

Lancer Corporation and International Union of Electrical Radio and Machine Workers, AFL-CIO. Cases 23-CA-8968, 23-CA-8969, 23-CA-8970, 23-CA-9035, and 23-RC-5080

31 August 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 10 June 1983 Administrative Law Judge Hutton S. Brandon issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ as modified below and to adopt the recommended Order as modified.

1. The judge recommended dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Charles Pfeiffer on 31 August 1982. The Respondent admitted its knowledge of Pfeiffer's union activity, and the judge found that the General Coun-

¹ The General Counsel and the Charging Party have 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Member Hunter notes that no exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees regarding their own and other employees' activities on behalf of the Union, creating the impression of surveillance, engaging in surveillance, threatening that organizing would be futile, and telling employees that rules would be more strictly enforced as a result of the employees' union activities. He adopts pro forma those findings. In so doing, he further notes that the hearing and the issuance of the judge's decision preceded the issuance of the Board's decision in *Rossmore House*, 269 NLRB 546 (1984).

³ The Respondent has correctly excepted that approximately three to four employees voted while employee Alice Camacho, who was wearing a union button, was in the polling area. This, however, does not disturb the judge's finding that Camacho's brief presence in the polling area was not disruptive and that she left when asked to do so.

In adopting the judge's recommendation that the Respondent's Objection 2 be overruled, Members Zimmerman and Dennis emphasize that the conduct in issue was of short duration and that "the *Milchem* strict rule . . . applies only where the objectionable conversations were prolonged . . ." *Boston Insulated Wire v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983).

The General Counsel argues that the Respondent's checking off of "VIOLATION OF RULES: . . . Misconduct" on employee Ramiro Avila's discharge notice as the reason for discharge conflicts with the judge's finding that the Respondent did not rely on any rule in discharging Avila. Avila, however, was discharged for sexual harassment, for which there is no specific rule in the Respondent's policy handbook. Thus, the Respondent's reference to a general rule against misconduct does not conflict with the judge's finding that the Respondent did not rely on a work rule in discharging Avila.

sel had established a prima facie case based on the union animus demonstrated by the Respondent's several other violations of the Act, including its announcement of a stricter enforcement of its rules. However, the judge found that Pfeiffer's refusal to answer questions at the discharge interview precluded him from finding that Pfeiffer would not have been discharged in the absence of his union activity. He therefore dismissed the allegation. We find merit to the General Counsel's and the Charging Party's exceptions to that finding.

Pfeiffer had been employed for approximately 16 months as a welder for the Respondent under the supervision of Robert Rodriguez. Having been employed for more than 1 year, he was entitled, pursuant to the Respondent's policy manual, to 5 days of paid sick leave. The policy manual stated, "No sick leave will be paid any employee without written physician's approval, indicating the days out for sickness." However, the policy manual also provided, "If you are eligible for sick leave, you may use two of your sick leave days at your own discretion." These 2 days were denoted by the policy manual as "Employee Discretionary Days," and the employees were requested, but not required, to give 24-hour notice prior to using them. Also pertinent to this allegation, the policy manual further provided, "These *two* days will not require a doctor's note; however, to claim the remainder of your sick leave time, it will be necessary to submit a written physician's approval. When the above requirements (for Employee Discretionary Days) have been met, be sure it is noted on your time card." (Emphasis supplied.)

According to undisputed testimony, Pfeiffer on Friday, 27 August 1982, informed Supervisor Rodriguez that he had a doctor's appointment for a premarital examination on Monday, 30 August, and would be absent for the entire day. Rodriguez replied that this would be all right as long as Pfeiffer brought in a doctor's excuse when he returned. Pfeiffer kept his doctor's appointment. The doctor provided him with a "certificate to return to work or school" acknowledging the visit and noting that Pfeiffer was able to return to work on 30 August. The next day, Pfeiffer returned to work and gave the doctor's note to Rodriguez, who filled out one of the Respondent's absence reports showing that the absence was "excused" and the reason for it was a "blood test." Although the report included a checkoff space for "Illness-Self," this portion of the report was not checked.

Employee Relations Manager Jackie Smith claimed that when she was reviewing the absence report on 31 August she noticed a discrepancy between the doctor's excuse, which released Pfeiffer

to return to work on 30 August, and the absence report, which excused Pfeiffer for all of 30 August. Smith testified that it was the Respondent's practice to investigate alleged misconduct before disciplining an employee. Pursuant to this policy she called the doctor's office, which confirmed that Pfeiffer had been there for a premarital appointment at approximately 11:30 a.m. on 30 August, and had been released to return to work that date. She did not ask at what time Pfeiffer had left the doctor's office. Neither did she check with Rodriguez about the circumstances of Pfeiffer's absence or his approval of it. According to her own testimony, she then decided to discharge Pfeiffer for fraudulently seeking sick pay and summoned Pfeiffer to her office to inform him of her decision. When Rodriguez brought Pfeiffer to Smith's office, Smith said she wanted to ask Pfeiffer some questions, but Pfeiffer refused to answer.⁴ Smith then wrote out his discharge papers.

At the hearing, Smith admitted that she was not aware that Pfeiffer had given a 24-hour prior notice of his 30 August absence before she decided to discharge him. However, she explained that this knowledge would not have made any difference in her decision—that, in her view, Pfeiffer was fraudulently attempting to receive nondiscretionary sick leave pay for that part of the workday that remained after his release from the doctor's office.

The judge found that, although a prima facie case had been established, Pfeiffer's refusal to answer questions at his discharge interview precluded a finding that his discharge was motivated by his union activity. He reasoned that, according to the information available to Smith, it appeared that Pfeiffer was making a fraudulent claim. Pfeiffer did not refute this at the interview and, therefore, a clear, nonunion-related basis existed for discharging Pfeiffer.

We disagree. According to Smith's own testimony, she decided to discharge Pfeiffer before the interview began. Further, the Respondent does not contend that Pfeiffer's refusal to answer the questions contributed to the decision to discharge him. In these circumstances, Pfeiffer's refusal to answer questions at the interview has no bearing on the Respondent's motivation for discharging him. Consequently, the judge erred in relying on that factor to conclude that the Respondent did not unlawfully discharge Pfeiffer. Instead, we must analyze the Respondent's actions prior to the discharge inter-

view to determine the motive for Pfeiffer's discharge.

Smith, on reviewing the doctor's note and absence report, called the doctor's office to confirm that Pfeiffer had kept his appointment and had been released to return to work that date. She took no further investigatory action before making her decision to discharge Pfeiffer. She did not check with Pfeiffer's supervisor, who approved the absence. According to her testimony, she did not even ask the doctor's office what time Pfeiffer had left although this certainly would have been relevant in determining how much, if any, of the workday remained at the time of his departure. It is well settled that an employer's failure to conduct a meaningful investigation of an employee's alleged misconduct may, in certain circumstances, indicate a discriminatory motivation. This is all the more true when the employer's practice, as Smith admits it was here, is to conduct such an investigation before taking disciplinary action.⁵ Smith's investigation was, at best, perfunctory: a facial review of the doctor's note and the absence slip and a call to the doctor's office. This minimal action in connection with a decision not merely to discipline but to terminate an employee gives rise to the inference that the Respondent's motive was to rid itself of a union adherent rather than to guard against the misuse of sick leave.

The inference of unlawful motivation is strengthened by Smith's failure to consult with Pfeiffer's immediate supervisor Rodriguez. In appropriate circumstances, the Board has regarded an employer's failure to consult with the immediate supervisor who is the most accurate source of pertinent information as evidence of discriminatory motivation.⁶ Here, Smith admits that she never questioned Rodriguez about Pfeiffer's doctor's note or absence report despite the fact that she could tell that Rodriguez had not understood the contents of the doctor's note from the way he filled out the absence report. Rodriguez' error in this regard threw the accuracy of his report into question. Yet Smith did not even make a phone call to Rodriguez. She simply decided to discharge Pfeiffer on the basis of the meager information before her.

Smith's failure to consult Rodriguez is particularly suspicious in light of the Respondent's policy of allowing 2 days of sick leave without substantiation. Under the Respondent's policy handbook, employees with Pfeiffer's amount of seniority have 5

⁴ The judge did not make a credibility resolution of the conflicting testimony on the reason Pfeiffer did not answer Smith's questions. According to Pfeiffer, he objected to the absence of his own witness. According to Smith, Pfeiffer objected to the presence of Rodriguez and Night Manager Edward Netherton as witnesses.

⁵ See, e.g., *Tekform Products Co.*, 229 NLRB 733, 739 (1977).

⁶ See *Industry General Corp.*, 225 NLRB 1230, 1233 (1976), *enfd.* 564 F.2d 99 (6th Cir. 1977); *Midwest Hanger Co.*, 193 NLRB 616, 627 (1971), *enfd.* in pertinent part 474 F.2d 1155, 1159-1160 (8th Cir. 1973), *cert. denied* 414 U.S. 823 (1973).

days of sick leave—3 of which must be substantiated as actual “sick days” by a doctor’s verification and 2 of which at the employee’s discretion may be used without substantiation. If an employee chooses to use discretionary sick leave, he must give 24-hour advance notice, and the absence report should state that this notice was given. Smith claimed that there was no need to inquire whether Pfeiffer had given advance notice because it was clear from the absence report that Pfeiffer was not using discretionary sick leave, i.e., the report made reference to a doctor’s note and did not state that a 24-hour notice was given. Yet it was also clear from the absence report that Rodriguez had made an error with respect to the doctor’s note. Given the existence of two types of sick leave and a supervisor’s error in writing up an absence report, it appears that a reasonable investigation of the matter would require a consultation with the supervisor. The Respondent, however, did not take this obvious course and decided to discharge its employee on the basis of a superficial review of the document and a call to the doctor’s office. Further, had the Respondent followed its usual practice of investigating alleged misconduct and questioned Rodriguez, it would have found out that Pfeiffer had not engaged in any misconduct.

The Respondent’s perfunctory investigation of Pfeiffer’s claim for sick leave and its failure to consult his supervisor, coupled with the Respondent’s knowledge of Pfeiffer’s union activity and its attempts to thwart unionization by such unlawful acts as more strictly enforcing its work rules, compel the finding that it used the discrepancy between the doctor’s note and the absence report as an excuse to rid itself of the union adherent. Thus, the Respondent’s decision to discharge Pfeiffer before its interview with him and in the absence of a full investigation demonstrates that Pfeiffer’s failure, at the interview or otherwise, to refute the Respondent’s claim that he attempted to misuse sick leave played no part in the Respondent’s decision to discharge him. The evidence similarly establishes that the Respondent did not rely on any alleged misconduct by Pfeiffer in deciding to discharge him. It is consequently clear from the record that the Respondent must have relied solely on Pfeiffer’s union activity in deciding to discharge him. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Charles Pfeiffer on 31 August 1982.

2. In a 27 May employee meeting, the Respondent’s president George Schroeder stated that if the Union won the election the Respondent would be required to sit down at a negotiation table and would negotiate all benefits from scratch. It is un-

disputed that employee Robert Mickey then told Schroeder that he was incorrect, that the employees would not lose their benefits. Schroeder replied that he would rephrase his statement and told the employees that at the negotiation table everything would be subject to negotiation and that the benefits could either go up or down or stay the same. Schroeder then asked Mickey if that was an accurate statement, and Mickey agreed. Schroeder further asked the assembled employees if they understood the point and whether there were any questions about it. No employee responded.

The judge found that Schroeder’s initial statement conveyed the impression that employees would forfeit existing benefits if the Union won and was, therefore, unlawful. However, he found that Schroeder’s clarification immediately corrected any coercive effect of his original statement and, accordingly, dismissed the allegation.

We agree with the judge’s conclusion but not with his rationale. Schroeder’s statements must be considered in the context in which they occurred. They were part of the same speech and question-and-answer session. Thus, Schroeder’s first statement concerning bargaining from scratch must be viewed against the second statement concerning all benefits being subject to negotiation. In this context, we find that Schroeder did not give any employee the coercive impression that a union victory would result in the loss of existing benefits. On this basis, we find that the Respondent did not violate Section 8(a)(1) by Schroeder’s conduct at the 27 May meeting and, therefore, we adopt the judge’s dismissal of the allegation.⁷

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 4 and renumber the subsequent paragraphs.

“4. By discharging its employee Charles Pfeiffer because of his union activities the Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.”

2. Substitute the following for Conclusion of Law 6.

“6. The Respondent did not violate Section 8(a)(3) and (1) of the Act in suspending its employee Jill McDonald or in discharging its employees Pete Mascorro or Ramiro Avila.”

