grievances and organizing attempts, which is intimidating and coercive, and establishes a discriminatory motive in the adoption of the rule. *Wm. H. Block Co.*, 150 NLRB 341 (1964).

Other indications of the violative promulgation of the rule were the timing during union organizing activity and its instant application against the initiation of such activity. In sum, it is found that the imposition of the no-solicitation rule is violative of Section 8(a)(1) of the Act.

D. Threats of Discharge and Solicitation of Grievances

The uncontroverted or credited evidence discussed in detail above clearly demonstrates that Green indicated, using expletives that if Richmond did not like Green resolving all grievances he could leave, told Richmond that those supporting or joining unions would not be

around long; asked Richmond what his gripes were; told Perry "things were going to change"; that no one was going to be there "when the smoke clears"; and that he considered organizing disloyal and those employees not loyal to him would not be there long. Green also asked Perry about his problem or gripes. Green did not deny in his testimony telling Goebel he was acting like Richmond and Perry when he joined in sending the letter to the Federal Protective Service and threatened him with discharge.

There is no claim by Respondent that these statements are protected by Section 8(c) of the Act nor can such a claim be made, for clearly there were threats of discharge. Nor can these statements be treated as predictions of a probable consequence beyond the employer's control. These threats of discharge for engaging in activity protected by Section 7 of the Act are clearly threats of reprisal aimed at coercing employees in the exercise of their Section 7 rights, which is proscribed by Section 8(a)(1) of the Act. *Pennypower Shopping News*, 253 NLRB 85 fn. 4 (1980); *Penn Color, Inc.*, 261 NLRB 395 (1982).

The solicitation of grievances by Green is also violative of Section 8(a)(1). As noted in *Penn Color Inc.*, id. at 406:

As the Board has said: ". . . there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44, 46 (1971), *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

In this case, the inference was amplified by Green's statement that, if Richmond did not like Green receiving and handling all grievances, he could quit, a statement which is also found violative of Section 8(a)(1) of the Act.

E. Discharges and Reduction of Work Hours

Although the disciplinary notice refers to suspensions and transfers, the General Counsel asserts that Richmond and Perry were constructively discharged and Goebel was terminated outright. Respondent asserts it disciplined the Charging Parties for good business reasons and denies discharging any of the three Charging Parties.

As noted in *Union 76 Auto Truck Plaza*, 267 NLRB 754, 760 (1983):

To establish a constructive discharge, it must be proven that the burdens upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employees to resign. It also must be shown that these burdens were imposed because of the employee's union or other protected, concerted activities.

These allegations raise the issue of whether Respondent violated Section 8(a)(3) and (1) of the Act in its disciplining of the Charging Parties. Section 8(a)(3) of the

Act prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

As stated by the Supreme Court in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469, 2474 (1983):

[T]he unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under § 10(c). But the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation.

The employer's burden is, as the Court recognized, an affirmative defense. (Id. 103 S.Ct. at 2473, 2475.) "Thus, where anti-union animus is established, the employer will be found in violation of 8(a)(3) unless it demonstrates (by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union.)" [Id. at 2471.]

In determining motive, resort may be made to circumstantial evidence. *NLRB v. Great Dane Trailers*, 383 U.S. 26 (1967); *NLRB v. American Can Co.*, 658 F.2d 746, 757 (10th Cir. 1981). The threshold issue is therefore whether the General Counsel established a prima facie case sufficient to support the inference that these employees' attempt to gain union representation was a motivating factor in the Employer's decision. It is found the General Counsel has sustained this burden.

Although consideration of the notice Respondent issued stating the basis for its actions, quoted in full above, may facially appear to warrant the disciplinary action, consideration of the record, including credited testimony, exhibits, and admissions, requires the finding that protected conduct was a "motivating factor" in the Employer's decisions. *Wright Line*, 251 NLRB 1083 (1980).

Some of the evidence supporting this conclusion includes: the clear showing Respondent had knowledge of the activity for Green interrogated the employees about the union meeting, threatened them with discharge, prohibited them from discussing the union during working hours, as well as committing the other violations of Section 8(a)(1) of the Act as found hereinabove. Other indications of proscribed motive are the various references to the Charging Parties as "troublemakers" and Green's use of similar appellations. The use of such euphemisms for protected activity is indicative of unlawful motive. *K & E Bus Lines*, 255 NLRB 1022 (1981); *Roadway Express*, 239 NLRB 653 (1978); and *NLRB v. Hertz Corp.*, 449 F.2d 711, 714 (5th Cir. 1971).

