

Jet Spray Corporation and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW and Jet Spray Employees' Committee, a/k/a Jet Spray Employees' Association, Party to the Contract. Cases 1-CA-19872, 1-CA-19896, 1-CA-20206, 1-CA-20465, and 1-CA-20491

9 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 21 December 1983 Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs,¹ the Respondent filed cross-exceptions, a supporting brief, and a brief in opposition to the exceptions,² and the Association, Party to the Contract, filed an answering brief.

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

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

We agree with the judge that the Respondent violated Section 8(a)(2) and (1) by dominating the Jet Spray Employees' Committee and further violated Section 8(a)(2) and (1) by recognizing, bargaining with, and executing a collective-bargaining agreement with the Jet Spray Employees' Association at a time when a valid petition for representation filed by another labor organization was pending before the Board. We find, however, contrary to the judge, that the Jet Spray Employees' Association was a mere continuance of the dominated Jet Spray Employees' Committee and that the Respondent dominated the Jet Spray Employees' Association in further violation of Section 8(a)(2) and (1). A brief recapitulation of the critical events reveals the following.

In early 1982³ shortly after the Respondent relocated to its present facility, the Auto Workers (the

Union) commenced union organizational activities among the Respondent's employees. In late April the Respondent's president, Leonard Jacobs, discussed with legal counsel Charles Mahoney the likelihood of unionization if the Respondent did not remedy certain existing problems. Shortly thereafter, on 23 April, Jacobs notified the employees that the Respondent had arranged for the employees and management to discuss and attempt to solve unspecified "problems" caused by the relocation.⁴ Later that day the Respondent's personnel manager, Elaine Clement, instructed its supervisors that the employees in certain departments were to select two "representatives" to attend an employee-management meeting and that a total of 20 employee representatives were to be selected. Pursuant to these instructions the employees then met on company premises and selected representatives.

On 28 April the employee representatives, known as the Jet Spray Employees' Committee (the Committee), met with the Respondent's representatives, including Company President Jacobs and legal counsel Mahoney, during working time in the plant's conference room.⁵ The Committee voiced several concerns regarding working conditions. In response Mahoney and Jacobs advised the Committee that the Respondent would look into these concerns and take steps to remedy them.⁶ Mahoney also told the Committee that, while employees had the right to organize and could choose representatives either through the Union or through the Committee, if employees selected the Union there was a consequence to pay and the Respondent would deal with that later through long court battles.⁷ Thereafter, on 4 May, Supervisor John Doolan asked two employees if they had attended a meeting of the Union the previous night, if there was a large turnout, and what took place.⁸

⁴ No exceptions were filed to the judge's finding that Jacobs' notice to the employees 23 April was motivated by the Union's organizational efforts.

⁵ A meeting between the management and employee representatives originally scheduled by the Respondent for 26 April was postponed at the initiation of the employee representatives because they feared retaliation from a management vice president if they expressed their concerns about working conditions.

⁶ No exceptions were filed to the judge's findings that the Respondent solicited the employees' grievances and then remedied those grievances because it feared union organization and wanted "to nip it in the bud" and that the Respondent violated Sec. 8(a)(1) by soliciting, promising to remedy, and remedying grievances for the purpose of discouraging support for the Union.

⁷ No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening its employees with extended litigation and other consequences if they selected the Union as their representative.

⁸ No exceptions were filed to the judge's finding that by this conduct the Respondent coercively interrogated employees in violation of Sec. 8(a)(1).

¹ In his decision the judge inadvertently stated that Thomas Waldstein, Esq., appeared as counsel for the Party to the Contract when in fact he appeared as counsel for the Charging Party.

² The Respondent contends that the Board should reject the exceptions of the General Counsel and the Charging Party because they fail to meet the requirements of specificity set forth in Sec. 102.46(b) of the Board's Rules and Regulations. Although the exceptions do not comply in all respects with the requirements of the rule, they sufficiently designate those findings of the judge claimed to be erroneous and therefore we shall consider them. *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979).

³ All dates are in 1982 unless noted otherwise.

On 5 May Company President Jacobs issued a memorandum to employees setting forth new restrictions on discussion by employees of nonwork matters on company time.⁹ Also on 5 May Mahoney stated to the Committee that "you realize you were formed to present the [employees'] problems," and he invited the Committee to take the "next step" by participating in the solution of those problems if such an effort was supported by the employees. The Committee then requested and received permission from the Respondent to meet with the employees in their respective departments.

It is undisputed that at all relevant times the Committee had no formal structure, collected no fees or dues from the employees, and met only on the Respondent's premises.

On 6 May Jacobs distributed a memorandum to the employees urging them to support the Committee and indicating that the Respondent was prepared to work closely with the Committee concerning working conditions if the employees were committed to these efforts. After the employees were polled on company time and voted to continue dealing with the Respondent through the Committee, the Committee informed Jacobs that the Respondent had 30 days to make an effort to remedy the employees' complaints or they would turn to an outside union.¹⁰

Throughout May and June the Committee and the Respondent continued to meet and discuss working conditions. On 14 May Supervisor Roger Messier asked an employee if he knew who had contacted and who was involved with the Union.¹¹ Thereafter, on 18 May, legal counsel Mahoney informed the Committee that union solicitation in the plant at any time or on company property would not be tolerated and that violators of this policy would be terminated.¹² On 4 June Jacobs announced to employees the implementation of various new working conditions effective 1 July.

On 9 July¹³ the Regional Director for Region 1 issued the instant complaint in Cases 1-CA-19872

and 1-CA-19896 naming the Committee as a Party in Interest and alleging numerous violations of Section 8(a)(2) and (1) as well as seeking the disestablishment of the Committee.