AMENDED REMEDY

In addition to the findings made by the judge, we have found that the Respondent has engaged in an unfair labor practice in violation of Section

⁷ See generally *Ludwig Motor Corp.*, 222 NLRB 635 (1976).

8(a)(3) and (1) of the Act. Accordingly, we shall order the Respondent to cease and desist therefrom, and to take certain affirmative action, in addition to that ordered by the judge, designed to effectuate the policies of the Act. Therefore, we shall order the Respondent to offer Charles Pfeiffer reinstatement to his former job or, if that job no longer exists, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges enjoyed by him. We shall additionally order that the Respondent make Charles Pfeiffer whole for any loss of earnings or other benefits he may have suffered as a result of his unlawful discharge. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Finally, we shall order the Respondent to remove from its personnel files all references to the discharge of Charles Pfeiffer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lancer Corporation, San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(f) and reletter the subsequent paragraph.

“(f) Discharging employees because of their union activities.”

2. Insert the following as paragraphs 2(a), (b), and (c), and reletter the subsequent paragraphs.

“(a) Offer Charles Pfeiffer 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 make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

“(b) Remove from its files any reference to the discharge of Charles Pfeiffer on 31 August 1981 and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used against him in any way.

“(c) 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.”

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

IT IS FURTHER ORDERED that the complaint is dismissed to the extent it alleges violations of the Act not specifically found here.

IT IS FURTHER ORDERED that Case 23-RC-5080 is remanded to the Regional Director for Region 23 and that the challenges to the ballots of Pete Mascorro and Ramiro Avila, which were cast in the 2 July 1982 representation election, are sustained, and that the Regional Director is directed to open and count the challenged ballot of John Hawkins and to prepare and serve on the parties a revised tally of ballots.

IT IS FURTHER ORDERED that, if the Petitioner receives a majority of valid votes cast, the Regional Director shall issue a certification of representative, but that if the Petitioner does not receive a majority of the valid votes cast, according to the revised tally, the election held on 2 July 1982 in the unit found appropriate is set aside and the Regional Director is directed to conduct a second election whenever he deems it to be appropriate.

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.

WE WILL NOT engage in surveillance of your activities in support of International Union of Electrical, Radio and Machine Workers, AFL-CIO, or any other labor organization.

WE WILL NOT create among you an impression that your activities on behalf of the above-named Union or any other labor organization are under surveillance.

WE WILL NOT tell you that we will not sign a contract with the above or any other labor organization should you select it to represent you in an appropriate unit.

WE WILL NOT threaten you that our rules will be more strictly enforced because of your activities on behalf of the Union or any other labor organization.

WE WILL NOT discharge you because of your union activities.

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

WE WILL remove from our files any reference to the 31 August 1981 discharge of Charles Pfeiffer and WE WILL notify him in writing that this has been done and that evidence of that discharge will not be used against him in any way.

LANCER CORPORATION

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was heard at San Antonio, Texas, on March 7 through 10, 1983. The charges in Cases 23-CA-8968, 23-CA-8969, and 23-CA-8970 were filed by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (the Union) on June 28, 1982.¹ The charge in Case 23-CA-9035 was filed by the Union on September 1. An order consolidating Cases 23-CA-8968, 23-CA-8969, and 23-CA-8970 and consolidated complaint and notice of hearing issued on September 13, alleging that Lancer Corporation (Respondent or the Company), independently violated Section 8(a)(1) of the National Labor Relations Act (the Act), through various actions and remarks, and violated Section 8(a)(3) and (1) of the Act with respect to the 3-day suspension of its employee Jill McDonald and the discharge of its employees Pete Mascorro and Ramiro Avila. Case 23-CA-9035 was consolidated for hearing with the prior cases by an order consolidating cases and amended consolidated complaint and notice of hearing dated October 14, and adding, in effect, the allegation that Respondent violated Section 8(a)(3) and (1) of the Act through the discharge of its employee Charles Andrew Pfeiffer on August 31. The issues presented by the consolidated complaint, as amended, are whether Respondent independently violated Section 8(a)(1) of the Act by the various actions of its agents as specified in the complaint, and whether Respondent's actions with respect to the employees named in the complaint were based upon their involvement with, or activity on behalf of, the Union. Respondent filed timely answers to the consolidated complaints denying the violations of the Act attributed to it.

The Union also filed a representation petition in Case 23-RC-5080 on May 27. Pursuant to a Stipulation for Certification Upon Consent Election approved on June 7, an election by secret ballot was conducted on July 2 in an appropriate unit of Respondent's employees. Three ballots were challenged, including those of Ramiro Avila and Pete Mascorro, who are named as alleged discrimi-

atees in the consolidated complaints noted above. The challenge to the third ballot, that of John Hawkins, was based upon his alleged supervisory status. Both the Company and the Union filed timely objections to the election on July 9 and July 12, respectively. On September 13, the Regional Director for Region 23 of the National Labor Relations Board (the Board), concluding that the issues with respect to challenges and objections of the Company and the Union could be best resolved on the basis of the record testimony, particularly where the allegations of the outstanding consolidated complaint were coextensive with the Union's objections, issued an order directing hearing, and consolidating Case 23-RC-5080 with the outstanding unfair labor practices cases for hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The consolidated complaint, as amended, alleges, and Respondent by its answer admits, that Respondent is a Texas corporation with offices in San Antonio, Texas, where it is engaged in the manufacture of beverage equipment. It is further alleged, and Respondent also admits, that during the 12 months preceding issuance of the complaint Respondent, in the course and conduct of its business operations, purchased products, goods, and materials valued in excess of \$50,000 directly from firms located outside the State of Texas, and that such products, goods, and materials, were shipped directly to Respondent at its San Antonio, Texas facility. The complaint concludes, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits the additional complaint allegation that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The uncontradicted testimony of Eddie Felan, an International representative of the Union, establishes that the Union began its organizing campaign at Respondent's place of business on April 8 by conducting a meeting at a local motel attended by Respondent's employees Jill McDonald, Robert Mickey, and Charles Pfeiffer. Because Felan was preoccupied with other out-of town-business, his direct attention to the organizational effort was delayed for approximately 2 weeks. Accordingly, sometime after April 22, Felan conducted additional employee meetings and held some 12 additional meetings between April 22 and the election on July 2. At some point in time not specified by the record, Felan established an in-plant committee consisting, he claimed, of Mickey, McDonald, Pfeiffer, Ramiro Avila, Pete Mas-

¹ All dates are in 1982 unless otherwise indicated.

corro, and certain others who were unnamed to solicit employees' signatures on authorization cards.² Felan said that he began meeting with these employees on a daily basis in addition to the general employee meetings earlier referred to. No contention was made by Felan that Respondent was advised of the identity of any of the employees on the committee. While several of the employee witnesses presented by the General Counsel herein testified that they had signed union cards, the dates of such signings were not established. However, according to the uncontradicted testimony of Jill McDonald,³ the Union did not begin to pass out union authorization cards until May 18. Respondent, through its president George Schroeder, admitted that it was aware of the Union's organizing drive and that authorization cards were being signed by employees some 2 or 3 weeks prior to Respondent's initial overt reaction to the organizing drive in a speech by Schroeder to assembled employees about May 27.

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

1. By George Schroeder

To support a complaint allegation that Schroeder on May 27 told employees that, if the Union came in, all benefits would have to be negotiated from scratch, employee Frank Wiggins testified that, in a speech about the Union to the first- and second-shift employees in the lunchroom, Schroeder stated "something about negotiations" and "that all benefits were going to start from scratch." In corroboration, former employee Robert Mickey testified that Schroeder "tried to tell everyone that when the Union came in that we would have to start from scratch." Similarly, employee Alice Camacho testified that Schroeder said, if a union came in, they would have to negotiate everything from scratch. Lastly, employee Pfeiffer also related that he heard Schroeder make the statement at a meeting that, if the Union came in and Respondent had to negotiate, it would start from scratch, and all the employee benefits would be taken away and employees would start over completely from scratch.⁴

Schroeder in testifying for Respondent acknowledged that he gave a speech to employees on May 27, and that following the speech he responded to questions from employees about what would happen if the Union won the election. To one question, Schroeder answered that Respondent would be required to sit down at a negotiating table and would negotiate all benefits from scratch. At that point, Mickey raised his hand, Schroeder acknowl-

edged him, and Mickey stated that what Schroeder had said was incorrect, that the employees would not lose their benefits. In response to Mickey's assertion, Schroeder replied that he would rephrase it. He testified that he then said that at the negotiation table everything would be subject to negotiation and the benefits could either go up or down or stay the same. Schroeder then asked Mickey if that was an accurate representation of what happened at negotiations, and Mickey agreed. Schroeder then turned back to the other employees and asked if they understood that point and whether there were any questions relative to it. The record shows no specific response by the other employees. Schroeder's version of his correction by Mickey was substantiated in Mickey's cross-examination.

The General Counsel and the Charging Party contend that Schroeder's statement that all benefits would have to be negotiated from scratch constituted a violation of Section 8(a)(1) of the Act. Under Board law, an employer's statement that employees would have to bargain from "scratch" if they selected the union to represent them interferes with employees' Section 7 rights in violation of Section 8(a)(1) where it conveys the impression that the employer will require the union to give up existing employee benefits. See, e.g., *Zero Corp.*, 262 NLRB 495 (1982). Thus, Schroeder's statement to the employees in its unclarified form clearly conveyed the unlawful impression. However, Schroeder was immediately corrected by Mickey and then lawfully, and correctly, explained that as a result of collective-bargaining employees could gain benefits, lose benefits, or they could remain the same. In view of this immediate clarification directed to the same audience which heard the first remark, I can perceive no basis for concluding that employees were left with the improper conclusion that they would necessarily lose existing benefits simply because they could choose to have the Union represent them. The General Counsel, citing *Intertherm, Inc.*, 235 NLRB 693 (1978), argues that Respondent's subsequent unfair labor practices vitiated any neutralizing effect of Schroeder's clarification prompted by Mickey. In the cited case, an employer's subsequent repudiation of a supervisor's unlawful interrogation was found to be vitiated by the employer's later unfair labor practices. The instant case is distinguishable, I conclude, because the coercive aspect of Schroeder's remark was immediately corrected. Any subsequent unfair labor practices by Respondent found herein do not affect correction of the misrepresentation or the misinformation which tended to make Schroeder's original remark coercive.

Schroeder's remark is more analogous to unlawful interrogation which has been immediately withdrawn prior to any response. The Board has held that such interrogation is not unlawful where the interrogation was immediately withdrawn, and the evidence reflected that a response was not expected. *Wesco Electrical Co.*, 232 NLRB 479, 482 (1977). Here, Schroeder was challenged regarding his remark, and the remark was corrected eliminating the basis for any finding of any lingering coercive effects. Accordingly, I find no violation of Sec-

² Mascorro in his testimony indicated he was unaware of his appointment to an "in-plant" committee.

³ McDonald, an alleged discriminatee herein, subsequent to the alleged unfair labor practices, married Charles Pfeiffer, another alleged discriminatee herein. She is referred to herein by her maiden name.

⁴ Pfeiffer was unclear as to the month in which Schroeder's speech took place and finally asserted that it took place on June 6. In the absence of other evidence establishing a second speech by Schroeder and because the May 27 speech of Schroeder was directed to the first shift on which Pfeiffer worked, I conclude that Pfeiffer was in error with respect to the June 6 date, and that he was referring instead to the May 27 speech.

tion 8(a)(1) of the Act in Schroeder's May 27 remark concerning bargaining.

The General Counsel argues, and the complaint alleges, that in the latter part of June 1982 Schroeder promised employees a wage increase, and on July 5 granted a wage increase, all in violation of Section 8(a)(1) of the Act. Schroeder admitted in his testimony that the question was raised sometime prior to the election as to the way the Union's election affected wage increases. Schroeder testified that he responded to that question stating that the law required them to do exactly as they had done in the past relative to all employee benefits, and their normal policy was that in January and July Respondent gave wage increases. Schroeder stated that Respondent would continue to do the same thing they had always done. Schroeder testified that Respondent had consistently given wage increases in January and July, except that in 1982, because of economic conditions, the first wage increase was given in February rather than in January. Schroeder contended that Respondent had followed this practice of giving wage increases in January and July for the past 5 or more years. Schroeder's testimony in the foregoing respects was substantiated by employees Raul Herrera and Grace Hernandez. The parties stipulated herein that Respondent did in fact grant a wage increase to its employees on July 5.