The timing of Respondent's actions, including attempts to chill organizing efforts immediately after the union organizing meeting and the discharges of two Charging Parties, infers discriminatory motivation. *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005 (9th Cir.

1978). The General Counsel also alleges a similar inference should be drawn from the fact that the third employee, Goebel, had his work schedule reduced 2 days after he wrote a memorandum to the Federal Protective Service complaining about Green's asserted instructions to spy on FPS officers and was fired 3 days thereafter. Respondent never asserted that Goebel and Richmond acted improperly or made a false accusation. Conversely, the General Counsel's brief never asserted that the sending of the notice was protected concerted activity. This act occurred after the alleged unlawful discharge of Richmond, eliminating a basis for asserted concerted activity, and was not alleged in the complaint, raising an issue of lack of notice to Respondent. This argument is also unnecessarily cumulative. The record clearly sustains a finding of discriminatory discharge of Goebel based on the threats, changed behavior, and disparate treatment regarding Goebel.

At least the reasons stated in the notice of suspension and transfer are found to be pretexts. For example, the lack of knowledge regarding keys was not shown to have been a subject the Charging Parties received training in or would otherwise know. There was no showing which keys were on the various key rings the guards were authorized to carry. As ridiculous as it may seem that the guards did not carry all keys needed to respond to emergencies, there were sealed keys they did not normally carry; Green admitted the courtroom doors had special closures and the judges' and freight elevators had special keys not shown to have been routinely carried by the guards.

Respondent, who apparently knew which keys were on the various key rings, never produced such evidence. Similarly, Perry was chastised for using FPS letterheads on company business, yet Green similarly used his stationery. The assertion of contradictory and unconvincing motives infers that the actual motive was unlawful. *Bendix Corp.*, 131 NLRB 599 (1961), 299 F.2d 308 (6th Cir. 1962). Perry's filling out job applications while on duty was, according to his uncontroverted and credited testimony, encouraged by Green. Green never informed Perry prior to the disciplinary action that his continued typing of job applications while on duty would result in discipline. Green did not deny Perry's credited testimony that typing was a job skill needed to properly assist the FPO's, yet such assistance became the basis for discipline. Another contradictory and inconsistent claim is that Perry and Richmond were only suspended, yet replacements were hired as new employees, and there was no showing which positions Respondent contemplated those employees would assume at the end of their suspensions. This action was taken despite Bennett's testimony that trained guards, if salvageable, are transferred, he can always find a place to put them. That they were permanently replaced immediately after suspensions was not shown to be the only, best, or even a reasonable response to the void created by their suspensions. As noted below, a party's failure to adduce evidence solely within its control requires the drawing of an adverse inference. Also unexplained is Respondent's failure to inform Perry and Richmond that replacements have been hired. *Ster-*

ling *Aluminum Co. v. NLRB*, 391 F.2d 713, 721 (8th Cir. 1968).

Further contradictory and inconsistent claims are with regard to uniform deficiencies. Respondent admittedly failed to supply the Charging Parties with uniforms and equipment as required by the contract. Richmond had been wearing the same "deficient" uniforms for many months without censure or complaint by Respondent. The company claims it was subjected to fines by GSA because guards failed to meet the contract's uniform requirements. Although Respondent received specific details of these failures, none were introduced into evidence. Respondent, through its counsel's questions during hearing, elicited unspecific testimony about these fines; not one deficiency in any Charging Party's uniform was mentioned as being included in these reports. The failure of Respondent to elicit this testimony or produce the documentary evidence it received from the government, which was solely within its control, requires the drawing of an adverse inference. As the court stated in *Auto Workers v. NLRB*, 459 F.2d 1329 at 1336 (1972):

Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. As Professor Wigmore has said:

"* * * The failure to bring before the tribunal some circumstances, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted." [2 J. Wigmore, *Evidence* § 285 (3d ed. 1940).]