On 6 August Jacobs informed the employees that the Respondent had decided to conduct a poll to determine the employees' desire for representation. The polling was conducted 12 August. A total of 124 votes were cast for the Committee, 66 for the Union, 22 for no employee organization, and there was 1 abstention. As found by the judge the Respondent conducted the poll because of the issuance of the 9 July complaint.¹⁴

Within a few days of the 12 August poll members of the Committee hired private counsel.¹⁵ By letter of 17 August counsel retained by members of the Committee made a demand for recognition to the Respondent on behalf of an organization referred to in the letter as the Jet Spray Employees' Association (the Association). The 17 August letter noted that the Respondent had committed itself to respect the results of the 12 August poll and that on the basis of that vote the Association represented the Respondent's employees. By letter of 24 August attorney Mark Peters responded on behalf of the Respondent that "I understand that the Jet Spray Employees Association is the organization otherwise known as the Jet Spray Employees Committee. Because the Association, under the name of the Committee, has been shown by the poll to have the support of a majority of the em-

stated to employee William Mullins that he knew Mullins was heavily involved with the Union. In agreement with the Respondent we find that this statement did not violate the Act. Thus, Mullins was an open union adherent who campaigned openly for the Union on company premises and the conversation with Jacobs in which this statement was made occurred during an informal encounter at a social occasion. In these circumstances we find that Jacobs' acknowledgement of Mullins' open union activities did not unlawfully create the impression that Mullins' activities were under surveillance. *Owens-Illinois*, 265 NLRB 931 (1982). We shall therefore dismiss the allegation in the complaint that the Respondent unlawfully created an impression that employee union activities were under surveillance. Member Zimmerman would find for the reasons set forth by the judge that Jacobs statements to Mullins created an unlawful impression of surveillance.

In the absence of exceptions we adopt pro forma the judge's findings that on 9 July the Respondent violated Sec. 8(a)(1) by soliciting Mullins to abandon his union activity and by promising benefits conditioned on the cessation of union activity.

¹⁴ Contrary to Jacobs' assertions to employees 6 August that the poll was motivated by competing claims for representation by the Committee and the Union there is no evidence that the Union made a recognition demand until 10 August, 1 day before the Union's filing of a representation petition with the Board. Further, there is no evidence that the Committee made a demand for recognition as of 6 August.

No exceptions were filed to the judge's finding that the 12 August poll violated Sec. 8(a)(1).

¹⁵ According to the testimony of employee Michael Regan, the Respondent's legal counsel Mahoney stated to the Committee 5 August that "[y]ou as a committee can act just like a union; and we'll treat you just like a union. You can go get your own lawyers." While Mahoney testified that he never at any time offered legal advice to the Committee or its members he did not deny the foregoing comments attributed to him by Regan.

⁹ In the absence of exceptions we adopt pro forma the judge's finding that Jacobs' 5 May memorandum violated Sec. 8(a)(1) of the Act.

¹⁰ No exceptions were filed to the judge's finding that the 6 May poll failed to meet the standards for employer polling set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), and therefore violated Sec. 8(a)(1).

¹¹ No exceptions were filed to the judge's finding that by this conduct the Respondent coercively interrogated an employee in violation of Sec. 8(a)(1).

¹² No exceptions were filed to the judge's finding that Mahoney's statements violated Sec. 8(a)(1). As noted by the judge the no-solicitation rule set forth by Mahoney on 18 May is unlawful under the standard of *Essex International*, 211 NLRB 749 (1974), which the Board returned to in *Our Way, Inc.*, 268 NLRB 394 (1983) (Member Zimmerman dissenting with respect to the overruling of *T.R.W. Bearings*), overruling *T.R.W. Bearings*, 257 NLRB 442 (1981).

¹³ The judge found that the Respondent violated Sec. 8(a)(1) when on 9 July on a cruise boat at the Respondent's annual summer party Jacobs

ployees who were eligible to cast ballots in that poll, the Corporation does agree to recognize the Association as the exclusive collective bargaining agent for these employees." Concurrent with this exchange of letters the organization known as the Association elected four officers,¹⁶ drafted a constitution, registered with the United States Department of Labor as a labor organization, and began securing signed membership cards and dues authorizations from the Respondent's employees.

At a membership meeting of the Association held 17 November the Association passed a motion "to confirm the fact that the Committee no longer exists as it once was, and that we are now one body, the Jet Spray Employees Association." On 23 November the Respondent and the Association commenced bargaining negotiations and thereafter reached agreement on a collective-bargaining agreement effective 1 January 1983.

Based on the foregoing we agree with the judge that the Committee was a dominated labor organization from its inception inasmuch as the Committee was formed not at the initiation of the employees but at the sole direction of the Respondent, the Respondent and not the employees determined the number of representatives and their method of selection, the Committee had no formal structure or independent means of support, the Committee conducted its meetings at the pleasure of the Respondent on company time and property, and the Committee continued to exist at all times as part of the Respondent's campaign to undermine through unlawful means the independent organizing efforts of another labor organization.

The Respondent contends that the impetus for the continuation of the Committee, if not its inception, came from the employees and not from the Respondent. We find no merit in this contention. Thus, the record reveals that soon after learning of the Union's organizational campaign the Respondent's president, Jacobs, formed the Committee and in direct response to the Union's campaign interfered with the employees' statutory right to select or reject a bargaining representative free from coercion by soliciting grievances, promising to remedy grievances, and thereafter remedying grievances. In further response to the Union's campaign the Respondent threatened employees with extended litigation and other reprisals if they selected the Union and engaged in numerous other concurrent unfair labor practices directed at the Union's supporters while continuing to deal with

¹⁶ Barry Carr was elected president of the Association. It is undisputed that Carr was the leading spokesperson and informal chairman on behalf of the Committee. The Committee's informal secretary was Pamela Yukna. Yukna was elected the Association's recording secretary.

the Committee. In these circumstances in which the employees were confronted with the alternative of, on the one hand, receiving the benefits of the favored Committee formed by the Respondent or, on the other hand, receiving reprisals for supporting the Union, it is not surprising that employees continued to participate in the Committee. In this context such participation does not establish that the impetus for the Committee's continued existence rested with the uncoerced desires of the employees. Further, in view of the absence of a formal structure or any independent means of support, as well as the holding of its meetings on company time and property and the circumstances surrounding its creation, we find no merit in the Respondent's contention that the Committee "functioned wholly independent of management" after its creation. Accordingly, we conclude that the Respondent dominated the Committee in violation of Section 8(a)(2) and (1) and that a disestablishment remedy is warranted. *Kurz-Kasch, Inc.*, 239 NLRB 1044, 1048 (1978); *Sound Technology Research*, 221 NLRB 496 (1975).¹⁷

Under the circumstances of this case we further find that the Association is a mere continuance of the Committee and is also a dominated labor organization whose disestablishment is warranted.

The record demonstrates that within a few days of the 12 August poll won by the Committee the organization known as the Association emerged in the Committee's place. The exchange of letters between the Respondent and newly retained counsel for the Association reveals conclusively that the parties themselves considered the Committee and the Association to be one and the same organization. Thus, the Association claimed majority status on the basis of an unlawful poll won not by the Association but rather by the Committee. Indeed, on the date of the poll the Association did not even purport to exist. In response to the Association's demand for recognition on the basis of the poll won by the Committee the Respondent granted recognition because the Association "under the name of the Committee" had attained majority status.