Board cases establish that an employer, when confronted by a union organizing campaign, must proceed as it would have done with respect to wage increases had the union not been conducting its campaign. *KDEN Broadcasting Co.*, 225 NLRB 25 (1976); *Russell Stover Candies*, 221 NLRB 441 (1975). Here, Respondent's July 5 wage increase was consistent with its prior practice. Had Respondent not granted the wage increase, it could well have been found in violation of Section 8(a)(3) and (1) of the Act because it would have been a departure from prior practice and, in the absence of some valid explanation, inferentially designed to discourage employees in their union activity. *KDEN Broadcasting Co.*, supra. Accordingly, because the timing of the wage increase in the instant case was consistent with prior practice, I find that Schroeder's remarks about the wage increase were not an unlawful promise of benefits designed to thwart employees in their union activity. Likewise, and again because of the undisputed evidence regarding the prior practice, I find Respondent did not violate Section 8(a)(1) of the Act in the actual granting of the wage increase as alleged in the complaint.

2. By John Day, tubing department supervisor

The complaint alleges that Day interrogated an employee regarding whether the employee had signed a union authorization card. In support of this allegation, McDonald testified that around June 1 she was approached during the late afternoon at her work station by John Day, who was her supervisor at the time. Day discussed with McDonald the antiunion meeting Respondent had held and asked her questions. Then Day asked her if she had signed an authorization card for the Union. McDonald answered affirmatively and Day turned and walked away.

Day, in his testimony for Respondent, denied that he had ever asked McDonald if she had signed a union card or how she felt about the Union. Day, who claimed that he had previously been a member of the United Steelworkers of America and a shop steward at a previous place of employment, conceded he had suspicions about McDonald's union inclinations due to the fact that she frequently, and to a greater extent than other employees in his department, asked Day questions about the Union.

Determination of whether Day violated the Act here depends, of course, upon whether he or McDonald is believed. I have carefully considered the testimony of both in light of the entire record as well as their respective demeanor in testifying. Day appeared completely at ease in testifying and did so in a calm and deliberate manner. He appeared to be straightforward and very candid. On the other hand, McDonald's testimony lacked detail of the context in which the alleged unlawful question had been propounded. Moreover, as an alleged discriminatee in this case, McDonald's testimony could not be considered entirely unbiased. McDonald impressed me as less forthright, less sincere, and more inclined to color her testimony to suit her own interest. It is significant that no other unlawful independent acts of restraint or coercion were attributed to Day by any other employee. Accordingly, I find Day more credible than McDonald and conclude that he did not question her about her union authorization card as she claimed. Accordingly, I find Respondent did not violate Section 8(a)(1) of the Act through Day as alleged.

3. By Johnny Hernandez, dispenser line supervisor

The complaint attributes a number of 8(a)(1) violations by Hernandez from the period of June 4 through 18. Initially in this regard, it is alleged that on June 4 Hernandez surveilled employees' union activities. Evidence to support this allegation was found in the testimony of Union Representative Felan and employees McDonald and Pfeiffer. Thus, Felan testified that he met with a group of employees almost daily behind the Lone Star Ice Store a short distance from Respondent's plant. At such a meeting with employees McDonald, Pfeiffer, and Mickey around June 4, McDonald pointed out Hernandez with an employee identified as Sharon Stubblefield parked in a truck in an alleyway beside the Lone Star Ice Store and at a point where the meeting between Felan and the three employees could be observed. Felan continued his meeting with the employees for about 10 minutes after Hernandez had been spotted. Felan's testimony was supported by that of McDonald and Pfeiffer. McDonald, however, added that she had seen Hernandez parked out in front of the store on other occasions drinking beer and conceded that Hernandez used to go to the ice store on a regular basis. However, she claimed she had never previously seen him parked to the side of the store in the alleyway where he could observe the employees meeting with Felan.

Hernandez testified that he went to the Lone Star Ice Store almost daily to drink beer. He testified on direct examination that on June 4 he had seen McDonald and three other employees at the Lone Star Ice Store talking

to a gentleman he did not know. He said he observed them while sitting on a retaining wall by the alleyway drinking beer. On cross-examination, he conceded that on another occasion he had been with Sharon Stubblefield parked in his truck in the alley. Hernandez denied that he had gone to the store to spy on employees, and explained he parked in the alley because Stubblefield did not want anyone else to see her.

The evidence clearly shows that Hernandez' presence at the Lone Star Ice Store was not unusual. Thus, and also because the "union meeting" which was taking place there on June 4 was not an especially called one likely to draw special attention, it could not be inferred that Hernandez had an unlawful purpose in visiting the store's premises on June 4. However, his choice of a parking location in a semihidden area from which the employees meeting with Felan could be observed, absent a credible explanation, warrants the inference that Hernandez had more than drinking beer on his mind. In this instance, I do not accept Hernandez' explanation of his presence at that particular location. That Stubblefield did not wish to be seen with Hernandez is perhaps understandable in view of the fact that Hernandez was married at the time. An additional reason for discreteness is found in the fact Respondent maintained a rule publicized to its employees in its policy handbook which prohibited supervisors from "dating" employees. However, if these were real considerations, it does not explain why Hernandez parked in a place where employees could nevertheless see both him and Stubblefield, and even remain there for 10 minutes. Moreover, that Hernandez by his own admission had watched from the same alley employees meeting with Felan on a prior occasion demonstrates that his presence was not purely happenstance. Finally, additional testimony credited infra reveals Hernandez' interest in identifying union supporters. Accordingly, while Hernandez' presence at the store may have been explained, his presence in the alley from where the employees meeting with Felan could be observed has not, in my opinion, been credibly explained. I conclude that Hernandez' presence was not coincidental and was, in fact, designed to interfere with employees' union activity. I therefore find that Hernandez unlawfully surveilled employees in their union activity as alleged in the complaint.

Other unlawful conduct by Hernandez was alleged in the complaint and supported by the testimony of Ramiro Avila, an alleged discriminatee herein, and Grace Hernandez. Employee Hernandez related that Supervisor Hernandez told her on June 5 as she was clocking out that the employees were doing everything wrong about the Union. When Hernandez inquired as to what he meant by that, he replied that "we" know who the Union is, and "we" know who the Union is not. Moreover, he told employee Hernandez that she should not be hanging around in the disconnect department because management knew that the department was really "gung ho" for the Union, and it did not look good for her. Further, he cautioned her about being seen with Mickey, McDonald, and Pfeiffer.

Hernandez in his testimony did not specifically deny the testimony of Grace Hernandez. Grace Hernandez impressed me as honest, and she is credited. The General

Counsel relied upon her testimony to establish the complaint allegation that on June 5 Hernandez created the impression of surveillance of union activity. I find Hernandez violated Section 8(a)(1) as alleged in his remarks to Grace Hernandez.

Avila testified that in early June, he was talking to two employees about a leaflet Respondent had put out to the effect that if the Union came in and there was a layoff, the ones organizing the Union would be the last to be laid off. While Avila's testimony on the point is not a paragon of clarity, it appears that Avila attempted to oppose Respondent's assertion in its leaflet. According to Avila, Supervisor Hernandez came by and told the employees not to believe Avila and that employees who went in the Union would be the first ones to be laid off.

Hernandez did not respond specifically to the foregoing testimony of Avila. He did, however, deny telling Avila or any other employee that they would be laid off if the Union came in. Because Avila was clearly confused and his testimony was contradictory regarding the leaflet and Hernandez' remarks, and because his testimony on the matter was elicited largely through leading questions, I do not credit Avila regarding the remarks attributed to Hernandez. Accordingly, I find no violations of the Act based on such remarks.

Avila further testified, however, that he had another exchange with Hernandez a week or 2 later on a Friday. It was the morning after a union meeting and, as Avila was coming up the ramp to the dock at the plant, Hernandez remarked that Avila looked like he had a real bad hangover. Avila inquired what he meant, and Hernandez started laughing and asked Avila if there had been a lot of beer out there at the union meeting the night before, and did he eat a lot of tamales. Avila did not respond. Hernandez then added that he was glad he did not have to have anybody buying him his beer, especially the Union, and he would not want them to buy him any beer or give him tamales. That afternoon Hernandez, Avila testified, approached him and asked him what the meeting was about. When Avila said he could not disclose that, Hernandez asked if Avila had already signed a card. Avila admitted that he had.

Hernandez in his testimony recalled that one morning he had asked Avila if he had had too much to drink the night before because he was lagging in his work. Avila responded that he had been drinking the night before. Hernandez specifically denied that he asked Avila whether he had gone to a union meeting, and denied asking him whether he had signed a union authorization card.

In this instance, I credit Avila whose recall on the point appeared more certain. I find Hernandez' denials unconvincing. Further, Hernandez' explanation of his remarks to Avila appears to be less complete and more likely contrived. Avila's claim that Hernandez' remark took place as he was coming to work puts the remarks in a context more believable than Hernandez' claim that his remarks were made during the course of the workday. There was no evidence that the meeting which Avila attended was generally announced or publicized so that Hernandez could have had a legitimate basis for knowing

about the meeting. Certainly, there was no publication regarding the serving of beer or tamales at the meeting. Under these circumstances, the remarks attributed to Hernandez by Avila clearly created the impression that Hernandez' information had been surreptitiously obtained. Accordingly, I conclude, as the complaint alleges, that Hernandez created the impression of surveillance through his remarks to Avila. Further, still crediting Avila over Hernandez, I find as established the additional complaint allegation that Hernandez unlawfully interrogated Avila about the meeting and his signing of a union card. In context, and notwithstanding Avila's truthful answers to Hernandez, Hernandez' questions had a clear tendency to restrain and coerce employees in their union activity particularly where, as here, no legitimate reasons were provided for the questions and the employees were given no assurances against reprisals.

4. By Jim May, second shift plant manager

Three employees attributed a number of coercive remarks and questions to Jim May which are alleged as violations of Section 8(a)(1) of the Act in the complaint. Employee Raul Herrera testified that on June 16 May took Herrera to the dining area where he talked with him about the Union and reasons why Herrera should not vote for the Union. According to Herrera, May asserted that George Schroeder did not plan to sign a union contract because it was not good for the Company or the employees. Similarly, employee Alice Camacho testified that she had a conversation with May in the conference room where May had taken her to talk about the Union, and May told her that Schroeder had already said he was not going to sign a union contract.

Raul Herrera further testified that on May 17 May approached him at his machine and began a conversation talking about work, but then stated he was not supposed to ask, but nevertheless asked, whether Herrera was for or against the Union. Herrera said he had not made up his mind yet, to which May responded with the question of whether Herrera had signed a card. Herrera stated that he had, but he still did not know which way he was "going."

Employee Frank Wiggins testified that he also had been taken to the lunchroom on June 16 where May talked to him about the Union and Respondent's opposition to the Union. The following day, according to Wiggins, as in the case of Herrera, May came back to Wiggins' area and asked him what he thought about the Union. Wiggins gave an equivocal response, and May then asked him if he had signed a union card, to which Wiggins responded that he did not want to tell May, that he did not think it was any of May's business.

The complaint alleges another incident of unlawful interrogation by May on June 22. This allegation is apparently premised upon Raul Herrera's testimony concerning further interrogation by May which he placed as occurring on June 28. According to Herrera, on that occasion May came back to his work station and asked him if he had made up his mind which way he was going. Herrera replied that he had not.

Finally, the complaint alleges further unlawful interrogation by May occurring on July 8 after the election had

been held. Wiggins testified in support of this allegation that on July 8 May came to his home with a six-pack of beer having indicated at some time earlier to Wiggins that he wanted to come over and talk. Wiggins related that May initially talked about going to the beach and summertime activities. Then, however, he changed the subject to talking about the Union and inquired as to what percentage of the employees was for the Union on the second shift, how many were for the Union, and who had voted for the Union. Wiggins declined to answer, and May remarked that the information was for his own personal use, but Wiggins persisted in telling him nothing. At that, May stated that he knew Raul Herrera did not vote for the Union although he knew that Wiggins had voted for the Union. Then May inquired of Wiggins whether another named employee voted for the Union. Wiggins declined to answer or even talk about it, and asked May to leave.

May, who had only become a night-shift manager in the month of May and who left the employment of Respondent later in August, denied stating to Herrera or any employee that Schroeder said he would never sign any contract with the Union. He further denied that he had asked any employee if they were for or against the Union, or whether they had signed a union card or how they were going to vote, although he admitted that he had met with Wiggins at Wiggins' home on July 8. He testified that they did not talk about work.