As the court noted in *Northern Railway Co. v. Page*, 274 U.S. 65, 74, 47 S.Ct. 491, 71 L.Ed. 929 (1927):

[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause.

The failure of General Counsel to subpoena or introduce the evidence in no way diminishes the impact of the adverse inference rule. See *Auto Workers v. NLRB*, supra at 1338. This adverse inference is buttressed by Bennett's instruction to Green that he had a blank check to eliminate the uniform deficiencies, an acknowledgment of company causation of at least some if not all of the difficulties. The use of pretext in discharging known union adherents strongly suggests that the reasons are

advanced to mask unlawful conduct. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). This is particularly true here where Green announced his antiunion position and engaged in the coercive actions detailed above. As previously noted, it was not until after the Charging Parties were disciplined that the issue of the supervisory duties of FPO's was clarified.

As indicated above, Bennett tried to retain employees, even where there were personality conflicts. Examples that Respondent practiced this philosophy include treatment of several former employees who were given a series of written warnings before they were terminated. Respondent failed to clearly explain why this apparently standard procedure was not followed with the Charging Parties. Disparate treatment and deviation from established disciplinary methods are also indications of unlawful motive.

The Company noted that it was preparing for a notorious trial involving prison gang members of La Nuestra Familia, where death threats were made to Government personnel including U.S. district court judges and employees of the office of the United States Attorney. The dates of these events were not introduced into evidence. Respondent, in its brief, indicates the trial was during the fall of 1981, well before the events here under consideration. Assuming Respondent's brief to contain an inadvertent error, Respondent still failed to show that the trial was occurring at or around the time the Charging Parties were disciplined. Further, even assuming such an event, there was no showing that the Charging Parties were receiving training to meet new exigencies caused by this trial; rather, they were quizzed, not instructed, and their failures in knowledge not shown to be subjects of training, rather they were given as the basis for discipline. This more rigorous current or postponed testing and enforcement of uniform requirements immediately after the commencement of organizing activity in a manner which deviated from the pattern of discipline established for other employees is another indication of discriminatory motive. *Upland Freight Lines*, 209 NLRB 165 (1974), enfd. 527 F.2d 766 (7th Cir. 1976); *Keller Mfg. Co.*, 237 NLRB 712 (1978). Also relevant in determining motivation is the Employer's use of a multiplicity of alleged reasons for disciplinary actions and the belated explanation of the prison gang trial and hiring of replacements, which are familiar signposts of discriminatory intent. See *La-Z-Boy Tennessee*, 237 NLRB 1255 (1977); *NLRB v. Superior Sales, Inc.*, 366 F.2d 229 (8th Cir. 1966).

That Respondent did not discipline all employees who attended the union organizing meeting does not alter the findings made herein. A discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar actions against all union adherents. *NLRB v. W. C. Nabors Co.*, 196 F.2d 272 (5th Cir. 1952), cert. denied 344 U.S. 865 (1952).

Many of the bases stated by Green in the notices were valid grounds for discipline and are admitted rule infractions. For example, both Goebel and Richmond had tape recorders at work, contrary to established policies. Respondent had a memorandum entitled "Standards of

Conduct and Personal Appearance on Duty." The uncontroverted credited evidence demonstrates that the Charging Parties never saw the document. Even if the Charging Parties had such knowledge, there was no warning that such violations would result in disciplinary action or, based on company records dealing with other employees, were such serious infractions as to warrant deviation from the normal practice of issuing a series of written warnings. Further, the requirements of the contract were never clearly shown to the Charging Parties; in fact, there is denied credited testimony that Green instructed the employees not to read the contract.

Having found that the employees were unlawfully disciplined in violation of Section 8(a)(3) and (1) of the Act, the next issue is to determine the nature of the discipline. It should be noted that suspension for proscribed reasons is also unlawful. *Detroit Plaza Hotel*, 267 NLRB 1030 (1983).

Perry and Richmond were constructively discharged. As found in *Crystal Princeton Refining Co.*, 222 NLRB 1068 at 1069 (1976):

There are two elements which must be proven to establish a "constructive discharge." First, the burden imposed upon the employee must cause, and be intended to cause a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. [Accord: *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268 (10th Cir. 1979), denying enf. in part to 229 NLRB 781 (1977); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490 (4th Cir. 1972), and cases cited therein at 494.]