¹⁷ Because the Committee was purely a creation of the Respondent, was not formed at the initiation of the employees, and continued to exist as part of the Respondent's campaign to undermine the Union through unlawful means, we find this case factually distinguishable from, and therefore find it unnecessary to rely on, *Northeastern University*, 235 NLRB 858 (1978), *enfd. in part, enf. denied in part* 601 F.2d 1208 (1st Cir. 1979), in which employees and not the employer were the impetus behind the formation of the labor organization involved. See also *Spiegel Trucking Co.*, 225 NLRB 178 (1976), in which an employer's direction to employees to form a union accompanied only by the suggestion to retain an attorney and a promise to negotiate was found insufficient to establish employer domination.

In addition to the absence of a hiatus between the disappearance of the Committee and the emergence of the Association and the virtual admission of continuity among these labor organizations as demonstrated by the exchange of recognition letters between the Association and the Respondent on 17 and 24 August, we also note that employees Barry Carr and Pamela Yukna, leading spokespersons of the Committee, also served as leading officials of the Association. That the Association is a mere continuation of the Committee is further demonstrated by the dissolution motion of 17 November at a membership meeting of the Association, in which the Association determined that the Committee "no longer exists as it once was" and decreed that "we are now one body, the Jet Spray Employees Association." In these circumstances we find that the judge erred in finding that the Committee "effectively ceased to exist" prior to the Respondent's 24 August recognition of the Association and further erred in finding that an entirely new and independent labor organization emerged to represent the Respondent's employees.

For many years the Board has applied a rule of reason that, where, as here, there exists substantial continuity between the purported disappearance of a dominated labor organization, and the emergence of an ostensibly independent labor organization, the party responsible for the domination must at minimum affirmatively assure employees freedom from further employer involvement in the decision to choose or reject representation. In the absence of such assurances the Board and the courts have found that employees likely will conclude that the newly emerging organization will enjoy the same dominating favor and support enjoyed by the previous organization and therefore the newly emerging organization is deemed to inherit the dominated status of the previous organization.¹⁸ As noted by Judge Hand:¹⁹

[W]here an unaffiliated union seems to the employees at large to have evolved out of an earlier joint organization of employer and employees, the Board may take it as datum, in the absence of satisfactory evidence to the contrary, that the employees will suppose that the company approves the new, as it did the old, and that their choice is for that reason not as free as the statute demands.

Here the Respondent not only offered no such assurances but instead demonstrated clearly to em-

ployees that it considered the Committee and the Association to be one and the same organization and that the latter would enjoy the fruits of the unlawful poll won by the former. In these circumstances we find that the Association is a continuance of the Committee and that it shares the same infirmities as the dominated Committee. Although we recognize fully that on the retention of private counsel the Association, unlike the Committee, drafted a constitution, elected officers, secured signed membership cards and dues authorizations, and formally registered as a labor organization, it is our view that to find such factors dispositive in the circumstances of this case is to exalt form over substance. Notwithstanding these formalities the essential fact remains that the parties rightfully considered the dominated Committee and the Association to be one and the same. The transfer of the Respondent's favor from one to the other without hiatus or assurances of independence therefore merely heightened the perception that the creation and continued existence of both the Association and the Committee were attributable to the efforts of the Respondent. Accordingly, we conclude that the formalities of structure that ordinarily would tend to support a finding of independence are outweighed in the circumstances of this case by those factors tending to demonstrate that both the Committee and its continuance, the Association, were dominated labor organizations. We therefore find that the Respondent dominated the Association in violation of Section 8(a)(2) and (1) and we shall modify the judge's Order by ordering the disestablishment of the Association.²⁰

ORDER

The National Labor Relations Board orders that the Respondent, Jet Spray Corporation, Norwood, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Forming, dominating, or interfering with the administration of the Jet Spray Employees' Association and the Jet Spray Employees' Committee, or with the formation or administration of any other labor organization of its employees, and contributing support to the Association and the Committee or to any other organization of its employees.

(b) Recognizing or in any manner dealing with the Association and the Committee, or any reorganization or successor thereof, as a representative of

¹⁸ See *Huberta Coal Co.*, 168 NLRB 122, 123 (1967), and cases cited.

¹⁹ *Westinghouse Electric & Mfg. Co. v. NLRB*, 112 F.2d 657, 660 (2d Cir. 1940), *enfg.* in pertinent part 18 NLRB 300 (1939), *affd.* 312 U.S. 660 (1941). See also *NLRB v. Southern Bell Telephone Co.*, 319 U.S. 50 (1943).

²⁰ Of course nothing in our Order should be construed as limiting the right of the Respondent's employees in the future to select either an independent or an affiliated labor organization to represent them if they so desire.

any of its employees for the purpose of dealing with Jet Spray Corporation concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

(c) Assisting or contributing support to Jet Spray Employees' Association by recognizing or bargaining with that labor organization as the exclusive representative of its employees for the purpose of collective bargaining.

(d) Maintaining or giving any force or effect to the collective-bargaining agreement between the Respondent and the Association effective 1 January 1983, or any extension or modification thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment that may have been established pursuant to the performance of that contract.

(e) Withholding from the pay of any of its employees union dues or other union fees or assessments that have been deducted on account of any obligation of membership in Jet Spray Employees' Association, and paying to the Association any dues, fees, or assessments that have been deducted from the pay of its employees.

(f) Directly or indirectly polling its employees regarding their preference of collective-bargaining agents.

(g) Promulgating, implementing, or enforcing overly broad solicitation rules, or threatening employees with warnings or discharge for violations of those rules.

(h) Threatening employees with extended litigation or other reprisals if they select a union as their collective-bargaining representative.

(i) Soliciting, promising to remedy, or remedying employee grievances in order to induce its employees to refrain from supporting the UAW or any other labor organization.

(j) Coercively interrogating its employees regarding their union activities or those of others.

(k) Soliciting employees to abandon union activity.

(l) Promising benefits to employees conditioned on the cessation of union activity.

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

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Withdraw and withhold all recognition from Jet Spray Employees' Association as the representative of its employees for the purpose of collective bargaining and completely disestablish the Jet

Spray Employees' Association as such representative.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments, and other moneys, if any, paid by or withheld from them in the manner provided in the remedy section of the administrative law judge's decision.