I credit the testimony of Herrera, Camacho, and Wiggins over that of May. The three employees' testimony was consistent in reflecting a pattern of interrogation by May. The three appeared to be sincere in their testimony and displayed generally good recall. May's denials were, for the most part, general in nature and clearly unconvincing when weighed with the more detailed testimony of the three employees. The fact that May had received general instructions from management regarding "do's and don'ts," including interrogation among the "don'ts" does nothing to lessen the likelihood that May engaged in the interrogation attributed to him. After all, as Herrera's testimony establishes, May had acknowledged that he was not supposed to ask employees any questions about the Union, but then he went ahead and did it anyway.

Based on the credited testimony of Herrera and Camacho, I find that May did state that Schroeder would not sign a contract with the Union. Such a remark clearly conveys to the employees the futility of their organizational efforts, thereby interfering with their Section 7 rights in violation of Section 8(a)(1). Also based upon the testimony of Herrera, Camacho, and Wiggins, I find that Respondent, through May, violated Section 8(a)(1) of the Act as alleged in the complaint in his questioning of employees regarding their union activities and that of other employees. In his questioning, May expressed no legitimate basis for his questions and gave the employees no assurances against reprisals as a result of their answers. The fact that the employees considered the questioning coercive is demonstrated by the fact that they gave equivocal or noncommittal responses.

5. By Robert Rodriguez, welding department supervisor

The consolidated complaint alleges that on May 28 Respondent, through Supervisor Rodriguez, threatened employees by telling them that the company rules would be strictly enforced as a result of the union activity. Three witnesses, Wiggins, Mickey, and Grace Hernandez, testified in support of this allegation. Thus, Wiggins testified that on May 28 Rodriguez called together approximately 10 employees in the weld area on both night and day shifts, and told them to read the employee manual or rule book "real good" because it was going to be strictly enforced. He told the employees that if they did not know the Company's rules and regulations they should know them. Some of the employees asked why they were getting so strict, and Rodriguez said he really did not know, but they were playing it by the rules. According to Mickey, Rodriguez, who had just come from a supervisors' meeting, told the employees that the Company was going to start enforcing the rules more, especially the tardiness and absenteeism rules. Mickey asked whether this was being done because the Union was coming in, and Rodriguez nodded his head affirmatively. Grace Hernandez confirmed that Rodriguez stated that Respondent was going to enforce the rules "a little bit more" but failed to attribute anything to Rodriguez indicating that the move was directly related to the union activity.

Rodriguez conceded in his testimony that he met with employees from his department on May 28. He said that this meeting was predicated on a supervisors' meeting held earlier in the day when it was brought to the attention of the supervisors that employees were "running around the plant." Management asked the supervisors to talk to the employees and see if they could straighten out the problems. Rodriguez' version of his remarks has it that he explained to the employees that the supervisors had gotten chewed out because a lot of employees were walking around the area and making stops in other departments talking to employees, taking time, and causing production problems. On cross-examination, Rodriguez admitted that he had told employees that he was going to go strictly by the book. He further conceded that one of the employees, either Mickey or Charles Pfeiffer, asked him if this action was because of the Union. However, Rodriguez testified that he denied that it was.

I have already found Mickey to be a credible witness with good recall. Because of his former employee status he was more likely to be unbiased. His version of Rodriguez' comments struck me as truthful when considered in contrast with Rodriguez' rather bland denials. In addition, Rodriguez displayed a rather sporadic memory and could recall nothing of the remarks of George Schroeder to the employees on May 27, the day before Rodriguez had his meeting with employees. Rodriguez conceded, however, that he attended the meeting with Schroeder and the employees. Further, Rodriguez claimed that Plant Manager Brown had previously talked to supervisors about tightening up on the rules, but he could not recall how long before it was. Accordingly, I accept Mickey's version of Rodriguez' remarks including the affirmative nodding of his head on Mickey's question. I

therefore find that Rodriguez implicitly threatened employees that more strict application of Respondent's rules was responsive to their union activities. In this regard, Respondent violated Section 8(a)(1) of the Act, I find, as alleged in the complaint. See *Vincent's Steak House*, 216 NLRB 647, 649 (1975). The conduct of Rodriguez and the other violations of Section 8(a)(1) provide the context in which the alleged 8(a)(3) violations must be considered.

C. *The Alleged 8(a)(3) Violations*

1. The discharge of Pete Mascorro

Mascorro was employed by Respondent in August 1980 and worked in the tubing department under Supervisor John Day. He was transferred to the acid room on March 30, where he worked under leadman David Lopez and Supervisor James Sundsted.⁵ Mascorro testified, in effect, that his work in the tubing department was exemplary, and he was utilized both to train new employees and to fill in on one occasion for Supervisor Day for about a 1-week period in 1982. On direct examination, he acknowledged only one prior reprimand and that reprimand which he placed as occurring sometime in 1980, was based on his failure to clean up around his work area at the end of his shift. According to Mascorro, everyone in the department received the same reprimand at the same time.⁶

Mascorro testified that he became involved in the union campaign beginning in the latter part of April when he and several other employees, including McDonald, Pfeiffer, Mickey, and Mario Gonzalez, began talking about the Union. He also attended union meetings beginning, he claimed, from the very first. He testified further that he passed out union cards sometime in May and signed a union card himself. Further, he stated that on May 28, he was seen passing out cards in the dining area by Supervisors Rodriguez and Day. According to Mascorro, Rodriguez and Day were sitting at the table right next to the table where he was seated.

According to Mascorro, he was discharged on June 7. In the late afternoon on that date, he was called into the office of Jackie Smith, employee relations manager, where, Mascorro related Smith said that he had "stuck out a screwdriver at Pablo Medina," another employee in the acid room. According to Smith, the incident had occurred on June 2 in the dining area during lunchtime. Mascorro denied that any such thing had happened and offered to take a polygraph to prove his innocence. Smith refused, and told Mascorro they had reached a decision to fire him and did fire him. Mascorro's testimony was contradictory with respect to whether Sundsted had said anything about his job performance during the meeting in which he was discharged. Initially, he related that

⁵ Mascorro in his testimony placed the transfer as taking place in the latter part of April, but Respondent's documents signed by Mascorro show the effective date was March 30. R. Exh. 7.

⁶ On cross-examination, he was confronted with a written reprimand signed by him and dated June 25, 1981, for failure to "clean up." Mascorro conceded that the reprimand was in 1981 rather than 1980 as he had initially claimed.

Sundsted had said that Medina and Lopez had complained to him about Mascorro's work. Subsequently, however, he testified nothing was said about his job performance at the June 7 meeting.

Mascorro acknowledged an encounter with Medina on May 28, in which Medina had asked him if he was for the Union, and Mascorro had replied that he was. Medina remarked that he was not for the Union and told Mascorro he should not be talking about the Union because people did not want the Union and Mascorro was going to be suspended or fired if he kept it up. A moment later, according to Mascorro, Lopez came into the department and Medina went over to talk to him. The two looked at Mascorro while they were talking. Then the two went to Foreman Sundsted and talked to him. Later on the same day, sometime after lunch, Sundsted talked to Mascorro and told him that he had to shape up because Sundsted could not be keeping an eye on him or babysitting him. Mascorro asked what he was doing wrong, and Sundsted said he was receiving complaints from Lopez and Medina. Mascorro testified that he had had no previous complaints from Sundsted about his job performance and, in fact, the week after he had started in the acid room Sundsted told him he was doing a good job. Moreover, he said that Lopez and Medina, who was a senior employee in the acid room and responsible for assisting leadman Lopez, never complained to Mascorro about his work or job performance. However, Mascorro admitted that also on May 28 Medina and Lopez told him that he was taking too long in going to the restroom. Lopez told Mascorro that he would have to do what Medina told him, and that, if he wanted to go to the restroom, he would have to do it in the acid room where the drainage was. On the same day, Mascorro complained to Jackie Smith about such instructions, and Smith told him he would have to listen to his supervisor and leadman, and directed him to go back to work.

Mascorro related that on June 2 Medina came in drunk and Mascorro reported that to Lopez. Lopez said that he would take care of the matter. Mascorro denied that he talked to Medina that day at all and denied specifically threatening Medina with a screwdriver.

Based on the foregoing, the General Counsel and the Charging Party's counsel argue that no legitimate basis existed for the discharge of Mascorro. They argue, based on Mascorro's testimony and the record as a whole, that Mascorro had been involved in union activity, that Respondent knew of Mascorro's involvement in such activity, that Respondent harbored union animus as reflected by its 8(a)(1) violations herein, and that Mascorro had engaged in no misconduct warranting his discharge. This evidence reflects, the General Counsel contends, all of the elements of a prima facie case as required under the principles of *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The contention is that the evidence establishes that Mascorro would not have been discharged had he not been engaged in union activity.

Respondent's defense is based upon the testimony of Supervisors Day and Sundsted, leadman Lopez, and employee Medina. In brief, Respondent contends that Mas-

corro was not, in fact, a good employee and this was a consideration in reaching a conclusion with respect to his discharge which was decided upon following a threat issued to Medina and witnessed by two other employees. With respect to Mascorro's work ability and employment history, Day testified that Mascorro was capable of good production. However, his production in March 1982 was becoming a problem because it had fallen down to less than half of what he had been producing. He therefore took Mascorro to the plant manager who warned Mascorro that he would have to bring his production back up and that, if he did not, they would have to take further action. Mascorro did not bring his production up, and, instead, asked the plant manager for a transfer to the acid room. Mascorro signed a transfer sheet reflecting that the transfer was at the employee's own request.⁷ Contrary to Mascorro's testimony that he had had only one prior reprimand, Day identified prior reprimands of Mascorro dated May 11 and 15, 1981, for tardiness, absenteeism, and early departure from work. The last dated reprimand had resulted in a 3-day suspension of Mascorro.⁸ Although Day admitted that Mascorro had been used to train other employees, he added it was common practice to use older employees to train newer employees. Day did not concede any knowledge of Mascorro's union activity, but quite candidly admitted that sometime prior to his transfer from the tubing department he had overheard Mascorro tell two other employees that they ought to get a union to represent them.

Medina testified that as a senior employee in the acid room he was expected, in the absence of leadman David Lopez, who had responsibilities outside the acid room, to see that the acid room work was done. Medina said that he had problems with Mascorro because Mascorro would not heed anything Medina said to him and advised the other workers in the acid room to also ignore Medina. Mascorro would leave the acid room to go to the restroom where he would stay 25 to 30 minutes or more and generally did whatever he wanted to do in the acid room. According to Medina, Mascorro told him that he was not going to work as hard as Medina did because Medina was paid more. Mascorro added that he was not going to hurry up in his work or worry about anything. Medina said he reported these matters to Lopez who thereafter told Mascorro to work with Medina. In early June, Mascorro told Medina in the dining room that he was not going to use his hands on Medina, but he was going to stick him with a screwdriver. Medina identified employees Armando Olivarez and Juan Martinez as being present and hearing Mascorro's remarks. Medina testified that he told Lopez about Mascorro's threat, and it was a few days later that he repeat-

⁷ Mascorro, on cross-examination, admitted his signature on the document but denied that the transfer was at his request. Contrary to earlier testimony suggesting the exemplary nature of his work performance, he testified that he was told to either transfer to the acid department or be fired.

⁸ While Mascorro acknowledged his signature on the two additional reprimands, he could not recall the incidents nor could he recall the 3-day suspension.

ed the matter to Jackie Smith through Lopez, who interpreted.⁹

Medina's testimony was supported by Lopez both with respect to problems he was having with Mascorro as well as the report of the threat by Medina. However, Lopez testified that Medina had complained to him about the threat on a Saturday (June 5) but that Medina had claimed that the incident had taken place a day or 2 earlier. Lopez immediately related the incident to Supervisor Sundsted. On cross-examination, Lopez, who was no longer employed by Respondent at the time of the hearing, admitted that he was aware that Mascorro was a union supporter. On further cross-examination, Lopez recalled Medina reported to him that there had been an actual attempt by Mascorro to stab Medina in the back. Such alleged attempt was never substantiated by any other witnesses, including Medina, and I conclude that Lopez was mistaken in this regard.

James Sundsted testified disputing Mascorro's claim that there had been no problems regarding his work in the acid department. Sundsted stated that he had received complaints about Mascorro working quite slow from Medina and Lopez, and he went over these complaints with Mascorro about 2 or 3 weeks after he came into the acid room. He had also had an occasion to talk to Mascorro about some lines or tubes that Mascorro had damaged delivering to the tubing department. The complaint about the lines had come from Day, who, Sundsted testified, informed Sundsted of problems Day had had with Mascorro when he worked in the tubing department. Sundsted added he had also talked to Mascorro about complaints about his cooperating with Medina and Lopez. Sundsted admittedly told Mascorro that he could not babysit with him that he did not have that luxury.