Transferring to a less desirable job and reducing work hours meets this criteria. See *Crystal Princeton Refining Co.*, supra.⁴ Richmond was suspended on November 3, 1982, until November 18, 1982. Richmond contacted Green on November 18 and was told he was not going to be assigned full-time work in Sacramento County and was assigned only 1 day's work in Modesto, a community located about 50 miles south of Sacramento. Richmond called Bennett for work once, and left a message he called with Bennett's secretary. Bennett never returned the call. He did not claim the message was not received. There was no explanation why, when Bennett did not return the call, Richmond filed a complaint with the State of California Consumer Services Agency, Department of Fair Employment and Housing wherein he asserted, under oath, that he was discharged because of

⁴ See also *Production Plated Plastics*, 247 NLRB 595 (1980); *Production Stamping*, 239 NLRB 1183 (1979); *Dumas Bros. Mfg.*, 205 NLRB 919 (1973), enf. 495 F.2d 1371 (5th Cir. 1974); *Razco, Inc.*, 231 NLRB 660 (1977). See also *Sullivan Transfer Co.*, 248 NLRB 909 (1980) (reduction in work hours constituting constructive discharge); *Coating Products, Inc.*, 251 NLRB 1271 (1980); *Maywood, Inc.*, 251 NLRB 979 (1980). But see *Dillingham Marine & Mfg. Co.*, 239 NLRB 904 (1978) (refusal to allow employee to change shifts not constructive discharge); *KDEN Broadcasting Co.*, 225 NLRB 25 (1976) (change in employee hours not constructive discharge); *Coliseum Hospital*, 202 NLRB 927 (1973) (reduction in employee hours not constructive discharge); *H. A. Kuhle Co.*, 205 NLRB 88 (1973) (assigning additional duties not constructive discharge).

sex discrimination. This allegation, which was dismissed for lack of evidence, is not probative. There is no showing that this may not have been an incidental motive, a disingenuously held belief, or an otherwise binding assertion. Richmond also filed a charge with the Board. Respondent did send Richmond a letter it claims offers reinstatement. The issue of the validity of the reinstatement offer is left to resolution at the compliance stage of this proceeding.

Perry was ostensibly suspended on November 8, 1982, and was asked to contact Green on November 22, 1982, for his work schedule. He complied with the notice and was not assigned work. He was told there were no openings. These actions are found to be constructive discharges. As noted, the Company, immediately after Perry and Richmond were "suspended," hired replacements. There was no showing that Respondent had any plan to return either Perry or Richmond to the same or similar employment at the end of their respective suspensions. On the contrary, it admittedly took actions which resulted in having little if any work to assign Perry or Richmond.

Goebel was discharged. Although Green told him he was to be transferred to sister company, that company, Carlson Security, was ignorant of Green's actions and, after giving Goebel a job application, failed to hire him. There was no contention that a new job application was necessary to effect a transfer. Rather, the facts indicate, as was the case with the other Charging Parties, that the asserted transfers was a pretext. This finding is supported by the notice of action Green prepared which referred to the discipline as termination of employment. Goebel never received a copy of this notice. Since the action came shortly after Green told Goebel that he had supervisory potential and then after organizing activity commenced, interrogated him, told him to keep away from the troublemakers and, the day before his termination, reduced his work hours, which in itself is violative of Section 8(a)(3) of the Act. See *Sullivan Transfer Co.*, supra, 248 NLRB 909 (1980). The question of when and if the Charging Parties were validly offered reinstatement is left to the compliance stage of this proceeding. That such offers may have been made does not obviate the need to consider the merits of the allegations contained in the complaint. *NLRB v. Raytheon Co.*, 398 U.S. 25, 25-29 (1970); *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1980). Offers of reinstatement "are matters which are properly left to be considered at the compliance stage of the proceeding." *Modesti Brothers, Inc.*, 255 NLRB 911 fn. 1 (1981).

Respondent's violations of Section 8(a)(1) of the Act, discussed in detail above, cojoined with the previously described changes in supervisory technique, including quizzes and tests where "no prior instruction was given," support a conclusion that these behaviors were designed to create and document causes for discharging the Charging Parties, with discriminatory intent, in violation of Section 8(a)(3) of the Act. See *Florida Steel Corp. v. NLRB*, 529 F.2d 1225 (5th Cir. 1976); *National Type Corp.*, 187 NLRB 321 (1971).