(c) Withdraw all recognition from the Jet Spray Employees' Committee as a representative of any of its employees for the purpose of collective bargaining and completely disestablish the Jet Spray Employees' Committee as such representative.

(d) Withdraw the solicitation rules announced by Leonard J. Jacobs 5 May 1982 and by Charles F. Mahoney 18 May 1982.

(e) 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 moneys due under the terms of this Order.

(f) Post at its Norwood, Massachusetts plant copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) 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 allegations that Barry Carr committed unfair labor practices are dismissed in their entirety.

²¹ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT form, dominate, or interfere with the administration of the Jet Spray Employees' Association and the Jet Spray Employees' Committee or any other labor organization of our employees, nor will we contribute support to the Association and the Committee or to any other organization of our employees.

WE WILL NOT recognize or in any other manner deal with the Association and the Committee, or any reorganization or successor thereof, for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

WE WILL NOT assist or contribute support to Jet Spray Employees' Association by recognizing or contracting with that labor organization as the bargaining representative of our employees.

WE WILL NOT give effect to our 1 January 1983 contract with Jet Spray Employees' Association, or to any renewal, extension, modification, or supplement thereof, but we are not authorized or required to withdraw or eliminate any wage rates or other benefits, terms, and conditions of employment that we have given to our employees under that contract.

WE WILL NOT solicit employee grievances, promise to remedy them, or remedy them for the purpose of discouraging union activity.

WE WILL NOT directly or indirectly poll employees regarding their preference of collective-bargaining agents, nor will we coercively interrogate employees regarding their union sympathies or activities or those of other employees.

WE WILL NOT withhold from the pay of any of our employees union dues or other union fees or assessments that have been deducted on account of any obligation of membership in Jet Spray Employees' Association, nor will we pay to the Association any dues, fees, or assessments that have been deducted from the pay of our employees.

WE WILL NOT promulgate, implement, or enforce overly broad solicitation rules, nor will we threaten employees with warnings or discharge for violations of any such unlawful rules, and WE WILL withdraw the rules announced by Leonard J. Jacobs in his letter of 5 May 1982 and by Charles F. Mahoney to the Committee 18 May 1982.

WE WILL NOT threaten employees with extended litigation or other reprisals if they select International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT solicit employees to abandon lawful union activity or promise them benefits on condition they do so.

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

WE WILL withdraw and withhold all recognition from Jet Spray Employees' Association as the collective-bargaining representative of our employees and WE WILL completely disestablish the Jet Spray Employees' Association as such representative.

WE WILL reimburse all our employees, former and present, for dues and other moneys unlawfully exacted from them under our contract with Jet Spray Employees' Association.

WE WILL withdraw and withhold all recognition from Jet Spray Employees' Committee as the collective-bargaining representative of our employees and WE WILL completely disestablish the Jet Spray Employees' Committee as such representative.

JET SPRAY CORPORATION

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was heard at Boston, Massachusetts, in March, April, and July 1983 pursuant to charges timely filed and complaints issued and amended. It is alleged that Jet Spray Corporation (Respondent or Jet Spray) violated Section 8(a)(1) of the Act by in numerous ways interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act. It is further alleged that Respondent violated Section 8(a)(2) and (1) of the Act by unlawfully dominating and/or interfering with the formation and/or administration of the Jet Spray Employees' Committee and the Jet Spray Employees' Association¹ (herein sometimes called the Committee and the Association).² Respondent denies the commission of unfair labor practices.

On the entire record,³ and after careful consideration of the comparative demeanor of the witnesses as they

¹ The names of the Committee and Association appear as amended at hearing.

² Allegations of violations of Sec. 8(a)(3) and (5) of the Act were either settled or withdrawn during the course of the trial of this case. The General Counsel also withdrew a paragraph of the complaint relating to the conduct of Frank Serra.

³ After settlement of various aspects of this case, the General Counsel withdrew numerous exhibits. They have been removed from the official exhibit file.

testified before me and the able posttrial briefs filed by the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a Massachusetts corporation engaged in the manufacture, sale, and distribution of beverage equipment at its Norwood, Massachusetts plant where it annually purchases in excess of \$50,000 worth of products directly from outside the Commonwealth of Massachusetts. Respondent is engaged in commerce within the meaning of the Act.

II. SUPERVISORS AND AGENTS

The pleadings and on the record agreements of the parties at trial establish that the following named individuals at all times material to this proceeding, except in the case of Alfred Pace as noted, occupied the positions set forth after their names and were supervisors within the meaning of Section 2(11) of the Act and agents of Respondent: Leonard J. Jacobs—president; Carol McNamara—administrative assistant; Elaine Clement—director of personnel; Dante Finelli—supervisor; Frank Serra—supervisor; John Doolan—supervisor; Ronald Baker—supervisor; Alfred Pace—vice president of manufacturing until 6/18/82 when terminated; and Roger Messier—supervisor.

The complaint alleges and Respondent's answer denies that Charles F. Mahoney acted as Respondent's agent. Mahoney was retained by Respondent as its labor relations attorney in April 1982 and thereafter acted as its spokesman in meetings with the Committee and later the Association on matters concerning the employees' wages, hours, and working conditions, including the negotiation of a collective-bargaining agreement. Accordingly, I find that Charles F. Mahoney was at all times material to the allegations before me an agent of Respondent within the meaning of Section 2(13) of the Act.

The parties disagree on the agency status of Barry Carr. The General Counsel has brought forth in support of the allegation that Carr is or was an agent of Respondent nothing more than evidence warranting suspicion. There is no convincing evidence to support the General Counsel's contention, and I conclude and find that it has not been shown that Carr ever was such an agent during the occurrences before me. All that the record reveals is that Carr was an aggressive leader of the employees supporting the Committee and the Association. That his interests in that capacity may have placed him in opposition to the interests of the Union does not establish that Respondent may fairly be held responsible for his actions in expressing that opposition, nor do warnings by him that Respondent would or might retaliate against UAW adherents, or the circumstance that he may have successfully interceded on behalf of employees receiving discipline. Inasmuch as the evidence does not show that he was or is an agent of Respondent or was held out by Respondent to be one, I conclude that his conduct may not be attributed to Respondent and therefore may not be found violative of Section 8(a)(1) of the Act. That being so, the complaint

allegations that Respondent by Carr committed violations of Section 8(a)(1) are to be dismissed.