With respect to the threat that was attributed to Mascorro, Sundsted stated that Lopez had reported the matter to him on Friday afternoon, June 4. Sundsted immediately went and talked to Medina about the matter but was unable to speak to Mascorro before the end of the shift. Although Mascorro was scheduled to work the next day, Saturday, he did not appear and Sundsted prepared a note regarding the allegations.¹⁰ On the following morning, Sundsted took the matter up with Mascorro, who denied the alleged threat. Sundsted thereafter turned the matter over to Employee Relations Manager Smith, who undertook to further investigate the matter by speaking to Lopez, Medina, and the witnesses identified by Medina. That afternoon, June 7, following Smith's investigation, Sundsted was called back into Smith's office where he was advised of the results of the investigation. Sundsted made the determination to discharge Mascorro basing that determination, he testified, not only on the alleged threat, but also on insubordination, lack of interest in the job entirely, his employment record, and a poor attendance record which included 9

⁹ Medina could speak little English and testified herein through an interpreter.

¹⁰ The note itself (R. Exh. 15) appears to be dated Friday, June 4. In addition to the threat attributed to Mascorro, it also refers to the fact that Mascorro had not been following orders from Lopez and Medina, and had not cooperated with them.

days off in a time span of 2 months.¹¹ Sundsted denied that he was aware of any union activities on the part of Mascorro, and further denied that union activity played any part in his actions with respect to Mascorro.

Smith corroborated Sundsted's testimony to the extent that she investigated the Mascorro incident based on the information supplied to her by Sundsted on June 7. It was Medina, according to Smith, who gave her the names of the additional witnesses, Olivarez and Martinez, whom she also spoke to during the investigation.¹²

Mascorro's recollection appeared to be too selective to be credible. His failure to recall two prior written reprimands, one resulting in a 3-day suspension and both of which were signed by him, demonstrates at best a very poor and unreliable recollection which serves to make unreliable his broad denials about prior criticism regarding his work performance. His failure to recall the prior reprimands also makes very doubtful his denial that the statement "employee requests transfer" was contained on the comment section of the transfer form transferring him to the acid room. Moreover, Mascorro's claim that his transfer to the acid room was totally involuntary, in that he was instead told to transfer or be fired, in itself refutes his contention regarding the quality of his work and Respondent's satisfaction with him. The transfer, it should be noted, took place long before he actually engaged in union activity. It is true from Supervisor Day's candid admission Respondent was aware that Mascorro had told two employees that a union should be sought to represent Respondent's employees. However, that statement was not shown to be related to the transfer by timing or any other factor, and the complaint herein did not allege that the transfer was discriminatory.

Mascorro's testimony that it was he and Mickey who contacted Union Representative Felan more than a month prior to the time of his transfer to the acid room was unsupported by either Felan or Mickey. Felan's testimony, already related, was that the Union campaign did not start until April 8, a time after Mascorro's transfer to the acid room. Furthermore, Mascorro's claim about early involvement in union activity was contradicted by his own statement given to the Board during the investigation of the case in which he stated he "first

¹¹ Sundsted testified that he had actually prepared a record of reprimand and disciplinary action for Mascorro on June 5 (R. Exh. 14). Although Sundsted and Plant Manager Brown had already signed the reprimand reflecting insubordination, violation of rules, and unsatisfactory performance, it did not reflect what action was to be taken. That determination apparently was not made until the following Monday. When the alleged threat was reported to Plant Manager Brown by Sundsted on Saturday, June 5, Brown had told Sundsted, according to Sundsted, that Sundsted should handle the matter. Sundsted explained, however, that he did not have time to investigate the matter further and Smith had taken over the investigation.

¹² Neither Olivarez nor Martinez was called as a witness herein. However, Olivarez and Martinez, subsequent to the filing of the charge alleging Mascorro's unlawful discharge, gave sworn statements to Respondent's counsel dated July 9 in which they generally corroborated Medina's allegation against Mascorro. These statements were received in evidence. Under the circumstances, and while such statements are clearly hearsay to the fact of the "threat," they preclude the inference urged by the General Counsel that had they been called as witnesses they would have testified contrary to Respondent's contentions.

became involved" with the Union when he attended a union meeting around the latter part of April.

Mascorro's testimony is further suspect because of an omission in his statement to the Board. Thus, while he testified herein that Supervisors Rodriguez and Day were present in the lunchroom once when he gave out union cards, there was no reference in his statement to the presence of such supervisors. His attempted explanation for such a critical omission was both feeble and incredible.

Considering all the foregoing, as well as the fact that Mascorro struck me generally as a witness who was willing to testify to whatever was expedient, I do not credit his testimony where contradicted by Respondent's witnesses. The testimony of Respondent's witnesses regarding Mascorro was mutually corroborative and contained only minor inconsistencies not materially affecting their credibility or impugning Respondent's motivation in its actions with respect to Mascorro. Based particularly upon the credible testimony of Respondent's witnesses Day and Sundsted, I find that Respondent was dissatisfied with Mascorro's work both in the tubing department prior to his involvement in union activity and subsequently in the acid room. I further find, and conclude, that upon reports of Medina to Lopez and subsequently Sundsted Respondent believed that Mascorro had threatened to stab Medina with a screwdriver. I further conclude that viewing Mascorro's threat in light of Mascorro's work background a further determination was made to discharge Mascorro. Notwithstanding Respondent's knowledge of Mascorro's union inclinations based upon Day's admission, I find, and conclude, that Respondent has demonstrated that Mascorro would have been discharged without regard to such activity. Accordingly, it is concluded that Respondent has rebutted the General Counsel's prima facie case with respect to Mascorro and that Respondent did not violate Section 8(a)(3) and (1) of the Act in the discharge of Mascorro. I have reached this conclusion with due regard to Respondent's more strict enforcement of its rules announced by Rodriguez. However, it must be noted that Mascorro's discharge was not based upon any specific rule violation, and, in light of his employment history based on Respondent's credited testimony, it cannot be said that Respondent's discharge of Mascorro was so out of proportion to his offense as to warrant a conclusion of pretext.

2. The suspension of Jill McDonald

McDonald was employed by Respondent in August 1981. At times material herein, she worked in the tubing department under Supervisor Day.

It is undisputed that McDonald first became involved in the union activity on April 8 by attending a meeting with Felan on that date. She testified that the Union started passing out union authorization cards on May 18, and that she herself signed a union authorization card and served on the Union's committee.

As already related herein, Supervisor Day admitted, in effect, that he believed McDonald to be a union supporter.

It is undisputed that at all times material herein Respondent maintained a rule in its handbook generally distributed to the employees to the following effect:

Employees will punch only their individual time card and no one else's. Employees will not change or alter their time card for any reason. A violation of these rules will result in immediate termination of one's employment.

It is also undisputed that McDonald was suspended for a period of 3 days effective June 23 allegedly for violation of the timecard rule cited above. The complaint alleges that this suspension was in retaliation for McDonald's union activities. In support of that allegation, McDonald denied any violation of the timecard rule. Her version of the events of June 22 upon which the suspension was based follows. McDonald testified that she normally rode to work with Charles Pfeiffer, who, like McDonald, worked on the day shift. McDonald testified that as she started to clock in she picked up the wrong timecard out of the timecard slot, but before clocking it in she noticed that it was the wrong card and immediately put it back into the timecard holder. She then got her own card, punched it in, and proceeded to work. Charles Pfeiffer got his own card, punched it in, and went to work but was two or three steps behind McDonald. McDonald added that when she clocked in she observed Day standing 50 to 60 feet away from her. McDonald was supported regarding the events surrounding the clock-in on April 22 by Pfeiffer to the extent that Pfeiffer denied that McDonald punched his timecard on that day, or at any other time. He testified that, although they did come into work together, she would always punch in right before him.

McDonald testified that she did not discuss her clocking in with Day at any time during the course of the day until the afternoon when she was taken by Day to Smith's office. There she was accused of clocking in Pfeiffer's timecard that morning and was asked to tell what happened. McDonald denied clocking Pfeiffer in and explained what had happened at the time she clocked in. Day disputed her version. McDonald's initial testimony that Smith was writing up the suspension notice at the time McDonald was relating her version was contradicted by McDonald's statement given to the Board which related that Smith wrote out the suspension notice after McDonald had related her version.

Respondent's position was predicated upon the testimony of Day. Day related that he saw McDonald pick a card out of the timecard rack, punch it, and put it back in the rack. She then looked around to see if anybody was watching, reached over, picked out another card, punched it in, and put it back in the rack. Day testified that, because the machinery had not started up he could actually hear the clock stamp both cards. Because of what he had seen and heard, Day stood and watched, and observed Pfeiffer join McDonald at the timeclock. Pfeiffer did not punch a card or reach for a timecard. They both then proceeded to their respective departments. Day went to the timeclock and picked up both McDonald's and Pfeiffer's timecards and took them to

Smith relating to her what he had seen. Smith said that she would take the matter up with higher management and come back with a decision as to discharge or suspension.¹³ Smith advised Day around 3:45 p.m. to call McDonald to the office. According to Day, it was his impression that the decision with respect to the suspension of McDonald was made before McDonald entered the office.

Smith testified that she made the decision to suspend Pfeiffer, and, although the rule book provided for the discharge of an employee punching another's timecard, she concluded that a discharge would be too harsh since that was the first time any employee had been found breaching the rule. She pointed out, however, that subsequent to McDonald's suspension another employee on August 16 had been discharged for a first offense of punching someone else's timecard. No disciplinary action was taken under the Company's rules with respect to employees whose timecards had been punched by another.

Resolution of the legality of McDonald's suspension depends upon whether she and Pfeiffer are credited on one hand or Day on the other. I have previously found Day more credible than McDonald. Here, also, I credit Day over McDonald, and I find that he did in fact observe and hear McDonald punch two timecards on June 22. It is undisputed that a romantic relationship existed between McDonald and Pfeiffer at the time of the incident, and it may be inferred from such relationship that each would be disposed to assist or help the other. Motivation for McDonald's action can be found in the fact that Pfeiffer had several prior warnings regarding poor attendance and tardiness. He had twice received 3-day suspensions, the last such suspension being effective March 1 to 4. Another incident of tardiness could reasonably have lead to further, and possibly severe, disciplinary action. Thus, it would not have been unreasonable for McDonald to preclude this possibility by clocking Pfeiffer in even though he was relatively close behind her.¹⁴

Finally, I specifically do not credit Pfeiffer's denials that McDonald clocked him in on June 22. In addition to being entirely self-serving, Pfeiffer's testimony was more likely to be biased not only because of his relationship with McDonald but also because he also was discharged by Respondent as discussed infra. Accordingly, I find that McDonald did clock Pfeiffer in as Day testified. A basis therefore, existed for disciplinary action against McDonald. The disciplinary action imposed, a suspension, was less severe than that provided for under Respondent's rules and subsequently imposed upon another employee for the same offense. Had Respondent been disposed to retaliate against McDonald for her union ac-

tivity, it is likely, particularly in view of Respondent's threat through Rodriguez of a more strict application of its rules in response to union activity, that it would have discharged her. Under these circumstances, I conclude McDonald was not the object of discrimination in violation of Section 8(a)(3) and (1) of the Act.

3. The discharge of Ramiro Avila

Avila began working for the Company in July 1981 and worked on the dispenser line under the supervision of Johnny Hernandez. He testified that he had become involved in union activity in early May, having attended union meetings and having signed a union authorization card. In addition, he estimated he gave out union authorization cards to about 10 other employees. Jackie Smith admitted that she was aware of Avila's union sympathies at times material.

Avila had missed work on June 16, and had brought in a doctor's excuse. On June 21, he was called to Smith's office where Smith told him that she was investigating some doctor's excuses which had been turned in for absences because they had found some forged ones.¹⁵ Accordingly, she told Avila that they were looking into his. Smith said she would be making some phone calls to verify Avila's excuse. Not having heard anything further from Smith, Avila went to her on the morning of June 25 to ask what was taking so long in verifying his excuse. She replied that she was still waiting for the doctor to call her and that she would have results that afternoon.

That same afternoon, Avila was told by Hernandez that Smith wanted to see him. Avila went to Smith's office expecting word concerning verification of his doctor's excuse. In Smith's office, he met with Smith and Plant Manager Sam Brown. Smith related to him that employee Karen Cook had come in that afternoon with a complaint about Avila. Smith further explained that Cook contended that Avila had made indecent remarks to Cook and had fondled her. Avila acknowledged that he had talked to Cook but denied making any indecent remarks to her or fondling her. Smith replied that there were two witnesses that said that he had. She declined to disclose their names. Avila maintained his innocence and protested that it had taken Smith only 30 minutes to investigate the whole thing whereas it has taken her a week or more to verify the doctor's excuse. To that Smith responded that she could not verify the doctor's excuse, but they could terminate him for his actions with respect to Cook. According to Avila, Smith had already prepared the termination papers and signed them before he came into the office. Avila refused to sign the papers himself, which reported as the cause of the discharge: "Indecent remarks of a sexual nature & fondling Karen Cook." The termination paper added under "description of circumstances," "Mr. Avila persisted even after Ms. Cook asked him to stop."