Respondent's evidence fails to establish that the Charging Parties would have been fired even if they had not engaged in union organizing activity. For example, the disparate treatment was not clearly justified. The lack of training and failure to furnish the requisite equipment were factors not shown to be attributable to the discriminatees. The undisputed evidence is that Green changed his supervision techniques and started quizzing known union supporters about job-related matters where there was no prior training. The employees' deficiencies in training and uniforms are undisputedly management-induced job failures. The changes in behavior immediately after the commencement of organizing activity indicates a nexus between such activity and the Employer's disciplinary actions. Those failures not attributable to training or lack of equipment were not shown to be sufficient under established disciplinary guidelines to warrant dismissal without prior warning of their seriousness or the probable consequences of several written warnings in an attempt to retain experienced personnel. Accordingly, Respondent has failed to meet its burden of proof by showing by a preponderance of the evidence that the Charging Parties would have been fired absent the union organizing activity.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

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 within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by:
 - a. Coercively interrogating employees concerning their union activities and desires and the union activities of other employees.
 - b. Coercively threatening employees with discharge or other dire consequences because of their union activities.
 - c. Telling employees they are not permitted to talk about the Union on the job or that they could not hold meetings without first consulting a supervisor.
 - d. Prohibiting employees from engaging in any union organization activities during working hours.
 - e. Coercively soliciting grievances.
4. By discharging Raymond P. Richmond, Darrel L. Perry, and Scott Goebel, and refusing to reinstate them, because of their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

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

REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent will be required to offer Raymond P. Richmond, Darrel L. Perry, and Scott Goebel immediate and full reinstatement to their jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Additionally, Respondent shall make them whole for any loss of earnings suffered as a result of the discrimination against them by payment to them of sums of money equal to that which they normally would have earned as wages from the date of their discharges to the date of said offers of reinstatement, less net earnings during such period. Backpay is to be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Based on the foregoing findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended⁵

ORDER

The Respondent, Nor-Cal Security, a Division of Master Security Services, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Interrogating employees about their own and other employees' union membership, activities, and desires.
 - (b) Threatening employees with discharge or other dire consequences because of their union activities.
 - (c) Telling employees they are not permitted to talk about the Union on the job or that they could not hold organizing meetings without first consulting a supervisor.
 - (d) Prohibiting employees from engaging in any union organizing activities during working hours.
 - (e) Coercively soliciting grievances.
 - (f) Discharging employees because of their union organizing activities.
 - (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Offer Raymond P. Richmond, Darrel L. Perry, and Scott Goebel immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substan-

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole Raymond P. Richmond, Darrel L. Perry, and Scott Goebel for any loss of earnings suffered by them as a result of the discrimination against them in the manner set forth in the section of this decision entitled, "The Remedy."

(c) Expunge from its records and files any and all references to the unlawful discharges of employees Richmond, Perry, and Goebel and, further, notify said employees, in writing, that this has been done and that evidence of the discharges or the failure to cooperate in the investigation will not be used as a basis for future personnel action against them. 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 back-pay due under the terms of this Order.

(d) Post at its Sacramento, California facilities copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁶ 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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT question our employees about their or other employees' union activities or desires.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT tell our employees they are not permitted to talk about the Union on the job or that they could not hold organizing meetings without first consulting a supervisor.

WE WILL NOT prohibit employees from engaging in any union organizing activities during working hours.

WE WILL NOT coercively solicit grievances from our employees.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Raymond P. Richmond, Darrel L. Perry, and Scott Goebel full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL reimburse Raymond P. Richmond, Darrel L. Perry, and Scott Goebel for their loss of wages and other benefits suffered as a result of the discrimination against them, together with appropriate interest thereon.

WE WILL expunge and physically remove from our records and files any references to be the unlawful discharges of Raymond P. Richmond, Darrel L. Perry, and Scott Goebel and WE WILL notify those employees, in writing, that this has been done and that this material will not be used as a basis for future personnel action against them.

NOR-CAL SECURITY