III. LABOR ORGANIZATION

The complaint alleges, and Respondent admits, that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (the Union or UAW) and Jet Spray Employees Committee, a/k/a Jet Spray Employees' Association are each a labor organization within the meaning of Section 2(5) of the Act. The Association filed a motion to intervene, which was granted, and a statement of position wherein it asserts it is a labor organization designated by Respondent's employees as their exclusive collective-bargaining representative and is party to a collective-bargaining agreement with Respondent.

Respondent's answer is binding on it, but, although all parties agree the Association is a labor organization, the Association does not admit the Committee was or is a labor organization. I find it was because it existed for the purpose of dealing with an employer concerning grievances and working conditions. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Chronology

Respondent moved its operations from Waltham, Massachusetts, to a much larger facility in Norwood, Massachusetts, during the winter of 1981-1982. The move began about November and was completed in January or February. After the move productivity and quality fell off, customer complaints increased, intramanagement communication and the relationships between management members and employees were poor, and employee morale was low.

On April 9, 1982,⁴ employee Leonard Murgo, after discussing it with fellow employee Michael Regan, called Richard Emberley, the executive vice president of UAW Local 1596, and told him a union was needed at Jet Spray. Emberley told him to select employees from each of Respondent's departments to attend a meeting with the Union. Emberley later set April 20 as the meeting date.

Between April 9 and 20, Murgo and Regan solicited different employees to attend the union meeting. All but Barry Carr agreed. Carr, a stockroom employee who was approached on April 20, declined on the ground he had prior arrangements to go with Respondent's personnel manager Elaine Clement that evening to buy equipment for the company softball team. There is no evidence, nor do I conclude, that Carr told Clement of the meeting scheduled for that evening. The meeting of April 20 took place and at least 2 employees, Regan and Murgo, of the approximately 20 attending then signed UAW authorization cards.

Respondent's president Leonard Jacobs called attorney Charles Mahoney in mid-April and met with him on April 21 or 22. The two discussed various problems at

⁴ All dates are 1982 unless otherwise indicated.

the plant, but Jacobs denies mentioning the UAW or any union to Mahoney. Mahoney first testified, consistent with his pretrial affidavit given to a Board agent,⁵ that Jacobs told him that he had heard rumors of employee union activity. Mahoney's testimony, *after* he testified Jacobs had told him of rumors of union activity, that Jacobs actually said he had heard rumors employees would turn to a union if the problems were not solved further discredits Jacobs' testimony and reveals that Jacobs was concerned that a failure to remedy existing problems would result in union representation of the employees.

On April 23, the following letter from Jacobs was distributed to employees in their pay envelopes:

Dear Member of the Jet Spray Family,

We have just come through a hard winter. Together we have been making the very difficult transition from Waltham to Norwood. It has not been an easy time for any of us.

Now that we have begun to settle in, I think we must begin to talk together about the changes that have occurred and, most importantly, how the Jet Spray family is going to work together in our new setting. I am especially eager to do this now because I am aware that our move has caused problems for all of us.

It seems to me that the best way to do this is by giving ourselves more opportunity to talk together about what the move has meant and how we can work together to resolve the problems it has caused. In order to do this, I have asked Al Pace, Elaine Clement and Frank Serra to arrange a meeting . . . which will probably be the first of several . . . with a number of you from various areas within the company. The purpose of such a meeting will be for us to share ideas about this transition we have gone through, the problems it has caused, the ways in which we might solve those problems. I am eager to hear what your ideas are, what the problems are from your point of view, because I think if we can focus on these together and discuss them within the family, we can resolve them.

Our success in this will depend very much on you. So I want to urge those of you who do participate in such a meeting to do so in the way that I will: We should be open and frank with one another and should not worry about creating hard feelings because only if we are willing to work honestly together will we be able to keep this family united and work effectively together the way we want to.

I look forward to our tackling this job together.

⁵ Mahoney claims that the affidavit, which was given under oath and signed by him, contains distortions of what he told the Board agent and that he so told the Board agent. Noting that Mahoney made some corrections in the statement and initialed them, and considering the fact that he is an experienced attorney not likely to carelessly affix his signature to a sworn statement which he has not carefully reviewed or knows not to be true, I am persuaded the affidavit is an accurate reflection of what he told the Board agent preparing the document.

On the same day, the supervisory staff was provided with the following written instructions prepared by Elaine Clement:

1. Employees in each department will select 2 representatives to attend an Employee/Management Meeting as mentioned in Mr. Jacobs' memo of today.⁶ Time will be provided later today between 3:00 and 4:00 p.m. for you to select these representatives and discuss problems to be brought up at the meeting. At the conclusion of the meeting please notify supervisors of your choice of representatives.

2. The function of the representative is to convey any and all problems and concerns of their own and their fellow workers to the management representatives. The representative should stimulate frank discussions from among their group.

3. These representatives should then attend a meeting to be held [sic] on Tuesday, April 28th at 2:45 p.m. in the cafeteria. Everyone present at that meeting should be prepared to stay as long as is necessary to conclude the meeting.

Attached to these instructions was a list of the departments and the number (1 or 2) of employee representatives to be selected from each, to a total of 20. Pursuant to these instructions the various departmental supervisors provided their employees with a place to meet and conduct an election of representatives, and then left the area. No supervisors were present during the actual selection of representatives.

Respondent scheduled a meeting with the employee representatives on April 26. On that day the employees met on company time prior to the scheduled meeting with management and decided not to meet with the Company's representatives because they feared Vice President Pace, whom they viewed as a vindictive man, might retaliate against them for expressing their concerns. They so advised Clement.

Later the same day, employee representatives Carr and Connor were called to Jacobs' office. From the beginning of the employee meetings Barry Carr assumed the mantle of spokesperson for the group. Contrary to the General Counsel's contention, the evidence does not show Carr was appointed by Respondent as spokesperson. Carr is an aggressive individual who, as one employee witness noted, appointed himself. Clement probably suspected he was taking a leadership role from her observations during brief visits to the employee meeting to ascertain whether they were ready to meet with management, and from the fact that he advised her of the refusal to meet. Accordingly, I do not find it surprising he was one of those called to the office. Jacobs was upset because there had been no meeting with management that day, but arranged that he and Mahoney would meet with the Committee on April 28.

The employee representatives met with Jacobs, Mahoney, company attorney Peters, and Carol McNamara, Respondent's administrative assistant, on April 28 during working time in the plant general conference room. In

⁶ Clement explains this is a reference to Jacobs' letter of April 23.

addition to the testimony of all witnesses pertaining to the content of this meeting, I have considered the content of the minutes which were received in evidence without objection and which are clearly not a verbatim report but rather in the nature of notes of matters deemed significant by McNamara who wrote them⁷ in constructing a fair synopsis of the relevant events that took place during the meeting.