It was Avila's testimony that he had occasion to talk to Karen Cook on June 18, when Cook, along with em-

¹³ Copies of McDonald's and Pfeiffer's time cards for June 22 reflect that both cards were punched in at 7:50 (7:30 a.m.), the clock being graduated in one-hundredths of an hour. Timecards for the preceding 3 weeks entered in evidence as G.C. Exhs. 5(a)-(c) reflect that it was not altogether unusual for McDonald and Pfeiffer to have the same clock-in time.

¹⁴ Respondent's rules define tardiness as the failure of an employee to report to work at the beginning of the employee's scheduled shift. The day shift on which both McDonald and Pfeiffer worked started at 7:30 a.m., the exact time they were clocked in on June 22.

¹⁵ It is undisputed that on March 10, Respondent had discharged an employee for falsifying a doctor's note.

ployees Hector Rangel, Edward Herrera, Daniel Lopez, Richard Diaz, and Cindy Herrera, were working on the dispenser line. According to Avila, he said hello to Cook, talked with her for a while, and then went back to work. He denied that he at any time touched her. Cynthia Herrera generally supported Avila, testifying she worked near Cook on June 18, and heard Avila briefly talking to Cook.

Avila testified that he had dated Cook two or three times, and that he had gotten together with her at Respondent's 1981 Christmas party. However, admittedly, he had not left the party with Cook and after that party they had not talked to each other "that much." To support the inference that Cook was somewhat preoccupied with sex and not likely to be offended by anything he might have said, Avila attributed a comment of a sexual nature to Cook occurring in October 1980. Even prior to that, Avila related that Cook had made an obscene comment to employee McDonald regarding certain initials on a T-shirt that Avila was wearing. McDonald in her testimony confirmed that Cook had made such remarks. Herrera also testified that on June 18 after Avila left Cook she heard Cook admonish Hector Rangel not to touch her because they did not have any privacy. Herrera apparently looked shocked by Cook's remarks and, Cook, observing this, told her not to be shocked, that she grabbed the guys and the guys grabbed her back.

While Avila did not admit to any misconduct with respect to Cook, the General Counsel produced other evidence that Cook was frequently involved in what may be euphemistically described as "sexual horseplay." In this regard, both McDonald and Pfeiffer testified that on occasions Cook had walked behind Pfeiffer in the plant "grabbing at his butt" and telling him he had a nice rear end. On one such occasion, Pfeiffer turned quickly and Cook grabbed at his front. However, neither McDonald nor Pfeiffer testified that Cook on any occasion actually touched Pfeiffer. Pfeiffer made no complaints to any supervisor about Cook's conduct prior to Avila's discharge.

It is the contention of the General Counsel and the Charging Party that Avila was discharged because of his union activity. They rely upon Respondent's knowledge of Avila's union inclinations, Respondent's union animus as demonstrated by the 8(a)(1) violations already found herein, Avila's denials of any misconduct, and the disparate treatment of Avila when compared with Respondent's failure to act against Cook based on complaints made by Pfeiffer subsequent to Avila's discharge. These elements, if credited in all respects, I find, would constitute a prima facie violation of Section 8(a)(3) and (1) of the Act in Avila's discharge.

Respondent relies on the testimony of Cook and employees Daniel Lopez and Richard Diaz to establish the misconduct of Avila for which he was fired. According to Cook, Avila had walked up to her on June 18, put his arms around her, and told her how he thought she was nice. He laughed and walked away, and then came back again later and tried to do it again. On this occasion, he put his arms around her waist but Cook jerked away asking him to leave her alone. Avila left again but then came back and tried it again. She told him to leave her

alone, but he put his arms around her waist again and tried to move them upward. Daniel Lopez, who was nearby, asked him to go back to his own work area, but Avila would not. Avila laughed saying he would love to kiss Cook. According to Cook, Lopez reported the matter to Supervisor Hernandez, who told Avila to go back to his own work station. Avila left, but shortly thereafter, he returned again. On one of the occasions, Avila touched her on the buttocks and on another told her he would love to get in bed with her and have a good time. Cook testified that she went to complain about the matter to Smith the following Monday, apparently June 21, but Smith was busy and could not see her. However, she did report it to Smith the following day, she claimed.

Cook's testimony is generally supported by that of Diaz and Lopez. However, Diaz testified he did not see Avila touch Cook. While Diaz related that he heard Cook repeatedly tell Avila to leave her alone, he did not hear Cook complain to a supervisor that day. Moreover, Diaz testified that most of Avila's remarks of a sexual nature about Cook were directed to Diaz and related in Spanish. Lopez testified he observed Avila touch Cook once on the arm.

According to Smith, Cook did not report the matter to her until June 25. Cook complained that Avila had made indecent remarks and gestures to her, and had touched her, notwithstanding Cook's repeated requests that Avila leave her alone. Cook named Diaz and Lopez as witnesses. Smith contended that she talked to both Diaz¹⁶ and Lopez before calling Avila to her office. When Avila came to Smith's office, Smith told him that she had investigated the matter, and asked him what he had to say about the matter. Avila denied the allegations of Cook, but Smith nevertheless discharged him.

The General Counsel and Charging Party argue that Avila did not engage in any misconduct with respect to Cook, and the absence of such misconduct coupled with Smith's admitted knowledge of Avila's union activities and her superficial investigation of the incident, including her admitted failure to consult with Supervisor Hernandez about Cook's complaint, establishes that the asserted basis for Avila's discharge was pretextual. The General Counsel further asserts that Respondent was "blindly and strictly enforcing Respondent's rules against a known union adherent." However, there was no showing that Respondent relied upon any particular rule in discharging Avila, and there appears to be no specific rule in Respondent's policy book covering the misconduct attributed to Avila. Finally, the General Counsel contends that even if Avila engaged in the misconduct attributed to him, it would not have resulted in his discharge, absent his union activities, because no other employee had been previously discharged for such an offense. Such offenses, according to the General Counsel, were "unimportant" as evidenced by a complaint voiced by Pfeiffer to Smith against Cook upon which Smith failed to Act.

¹⁶ Diaz denied he was interviewed on the matter prior to Avila's discharge. I do not credit his assertion in this regard, and instead credit Smith, who I believe was sincere.

With regard to the General Counsel's latter contention, the evidence revealed that on June 28, following Avila's discharge, Pfeiffer went to Smith's office and complained to her about Cook. According to Smith's notes received in evidence as General Counsel's Exhibit 13, Pfeiffer reported that Cook had grabbed at his posterior approximately 3 weeks earlier in the presence of McDonald but did not touch him. He said nothing to Cook but "inside he was hoping she would stop it." Further, Pfeiffer reported to Smith that at an earlier time, not specifically specified, Cook had pinched him on the posterior and grabbed at his "front."¹⁷ He named witnesses to the incident, including Supervisor Rodriguez, who had suggested to Pfeiffer that he "take advantage" of Cook. Smith's notes reflect that on the following day, June 29, Pfeiffer came in to see if Smith was doing anything about his complaint. Smith's notes reflect that she told him he could not give her two elements necessary for action by Smith. One was touch, and the other was a request by Pfeiffer of Cook to quit. Moreover, she pointed out that she would be interested if he could remember the day of the occurrence which included these elements. He said he would try to remember and see if he could ascertain the dates but apparently never did.

Smith admittedly did not investigate Pfeiffer's complaint. Smith explained in her testimony that she felt that Pfeiffer's complaint was simply responsive to Avila's discharge. Moreover, she stated that she knew that people "kidded around and joked with each other," but it became extremely serious when one party requested the other party to stop it. In the case of Cook, Cook had asked Avila to stop, whereas in the case of Pfeiffer, he never contended to Smith that he had asked Cook to stop.

Respondent's position with respect to Avila is simply stated. Avila harassed Cook in spite of repeated requests by Cook for him to stop. Smith's investigation through Cook, Lopez, and Diaz established the fact of the harassment which Smith deemed to be serious. Avila was discharged for such harassment. Smith specifically denied that Avila's union activity was a consideration.

Lopez impressed me as the most credible, reliable, and disinterested witness to the Cook-Avila episode of June 18. He exhibited good recall and appeared to earnestly relate what occurred. Diaz, on the other hand, was admittedly a friend of Avila's and appeared somewhat reluctant in testifying against him. Herrera also was an admitted friend of Avila and may be regarded as less disinterested. Moreover, since she did not work as close to Cook that day as the other two witnesses, Lopez and Diaz, I am unconvinced that she was able to see and hear all that took place between Cook and Avila. Avila's testimony of the encounter with Cook was **unconvincing**. While he contended he had "made out" with Cook at the Christmas party, he would have me believe he said nothing to Cook of a sexual nature on June 18.

The record will support no illusions of great modesty on the part of Cook. However, I believe her testimony about Avila's conduct on June 18 was sincere. The fact

¹⁷ Earlier in her testimony, and prior to reference to her notes, Smith had denied that Pfeiffer had related that Cook had touched him.

that Cook found Avila's remarks offensive and his advances unwelcome was supported by the particularly credible testimony of Lopez as well as the more reluctant testimony of Diaz. Accordingly, on this record, I find Avila made repeated sexual remarks and advances to Cook which she found objectionable, and which she repeatedly rejected with requests that he leave her alone.

There is absolutely no evidence that the Cook-Avila episode was a "set-up" to provide a basis for Avila's discharge. One may wonder about Cook's delay in reporting the matter to Smith,¹⁸ but it is that very delay which precludes any inference of a conspiracy between Cook and Respondent to provide a basis for Avila's discharge. Hernandez' failure to discipline Avila also suggests Respondent was not making a determined effort to "get" Avila. That Smith might have been more sensitive to Cook's complaint was understandable.

The question remains whether the record evidence supports a conclusion that Respondent would not have discharged Avila but for his union activities. I conclude that it does not. The fact that there had been no discharges for similar offenses is immaterial since there was no showing that any previous offenses of a similar nature occurred. Nor does the fact that a significant amount of "sexual horseplay" takes place in Respondent's plant affect the conclusion, for Cook in spite of any proclivity to engage in such "horseplay" specifically rejected Avila's advances on June 18, and repeatedly asked him to leave her alone. Willingness generally to engage in sexual banter or horseplay does not mean one must suffer unwelcome advances of a sexual nature.

I find no evidence of disparate treatment of Avila based on Pfeiffer's belated complaint about Cook's much earlier conduct directed at Pfeiffer. I conclude, as did Smith, that Pfeiffer's complaint was directly responsive to Avila's discharge and that whatever Cook's earlier conduct toward Pfeiffer had been it was tolerated and was not unwelcome.

Finally, while Smith's investigation of the Cook-Avila episode was brief and clearly incomplete to the extent she did not consult with Hernandez, it was nevertheless sufficient to establish the fact of Avila's misconduct.

Considering all of the foregoing, and the record as a whole, I conclude a lawful basis existed for the discharge of Avila and that there was no disparate treatment in his discharge. In short, and also because Smith's denials of union considerations in the discharge of Avila impressed me as sincere, I conclude that Respondent has demonstrated that Avila would have been discharged without regard to his union activities. I therefore find no violation of Section 8(a)(3) and (1) of the Act in his discharge.

4. The discharge of Charles Pfeiffer

Pfeiffer, whose union activities have already been mentioned herein, was discharged on August 31 for, ac-

¹⁸ Here, I credit Smith over Cook with respect to the date that Cook reported the matter. Accordingly, Cook's testimony to the effect that the matter was reported by her to Smith at the first opportunity, about June 22, is rejected. The report was made, I find, 1 week after the episode occurred.

ording to Respondent, "failure to return to work in accordance with physician's statement."¹⁹ The General Counsel, on the other hand, consistent with complaint allegations, contends that Pfeiffer was discharged because of his union activities in violation of Section 8(a)(3) and (1) of the Act.

The facts leading up to the discharge of Pfeiffer are not largely in dispute. Pfeiffer, who had been employed by Respondent since May 18, 1981, worked as a welder under the supervision of Robert Rodriguez. Having completed a year of work, Pfeiffer, under Respondent's policies, was entitled to 5 days of paid sick leave. Respondent's policy provided, however, that no sick leave would be paid any employee without written physician's approval indicating the days out for sickness. Respondent's policy also provides, however, that "sick leave does not mean you take off work when you do not feel like working, it means when you are genuinely sick and cannot work, the company wants to compensate you for your lost time because of your past loyalties."²⁰ Nevertheless, 2 days of sick leave could be used at the employee's own discretion and were designated as "employee discretionary days." A 24-hour notice to the employer of an employee's determination to use one or both discretionary days was requested under Respondent's policies but was not mandatory. Discretionary days were not required to be supported by a doctor's note or excuse, but a decision to use a discretionary day was to be noted on the employee's timecard.

Pfeiffer was absent from work on August 30 in order to keep a doctor's appointment for a premarital matter. He advised his supervisor on the preceding Friday, August 27, and Rodriguez had indicated the absence would be all right as long as he brought in a doctor's excuse when he returned. Pfeiffer kept his appointment on August 30, and obtained from the doctor's office a "certificate to return to work or school" showing that he was under the doctor's care on August 30, but also showing that he was able to return to work on August 30. The nature of illness or injury illness on the certificate was filled in "premarital." When he returned to work on August 31, Pfeiffer surrendered the certificate to Rodriguez, who filled out an absence report on Pfeiffer showing the absence was excused and the reason being "blood test."²¹

Pfeiffer testified that sometime later in the day on August 31 he was taken to Smith's office by Rodriguez where he met with Smith, Rodriguez, and Edward Netherton, night manager. Pfeiffer testified that he asked Smith if he could have a witness, repeating, in effect, a request he had made to Rodriguez on the way to the office. Smith did not respond directly and replied only that she had some questions she was going to ask him. Pfeiffer repeated his request for a witness, but Smith replied that Netherton and Rodriguez were his witnesses. Pfeiffer testified he insisted that he wanted his own witnesses. Smith responded that that was all he was going

to get. Then she said, according to Pfeiffer, that they were going to fire him. Pfeiffer asked what for, and Smith asked if he was going to answer the questions they had for him. Pfeiffer said he would not until he could have a witness. Smith repeated that they were going to fire him. She wrote up a termination sheet handing it to Netherton to sign, then Rodriguez. Pfeiffer refused to sign it. On his way out of the office with Netherton and Rodriguez, Pfeiffer asked what he was fired for, and Rodriguez replied that he did not know.

Smith testified for Respondent that, when she saw Rodriguez' absence report and Pfeiffer's doctor's excuse come across her desk, she noted that Pfeiffer had been released to return to work on August 30 but had not returned to work. Smith then called the doctor's office to confirm that Pfeiffer had been released to return to work on August 30. She was advised that he had, that he had had an appointment at 11:30 a.m. on a premarital matter, including a blood test. When Smith had Rodriguez bring Pfeiffer to the office, she explained that she wanted to ask some questions about his doctor's note that he turned in, and Pfeiffer replied that he was not answering any questions. Smith then started writing up the discharge papers asking Pfeiffer again if he was sure he did not want to answer any questions, and he again replied that he did not. Pfeiffer also objected to Robert Rodriguez and Edward Netherton being present. Smith wrote on the back portion of Pfeiffer's record of reprimand that she had called Pfeiffer in to ask him questions about his doctor's note. She further noted thereon that he had refused to answer any questions because he did not like Rodriguez and Netherton "as witnesses." Pfeiffer refused to read or sign the record of disciplinary action.²² Smith disputed Pfeiffer's claim that he had asked for witnesses, testifying that he at no time had asked for witnesses and only objected to Rodriguez and Netherton as witnesses. She admitted that she had not talked to Rodriguez about the matter prior to calling Pfeiffer in, and she further admitted that she had already made the decision to discharge Pfeiffer before he was called in. Moreover, Smith conceded that she was not aware that Pfeiffer had given a 24-hour prior notice of his absence when she made the determination to discharge him. However, she contended that that was immaterial inasmuch as Pfeiffer had been released to return to work on the August 30 and did not return while, in effect, seeking to be paid for his sick leave. If, according to Smith, Pfeiffer had told his supervisor he was going to be absent and was going to be absent all day, there would not have been any problem, but by submitting the doctor's excuse and, in effect, seeking pay for the time he was actually eligible to come to work he committed an act of fraud. The record is not clear whether Pfeiffer was eligible for employees' discretionary days, but, in any event, according to Smith, he had not sought such days. Assuming his eligibility, had he done so, it would have made a difference. However, since Rodriguez did not indicate on his timecard in accordance with Respondent's rules that Pfeiffer had requested a discretionary day, Smith concluded that

¹⁹ The quotation is from the record of the reprimand and disciplinary action regarding Pfeiffer completed by Smith. (R. Exh. 19.)

²⁰ G.C. Exh. 3, p. 6.

²¹ G.C. Exh. 7.

²² R. Exh. 19.

Pfeiffer was seeking sick leave pay for the time he was able to return to work after the doctor's appointment.

The General Counsel and Charging Party contend, in essence, that Respondent was aware of Pfeiffer's union activities, a fact admitted by Smith, that Pfeiffer had given advance notice of his absence, that Supervisor Rodriguez had noticed no problems with Pfeiffer's absence or his doctor's excuse, and that under the circumstances Smith's seizure upon the absence and the doctor's excuse to discharge Pfeiffer without even checking with Rodriguez revealed the pretextual nature of the discharge. Respondent contends, on the other hand, that based on the information available to Smith at the time she called Pfeiffer and Rodriguez into her office, it appeared to Smith that Pfeiffer was fraudulently seeking sick pay for at least that portion of the time he was absent on August 30 after he had been released by the doctor to return to work. Such action by Pfeiffer warranted Smith's decision to dismiss him, and, since he refused to answer any questions about the matter when she confronted him, there was no contradiction of the information she had and upon which the discharge was based.

The elements cited by the General Counsel viewed in the context of Respondent's union animus as reflected in the other violations of the Act, and Respondent's strict enforcement of its rules, establish the requisite prima facie violation of the Act in Pfeiffer's discharge. However, Pfeiffer's refusal to answer questions of Smith regarding his absence and the doctor's excuse preclude me from concluding that he would not have been discharged but for his union activities. Based on the information available to Smith, it appeared that Pfeiffer was making a fraudulent claim, and this conclusion was unaffected by any advance permission given to Pfeiffer to be off from work. Thus, a clear basis for discharge existed. It is, of course, conceivable that Pfeiffer could have avoided the basis for the discharge by explaining that he was not in fact seeking pay for that portion of the day when he was able to return to work, or notwithstanding any notation on his timecard Pfeiffer could have contended that he was really seeking application of a discretionary day. That would have more clearly put to test Respondent's good faith in the discharge. He did neither in his confrontation with Smith nor did he at the hearing herein. Instead, he refused to answer questions without a witness of his choosing,²³ and no mitigating circumstances of any kind were revealed. Even the fact of his advance notice to Rodriguez of the absence was not revealed as it likely would have been because of Rodriguez' presence in Smith's office during the attempted questioning of Pfeiffer. Thus, the basis for the discharge remained unrefuted.

It is possible that Smith was happy to have the opportunity to discharge Pfeiffer because of his union activities, but it does not make the discharge unlawful under the Act if he would have been terminated in any event. See, e.g., *Golden Nugget, Inc.*, 215 NLRB 50 (1974); *Klate Holt Co.*, 161 NLRB 1606 (1966). The Act does

not protect employees from their own misconduct. *Guardian Ambulance Service*, 228 NLRB 1127 (1977). And this is true even where union animus is present. *H. M. Patterson & Son*, 244 NLRB 489 (1979). In view of the valid basis for discharge which existed, and in the absence of evidence of disparate treatment, I am satisfied that no pretext has been established, and that, on the contrary, Respondent has demonstrated that Pfeiffer would have been discharged without regard to his union activities. I therefore find no violation of Section 8(a)(3) and (1) of the Act in Pfeiffer's discharge.

III. THE CHALLENGED BALLOTS

The ballot of Ramiro Avila was challenged by Respondent because of his termination prior to the election. I have previously found herein that the discharge of Avila did not violate Section 8(a)(3) and (1) of the Act. Accordingly, it is concluded that the challenge to the ballot of Avila should be sustained.

Pete Mascorro's ballot was challenged by the Board agent because he was not on the voting list. I have found herein that Mascorro's discharge did not violate Section 8(a)(3) and (1) of the Act. Thus, he lacked employee status at the time of the election, and the challenge to his ballot must therefore be sustained.

The ballot of John Hawkins was challenged by the Union based on the Union's contention that he was a supervisor. Evidence presented by the Union reflected that Hawkins, who did not testify herein, worked in the sheet metal department on the first shift. It is undisputed that he was hourly paid, but he was not the highest paid employee in the department. According to Raul Herrera, a second-shift employee, Hawkins approved overtime for Saturday work and initialed timecards for such overtime work as required of supervisors under Respondent's rules. However, Herrera was uncertain whether overtime was cleared in advance by higher management or whether particular selection of employees for overtime by Hawkins was cleared in advance by Hawkins. Herrera related that sometimes Hawkins would ask him to work overtime, and on other occasions he would ask Hawkins. Hawkins, Herrera testified, did not operate a production machine and largely spent his time at a desk assigned to him in the department doing paperwork, assigning jobs, and preparing work schedules. In fact, according to Herrera, Hawkins stayed 1 to 1-1/2 hours beyond his shift three or four times a week to do paperwork and openly complained of the paperwork assigned to him after a supervisor left Respondent's employment.²⁴ Such paperwork included the filling out of employee absence reports although Hawkins marked out the title "supervisor" on the absence report form and inserted instead the title "leadman." Herrera also testified that Hawkins was the highest man in terms of authority in the sheet metal department and reported directly to Plant Manager Sam Brown or John Garza, whom Herrera identified as a lead production manager or engineer. When problems oc-

²³ The General Counsel at the hearing disavowed any contention of a violation of the Act under the principles of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), in Pfeiffer's confrontation or interview with Smith.

²⁴ Plant Manager Brown admitted that there was no supervisor or general foreman for the sheet metal department in June, the prior supervisor having quit, and that he personally directed the department during that time with Hawkins reporting to him.

curred on the night shift in the welding department, Hawkins' instructions were to call him at home. Even the supervision on the night shift would tell employees to contact Hawkins at home regarding problems, Herrera claimed. Finally, in January 1983 during inventory time when all employees were called in to work on the day shift, Hawkins, still according to Herrera, released a man to go home from work for an emergency situation.

Herrera testified that Hawkins in August told him that he could hire, fire, or reprimand employees. A similar statement was attributed to Hawkins by McDonald and Pfeiffer when Hawkins refused to sign a union authorization card for them when they asked in May. Such statements, however, are hearsay to the existence of actual authority and entitled to little weight.

Respondent's position is that Hawkins was simply a leadman without supervisory authority, and leadmen were specifically included in the collective bargaining unit in which the election was held. In support of the lack of supervisory authority of Hawkins, Company President Schroeder testified he did not consider Hawkins a part of management. However, he could not recall and did not deny that Hawkins attended a supervisory meeting at which Respondent's attorney talked to him about the union organizational campaign. On the other hand, Supervisor May testified that Hawkins was at such meeting remembering that Hawkins sat right next to him.

It is the testimony of Plant Manager Brown that the Company employs 13 supervisors, 6 or 7 general foremen, and roughly 13 leadmen, 1 for each department. Brown testified that Hawkins' duty was to set up and operate the machines working alongside the other people. He insisted that Hawkins had no authority to hire or fire, and has never done so. Moreover, he could not on his own initiative assign overtime, all overtime being determined by Brown. Brown conceded, however, that leadmen do initial timecards for overtime, but such timecards are subsequently reviewed by Brown. While leadmen do fill out leaves of absence, they are expected to tell the employee involved that the leadman would have to see if it would be approved.

Brown claimed that he made the schedule for the sheet metal department which was broken up into three areas using three leadmen, including Hawkins. Brown testified that Hawkins had no authority to transfer workers and that he received no special benefits as a leadman. According to Brown, Hawkins had never been told that he was a supervisor or that he had authority to hire or fire employees and had never done so. Moreover, he had no authority to reprimand employees. Hawkins was paid about 85 cents per hour less than the next highest paid employee in the department in July, Brown said. While Hawkins did attend some production meetings held by Brown on Monday mornings, all the other leadmen attended such meetings also. However, there are also supervisor meetings, Brown asserted, that Hawkins and leadmen do not attend.