Pamela Keebler (now Yukna), who had been keeping notes for the employee group, voiced the list of concerns compiled by the employees. These included wage raise policies and wage differentials, medical insurance benefits, vacation policies, the length of lunch breaks, cafeteria prices, the existing prohibition of taking coffee to the work station, various safety hazards, the first aid program, safety shoes, job security, need for a credit union, and productivity. Mahoney and Jacobs advised the employee representatives that Respondent would look into the expressed concerns and take steps to remedy them. Jacobs specifically said the safety shoe program formerly in effect at Waltham would be reinstated and the safety problems would be promptly addressed. Jacobs concedes the safety problems were in fact remedied as soon as possible.

There is general agreement that Mahoney told the employees that they had a right to organize, but after that the versions sharply differ. Michael Regan first testified that Mahoney said the employees could either go to the Union or deal with the Company but he was not going to tolerate guerilla warfare, and if the employees wanted to go to the Union he would deal with that later with long court battles. On cross-examination Regan agreed that Mahoney said the Company could not deal with two groups representing the employees, employees could choose representation by a union or through the group then assembled or otherwise and were free to organize in any way they choose, but avers Mahoney also said there was a consequence to pay. Leonard Murgo asserts that Mahoney said there was guerilla warfare going on within the Company and if it continued there would be long legal battles, strikes, and great hardships for employees.⁸ William Mullins, a witness with admitted faulty memory in some respects, reports that Mahoney said he knew there was talk of union meetings and he knew about the unions, and he would deal with any type of guerilla activity inside the Company. Mahoney testified that he made the employees' right to form a union clear to them and told them the Company would not interfere with that right. He denies any statements of detrimental consequences. He further denies using the word "consequence" or that there was any discussion of consequences resulting from union activity. He concedes he might have used the term "guerilla warfare" on April 28. McNamara's minutes attribute to Mahoney the advice that the right to organize is a freedom but there is a consequence. The minutes also contain the following note:

⁷ McNamara credibly testified her notes were interpretations but reflect what she heard. The McNamara "minutes" bear the heading "Minutes of Meeting held with Jet Spray Grievance Committee 4/28/82."

⁸ Murgo further claims that Mahoney added that union activity in the Company should stop immediately, but I do not credit this testimony.

C. Mahoney—very impressed with what has taken place today. You must understand that you have rights you can exercise but they cannot be crossed-section. There is a great concern coming from the employees if you want to address the problems and solve them we must do it together. But, we are not going to deal with this and then deal with something else again. If you want to deal with it fine, but you cannot deal with it and have gorilla [sic] warfare going on.

Regan was a more impressive witness than Murgo on this incident, Mullins was forgetful, and Mahoney's believability suffers from his unpersuasive attempt to brand his pretrial statements as inaccurate recordings. On the whole, I am persuaded that Regan's testimony is the most credible and that Mahoney's mention of guerilla warfare was a reference to potential conflict between the Union and the Committee with both vying to represent the employees. Although I also find that Mahoney made reference to long litigation and consequences if the Union were selected, I discount Murgo's claim that strikes and employee hardship were specifically mentioned as embellishment. If these two ominous items were mentioned by Mahoney, I do not believe Regan would have forgotten or failed to mention them during his testimony.

On April 30, the UAW distributed more than 200 leaflets outside the plant advising, inter alia, that a union meeting would be held on May 3. This was observed by Supervisor Messier who spoke to the union agents. The UAW again distributed leaflets at the same location on May 3 and 6, each of which announced union meetings on the day of distribution.

On April 30, Jacobs addressed a memorandum to all employees setting forth the progress on completion of the first aid room which had been designed into the new building specifications in 1981 before construction commenced. Delay in the operation of this first aid facility was caused by the delayed delivery of necessary equipment. Respondent had decided long before the hiring of Mahoney or the beginnings of union activity to staff this room with a nurse and a physician. Two other memoranda to employees were issued by Jacobs on the same date. One announced the company policy with respect to the purchase of safety shoes. The other stated a new policy permitting employees to carry purchased beverages which were not completely consumed prior to starting time or the conclusion of morning and afternoon breaks to their work areas.

Another Jacobs' memorandum was directed to employees on May 3 setting forth an amended leave of absence without pay policy. Yet another such memorandum of May 3 reads as follows:

As you know, at my request of approximately ten days ago, a committee of twenty of your representatives was convened in order to meet with me for the purpose of representing all of you on matters of concern that require attention of me and my management staff. That committee has met with me on

two occasions; Wednesday, the 28th and Friday the 30th.⁹

During the course of our first meeting the committee presented a substantial but manageable list of your problems. Many of these, you will understand, can only be addressed as members of management and the committee work together and define the most satisfactory policies and practices from your and the company's point of view. Others among the problems we have been able to address very quickly. For example, last week I, personally, toured the plant and identified a number of problems pertaining to safe operations of the plant and some machinery. I have instructed that these matters be rectified as soon as is possible and, in some instances, that is immediately.

With respect to First Aid, I have informed the members of the committee concerning the steps being taken to establish and stock the First Aid Room which will offer services of an LPN and periodically a physician. More details are in the attached policy memorandum concerning this.

I also learned of discrepancies in company application of the safety shoe program and the inconsistencies should not have occurred, in fact, is being corrected. It will operate in accordance with the policy attached.

Regarding merit increases, I learned that during our transition period some merit increases were not processed and discussed with some employees on a timely basis, even though the effective date of the increases were retroactive. I was distressed by this and have instructed members of management to insure that all merit increases are processed by the employees' anniversary date.

By this process we have quickly addressed these problems previously listed. More important issues have been discussed or are in process right now. Namely, regarding a credit union; we *will* have a credit union and it will be implemented within one month. Also, the company has had a discretionary sick pay policy to this point in time. We will abandon this and we will develop a written formal sick leave policy. This policy will be issued to all employees *within 10 days*.

The issue of the cafeteria pricing has been reviewed and in accordance we have reduced the prices on many items to be effective tomorrow morning. I would like to convey that our cafeteria is company subsidized. Since moving to Norwood the monthly cost of subsidy for Jet Spray has been running approximately \$8,000 per month.

The subject of safety issues brought forth is presently being addressed and remedial action will be taken as quickly as possible.

Relative to the job bid program, I would like to clarify for the benefit of all that any eligible employee may bid on any job opening at any time and that job bid application will be processed.

⁹ Carr and Jacobs refer to a meeting of Jacobs with the Committee on April 30, but further details of the meeting were not developed.

I will continue to keep in touch with you through contact with the employee committee as well as from time to time with similar memorandum.

On May 4, Supervisor John Doolan¹⁰ asked quality control inspectors Vautour and Aucoin if they had attended a UAW meeting the previous night, if there was a large turnout, and what took place. They said "yes" to the first two questions, and gave noncommittal answers to the third.

Jacobs issued another memorandum to employees on May 5 headed "Violation of Company Rules" and reading:

It has come to my attention that several employees are spending company time discussing matters other than work, going into other departments and disturbing people at their jobs, and so forth.

Effective immediately, any employee in violation of the company rules will be given a verbal warning, to be followed by a written warning if the infraction continues.

There is no evidence of any preexisting rule covering employee conversations or visits to other departments.

There were two meetings on May 5. The first included all levels of management and supervision together with the Committee. It was a failure because the participants were apprehensive and communication between them was conspicuously absent. Shortly thereafter Jacobs, Mahoney, McNamara, and Attorney Peters met with the Committee. Mahoney relates¹¹ that he addressed the Committee as follows:

I said "you realize you were formed to present the problems and you were elected for just that purpose and we have invited you now to take the next step of participating in the solution of these problems if you wish to do so." I said "You were not elected to participate in the solution of the problems and we unstand [sic] this. The problems you and others have presented would require a major investment in effort, time and money to solve. We are prepared to make that commitment if the employees are willing to do so. However you will have to go back to the Employees, and get their vote to authorize it." I said again "you don't know me very well but I want you to know if the Employees of the Company want a union they have a right to do and we wont [sic] interfer [sic] but if you want to go forward the way we are suggesting go get the vote if you wish to because we don't want to spend time, money and effort if it is not

¹⁰ Doolan erroneously appears as Dolan in the pleadings. He did not testify.

¹¹ Mahoney was acting in his capacity as Respondent's agent when he addressed the group, and his pretrial affidavit of June 16, 1982, was taken during the period he continued as company spokesman in dealing with the Committee. His affidavit recitation of what he said at this meeting is therefore an admission under Rule 801(d)(2)(D) of the Federal Rules of Evidence. His testimony before me is more general than his affidavit but is not inconsistent with it.

supported by the Employees. I want you to know what we are talking about is a process and that you should understand right up front that we might end up in agreement or not in agreement in the problems presented by you. One thing we are not going to do to is engage in guerilla warfare. If the Employees deceeded [sic] they wanted a union we would deal with it in that context.

I believe the foregoing statement is more probably a general description of what was said rather than a collection of exact quotations, notwithstanding the presence of quotation marks in the affidavit. In any event, I find this extract from Mahoney's affidavit to be an accurate reflection of what he said at the May 5 meeting.

After Mahoney's remarks the Committee recessed and then returned with a request that its members be permitted to meet with the employees in their respective department for the purpose of ascertaining their desires in the light of Mahoney's comments. Permission was granted.

On May 6, Jacobs issued the following memorandum to all employees:

The purpose of this memo is to keep you informed of the progress we are making in the process which has been initiated through meetings between the Employees' Committee and Management.

On May 3, 1982, I wrote to you concerning a number of the specific problems and issues which the Employees' Committee has listed. I have shared that information with all the Managers. Yesterday I met jointly with the Employees' Committee and Managers to continue our process of re-establishing open communications and improved working conditions and productivity in the company.

The Employees' Committee and I are agreed that the committee must have employee support in our joint efforts to improve communications, working conditions and productivity so that the company can remain strong and continue to grow. With this in mind, I have agreed to the committee's suggestion that the two employee representatives from each department met today with their fellow employees in the department so that they can report on our work to date and can obtain the support necessary for us to continue to deal with the matters together. I have arranged to have these meetings take place today for ten minutes at the end of your afternoon coffee break.

Management and the Employees' Committee cannot be expected to invest the time, money and effort needed to resolve the problems and issues that have been listed unless the committee has broad employee support. I have personally assured the members of the committee that I am prepared to work closely with them if I feel certain that there is a similar commitment from the employees to do so. I hope, that in your meetings today you will give the members of the committee your full support so that we can continue working together to improve our communications with one another,

the working conditions of everyone and the productivity of the entire company.

I look forward to having your support and to continuing my work with the Employees' Committee.

The same day, May 6, the Committee members polled the employees in their departments to ascertain whether they wanted to continue dealing with Respondent through the Committee rather than the Union.

Supervisor Doolan's statement to employee Vautour on May 6 that the vote was to choose between Jacobs and the UAW reflects the realities of the situation and underscores that Respondent was aware and apprehensive of organizing efforts of the Union.

The Committee suggested that the employees agree to give Respondent 30 days to correct the problems they had raised through the Committee. The vote was overwhelmingly in support of continued dealings between Jacobs and the Committee. After the polling concluded, the Committee met with Jacobs. Barry Carr announced that the employees had voted in favor of giving Jacobs 30 days within which to make good faith efforts to remedy the employee complaints previously voiced through the Committee, and that the employees would turn to a union if Respondent did not make such efforts.¹²

The Committee and Respondent continued to meet in May and June and to discuss the employee complaints, and Respondent took steps to remedy these concerns as it had promised to do. The matters discussed and resolved are clearly related to the working conditions of Respondent's employees. Thus, we have Respondent preparing drafts of new or revised policies in response to Committee complaints. On May 14, 18, 20, and 25, intramanagement communications set forth various proposals, suggested solutions, and announced solutions designed to meet those complaints. In summary, these communications concerned policy drafts on absence policy, disability insurance, medical insurance, sick leave, personal days off with pay, the implementation of a safety committee, safety shoe procedure, need for additional restrooms, first aid equipment, the correction of noise problems, and the installation of new equipment. Some of these items such as first aid equipment, restrooms, safety items including the securing of machinery, and the installation of new machinery were either items in implementation of the preexisting plans for the new building or the correction of problems arising as a result of the construction which would most likely have been effected with or without a Committee or a union campaign. Others such as the absence policy, insurance, sick leave, personal leave, and the safety shoe policy were in direct response to employee complaints voiced through the Committee.