Section 2(11) of the Act defines a supervisor as "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 griev-

ances, or to effectively recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Possession of any one of the specified authorities is sufficient to establish supervisory status. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 355 U.S. 908 (1949). But while the existence of the powers enumerated in Section 2(11) are to be considered in the disjunctive, the section nevertheless "states the requirement of independence of judgment in the conjunctive with what goes before." *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). "[T]he burden is on the party alleging supervisory status to prove that it in fact exists." *Commercial Movers*, 240 NLRB 288, 290 (1979).

In the instant case, there is little evidence to establish Hawkins exercised supervisory authority. "[T]he failure to exercise [it] may show the authority does not exist." *Laborers Local 341 v. NLRB*, 564 F.2d 834, 837 (9th Cir. 1977). The only evidence of exercise of authority is found in Herrera's testimony that Hawkins approved overtime and initialed overtime on timecards. But Herrera could not confirm that Hawkins' actions in this regard were not previously authorized by higher management, or that Hawkins otherwise exercised independent judgment in determining overtime. Brown's uncontradicted testimony dispelled any notion that Hawkins exercised any independent judgment in overtime matters. Moreover, the initializing of timecards does not in itself establish one as a supervisor. *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

That Hawkins attended the supervisory meeting at which Respondent's attorney talked to supervisors regarding the Union's organizing campaign suggests that Respondent considered Hawkins to be a supervisor. However, while suspicious, it nevertheless does not establish Hawkins' actual possession of supervisory authority. Accordingly, and mindful of the need "to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect" (*Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970)), I conclude that Hawkins did not possess the authority required under Section 2(11) of the Act to constitute him a supervisor. I therefore find that the challenge to his ballot should be overruled.

IV. THE OBJECTIONS

A. *The Union's Objections*

The Union filed 12 numbered objections to the election. Objections 1 and 9 were subsequently withdrawn by the Union. Objection 2 complained that Respondent created an atmosphere of fear and coercion through its campaign literature, and captive audience speeches, by repeatedly predicting strikes, violence, loss of business, and loss of jobs as an inevitable result of the Union's victory. No credible evidence was presented to establish this objection, and it is found to be without merit.

Objection 3 alleges that Respondent created the impression that the collective-bargaining process would be futile and harmful to employees by making repeated predictions of bargaining difficulties, delays, loss of benefits, and strikes. Credited evidence reflects that Supervisor May told employees that Respondent would not sign a contract with the Union, thereby indicating the futility of the collective bargaining process. Supervisor May's comment in this regard has been found to have violated Section 8(a)(1) of the Act. Violations of Section 8(a)(1) a fortiori constitute objectionable conduct affecting the results of the election. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Accordingly, merit is found to Objection 3.

Objection 4 contended that Respondent threatened employees with a loss of benefits, more onerous working conditions, and other reprisals if they elected the IUE as their bargaining representative. No evidence was presented to support this objection, and it is found to be without merit.

The Union's Objection 5 alleged that Respondent threatened that work rules would be more strictly enforced because of the employees' organized union activities. Credited evidence establishes that Supervisor Rodriguez did, in effect, communicate to employees that working rules would be more strictly enforced because of the union organizing effort. Rodriguez' action in this regard was found to have violated Section 8(a)(1) of the Act. Merit is therefore found to this objection.

It is contended in the Union's Objection 6 that Respondent threatened employees with a loss of access to management and a loss of harmonious working conditions if they voted in favor of union representation. No evidence was presented to support this objection, and it is found to be without merit.

The Union's Objection 7 alleges that Respondent interrogated employees regarding their union sympathies and activities. Based on credited evidence, it has previously been concluded herein that Supervisors Hernandez and May did interrogate employees regarding their union activities during the critical period. Accordingly, it is found that the Union's Objection 7 has merit.

Objection 8 claims that Respondent restricted the normal movement of certain employees and otherwise interfered with employees' rights to solicit their coworkers on behalf of the Union. No evidence was presented to establish this allegation, and it is found to be without merit.

The Union's Objection 10 contends Respondent granted discretionary wage increases to certain employees and promised to implement additional wage increases after the election in order to discourage employees' support for the Union. It has already been found herein that Respondent's grant of wage increases was consistent with its prior practice and not unlawful. Accordingly, it is concluded that the Union's Objection 10 must be found to be without merit.

The Union's Objection 11 asserts that Respondent engaged in surveillance and created the impression of surveillance of employees' union activities. Evidence to support the allegations is based upon the conduct of supervisor Hernandez which was found herein to have consti-

tuted a violation of Section 8(a)(1) of the Act. It is therefore found that Objection 11 has merit.

Objection 12 contends that Respondent unlawfully disciplined, discharged, and otherwise discriminated against certain employees because of their union sympathies and activities, and for the purpose of discouraging such sympathies and activities among other employees. The objection is premised on the discharges of Avila and Mascorro and the suspension of McDonald during the critical period. The suspension of McDonald and the discharges of Avila and Mascorro have been found herein not to have been unlawful. Accordingly, the Union's Objection 12 is found to be without merit.

B. *The Respondent's Objections*

Respondent filed two timely objections to the election, the first claiming that the Union's observer and various supporters of the Union engaged in electioneering at the polls by wearing and/or displaying buttons proclaiming their support for the IUE, while the second objection contended that the union supporters engaged in electioneering near the polls and exhorted employees standing in line at the polls to cast their votes for the Union.

With respect to the first objection, John Garza, who served as Respondent's observer during the election, testified that at the beginning of the election Ramiro Avila, the Union's observer, wore a blue button approximately the size of a silver dollar containing the legend "I'm Proud to be I.U.E." The Board agent told Avila to take the button off inasmuch as he was not supposed to have one on. Avila took the button off and laid it on the table in front of him face up. Individuals going to vote passed by his table. The button remained face up for approximately 5 minutes when the Board agent noticed the button and told Avila he was not allowed to have it. At that time Avila turned the button face down. Subsequently, however, a voter coming through the line reached down and picked the button up, turned it face up on the table, and told Avila to "be proud." The button then remained face up again for about 45 minutes until the Board agent again noticed it and told Avila to put it away. Garza stated that approximately 106 employees voted during the morning session.

Garza further testified that during the afternoon session Alice Camacho came through the voting line wearing an IUE button, apparently identical to Avila's. Following her voting, Camacho sat down in the voting area and observed the proceedings for approximately 5 minutes until the Board agent noticed her and asked her to leave. Also during the afternoon session, Raul Hernandez voted while wearing an IUE button. Moreover, after he voted, Hernandez came back to show another employee where the voting was taking place and where to stand in line. At that time he was still wearing the IUE button. Garza's testimony in the foregoing respect is not contradicted and is credited.

Evidence to support Respondent's second objection was revealed in the testimony of Sam Brown. Brown testified that around the midpoint of the morning session of voting, he had occasion to go to the shipping area where he observed Raul Hernandez and Pete Mascorro stand-

ing at the end of a loading dock approximately 10 feet away from the end of the voting line. Brown stated he heard Mascorro and Hernandez hollering and talking to employees lined up to vote and he heard them say "Vote, Vote, Vote." Approximately 35 to 40 people were in the voting line at the time, according to Brown. Brown related that Hernandez and Mascorro were present as far as he could tell for only 2 or 3 minutes.

Both of Respondent's objections are based on the proposition that the Union had improperly engaged in electioneering at or near the polls. Such electioneering, Respondent argues, has been long held to be a basis for setting an election aside. I have difficulty concluding, however, the conduct complained of can be regarded as electioneering. All Mascorro and Raul Hernandez did, even assuming, arguendo, their status as agents for the Union, was to encourage employees to vote. The evidence does not establish that they solicited employees to vote one way or another. Moreover, their conduct was of short duration according to the evidence and extremely unlikely to have had an impact upon the election. Their conduct in no way is comparable in gravity or degree to the conduct of the leadman in *Claussen Baking Co.*, 134 NLRB 111 (1961), cited by Respondent. There the leadman had solicited newly hired employees on their way to the polls to vote against the Union. Here, as stated, employees were not shown to have been solicited to vote one way or another by Mascorro or Hernandez in the morning session. In this regard, the case is also unlike *NLRB v. Carroll Contracting & Ready Mix*, 636 F.2d 111 (5th Cir. 1981), also cited by Respondent. There, two former employees had stationed themselves in a position where they could urge employees waiting in line to vote for the union by signs on their hats and gesturing to ballots marked "Vote Yes" pinned to their shirts. Although Hernandez, wearing a union button, accompanied another employee to the polling area during the afternoon session, there was no showing he solicited him to vote any particular way. Accordingly, I find no merit to Respondent's objection based upon the conduct of Mascorro and Hernandez.

Avila's conduct with the union button during the morning session was no more objectionable. His conduct was simply equivalent to the wearing of the button during the election, and the Board has held that an observer's wearing a union button is not in itself a sufficient basis for setting an election aside. *Nestle Co.*, 248 NLRB 732 (1980). See also *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 971 (5th Cir. 1982); *NLRB v. Laney & Duke Storage Co.*, 369 F.2d 859, 864-865 (5th Cir. 1966). Nor does Camacho's presence in the polling area for a few minutes after voting and while wearing a union button constitute objectionable electioneering. Her presence was not disruptive, there was no showing that any voters were present during the 5 minutes she sat in the polling area, and she left when asked by the Board agent.

In view of the foregoing, I shall recommend that Respondent's objections be overruled in their entirety.

CONCLUSIONS OF LAW

1. The Respondent, Lancer Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. By surveilling the union activities of its employees, by creating the impression of surveillance of the union activities of its employees, by interrogating employees regarding their own and other employees' activities on behalf of the Union, by telling employees Respondent would never sign a contract with the Union should the employees select the union to represent them, and by threatening employees that it would more strictly enforce its rules as a result of employees' union activities, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent did not violate Section 8(a)(3) and (1) of the Act in suspending its employee Jill McDonald Pfeiffer or in discharging its employees Pete Mascorro, Ramiro Avila, or Charles Pfeiffer.
6. Respondent has not violated the Act in any other manner not found above.
7. The Union's Objections 3, 5, 7, and 11 to the election in Case 23-RC-5080 which are coextensive with the unfair labor practices found above are meritorious and must be sustained while the remaining objections of the Union are found to be without merit and must be overruled.
8. Respondent's Objections 1 and 2 to the election in Case 23-RC-5080 are without merit and must be overruled.
9. The challenges to the ballots of Pete Mascorro and Ramiro Avila are found to be valid and must be sustained.
10. The challenge to the ballot of John Hawkins is found to be invalid and must be overruled.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act to include the posting of an appropriate notice to employees. Having found the challenges to the ballots of Pete Mascorro and Ramiro Avila valid, it is recommended to the Board that the challenges be sustained and that such ballots not be counted. On the other hand, having found that the challenge to the ballot of John Hawkins was invalid, it is recommended that the challenge be overruled and the ballot be counted. It is further recommended that should the ballot of John Hawkins, after opening and counting, result in a majority of the valid ballots cast being cast against representation, and because of merit being found to the Union's Objec-

tions 3, 5, 7, and 11, the election in Case 23-RC-5080 be set aside and a new election directed.

On these findings of fact and conclusions of law on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Lancer Corporation, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Surveilling the activities of its employees on behalf of International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, or any other labor organization.

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

(c) Threatening employees that work rules would be more strictly enforced because of the employees' union organizing activities.

(d) Interrogating employees concerning their own and other employees' union activities.

(e) Telling employees that it would not sign a contract with the Union should the employees select the Union to represent them.

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

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

(a) Post at its San Antonio, Texas facility copies of the attached notice marked "Appendix."²⁶ Copies of the

notice on forms provided the by the Regional Director for Region 23, after being signed by Respondent's authorized representatives, 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 said notices are not altered, defaced, or covered by any other material.

(b) 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 violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that Case 23-CA-5080 be severed from the four complaint cases and that it be remanded to the Regional Director for Region 23; that the challenges to the ballots of Pete Mascorro and Ramiro Avila, which were cast in the representation election conducted in Case 23-RC-5080 on July 2, 1982, be sustained; that the challenge to the ballot of John Hawkins be overruled; and that the Regional Director be directed to open and count the challenged ballot of John Hawkins and to prepare and serve on the parties a revised tally of ballots.

If the Petitioner receives a majority of valid votes cast, the Regional Director shall issue a certification of representative. If the Petitioner does not receive a majority of the valid votes cast, according to the revised tally, it is further ordered that the election held on July 2, 1982, among certain employees of Respondent's San Antonio, Texas facility be set aside and that the Regional Director be directed to conduct a second election at such time as he deems that circumstances permit the free choice of a bargaining representative.

²⁵ 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.

²⁶ 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."