In addition to its dealings with the Committee, the Company caused job classifications and opinion surveys

¹² Carr's testimony to this effect is reinforced by McNamara's notes that management was advised that, if it did nothing, employees would have no other resource but to turn to "the union." The word "union" is not capitalized in McNamara's notes as the General Counsel's brief indicates it is.

to be made by the American Association of Industrial Management who had done such surveys for the Company at intervals over a period of many years. I find nothing unlawful in the actual conduct or content of these surveys. The changes in company policies and practices after these surveys cannot, however, be attributed solely to a normal business-like reaction to routine surveys because Jacobs announced to all employees via a memorandum of June 4 that the following new policies were to be effective July 1, after an initial review of the survey results, and meetings with supervisors, managers, and the employee committee: credit union services, medical/first aid room, absence from work, disability insurance, sick days, personal days, safety shoe policy, and a Jet Spray safety committee. The medical/first aid room and the safety committee were apparently under contemplation prior to the rising of the Committee, but Jacobs clearly states that all of these policies were effected after consultation with the Committee. A volume could be written detailing all the various details of investigation, consideration, and implementation of all these items, but for the purposes of this decision it is sufficient to note that all were discussed with the Committee before implementation and all were implemented after company knowledge there was union activity afoot.

While all this was going on in May and June, there were events which the General Counsel contends contained elements violative of Section 8(a)(1) of the Act. On May 10, employee Mullins received a warning from Supervisor Dante Fenelli for leaving his machine to advise another employee on the production line that machinery he had worked on was missing certain screws when it reached Mullins' work station. Fenelli had a few days earlier told him that he was not to leave his machine but should tell Fenelli about any such problems and Fenelli would have it corrected. On the day in question, May 10, Mullins says he made unsuccessful efforts to contact Fenelli before leaving his machine to speak to the errant employee. As he returned to his station, Fenelli called him over and handed him a written warning. If, as Mullins says, Fenelli was available to give him a warning I have some difficulty in concluding he was not available prior thereto, but it seems probable, in view of the absence of such restrictions on employee movement in the past, that the instruction not to leave the machine and the subsequent warning were issued in implementation of the rule announced by Jacobs in his May 5 memorandum.

On the same day, May 10, Doolan told Vautour that he had been told to instruct Vautour not to speak to people on the line. Vautour reported this to Jet Spray Vice President Arzbürger. Arzbürger told Vautour that he could speak to anyone on the production line as long as it was job related. Vautour credibly testified this was the first time his talking was so restricted.

Later that day, Mullins complained to Barry Carr. Carr said he would talk to Jacobs. Later yet, Carr returned to Mullins stating that he had talked to Jacobs and not to worry about it. Carr left. Fenelli then came to Mullins a short time later and tore up the warning. Fenelli left. Carr returned and told him "We" had taken care of it. After this relation, Mullins added that Carr had

said that if Mullins turned in his union cards the warning would be torn up. Mullins did not do so, and I therefore cannot conclude he was rewarded for doing so. All I can gather with any certainty from this episode is that Carr acted on Mullins' behalf in securing the withdrawal of the warning. This is not surprising because it is clear Carr was the acknowledged spokesperson, even if self-appointed, of the Committee with whom Respondent was dealing at the time, and Mullins directed his complaint to Carr. I certainly cannot find on this evidence that Carr was acting as Respondent's agent.

On May 14, Supervisor Roger Messier asked Leonard Murgo if he knew who was involved with the Union. Murgo said he could not answer that. Messier then asked if Michael Regan was involved and if he was involved. Murgo replied to both questions that he could not answer that. When Messier asked who contacted the Union, Murgo said he did. It requires no research or citation of authority to conclude that Supervisor Messier has engaged in systematic interrogation into the union activities of Murgo and others.

At a meeting with the Committee on May 18, Mahoney again assured employees that they had a right to organize on behalf of a union, but added that there was a company policy against solicitation in the plant. He continued that solicitation in the plant at any time or on company property would not be tolerated and that violators of the policy would be terminated.¹³

The Union had filed the charges in Case 1-CA-19872 on May 19, and in Case 1-CA-19896 on May 25, and on July 9 a consolidated complaint issued alleging Respondent had violated Section 8(a)(2) and (1) of the Act.

The Company's annual summer party took place on a cruise boat on July 9. William Mullins was strolling on the deck when he encountered Jacobs. Mullins took the opportunity to thank him for taking care of the written warning he had received from Fenelli. Jacobs made no reply to this, but the two fell into conversation in the course of which Jacobs told Mullins that he knew Mullins was heavily involved in the UAW, and he wanted Mullins to help save the Company. Jacobs continued that they would have a much better Company and they could do it without involving the Union. Mullins opined that the first thing Jacobs had to do to save the Company was give a dollar raise to everyone. Mullins made a few more statements whose content was not adduced. Jacobs apparently said nothing further. All witnesses to this conversation had been drinking, to what extent is unclear, but Mullins seemed to have a clear recollection of the incident and I have credited his testimony which was

¹³ I do not credit Vautour's account that Mahoney threatened to take action against Committee members engaged in union activity. In my opinion, Vautour testified to what he thought Mahoney meant rather than what he said, and that his recollection of Mahoney's statements were colored by statements by Carr, after Mahoney and Jacobs left, that Jacobs had led him to believe employees might be terminated for attending a union meeting. I further find that Regan's testimony that Mahoney said, on June 17, that anyone signing or completing cards on company time could be terminated is in error as to date and refers to Mahoney's May 18 statement. The evidence does not support a finding that such a rule existed, that there was a valid business reason for the rule, or that employees were made aware of those times or places they could solicit.

delivered in a straightforward and believable manner. Moreover, he is substantially corroborated by Vautour who overheard a portion of the conversation.

On July 13, the Committee met, without Respondent's representatives present, and discussed the fact it had been named in the complaint as a party in interest. There was some feeling expressed that the Committee was unfairly characterized in the complaint. Barry Carr said he wanted to answer the complaint. After Carr spoke, Mahoney entered the meeting, whether by request or on his own initiative is not clear. Mahoney declined to give any advice other than that the Committee could contact the Board's offices to secure information about the complaint. I credit Michael Regan, however, that Mahoney said the charges were not true and if he ended up in court he would "tear 'em apart when they were on the stand." I think it unlikely the foregoing is an exact quote, but I am persuaded Mahoney did convey the idea he would discredit opposing witnesses. Even if the quote is exact, I am not persuaded that an attorney's statement he will fiercely attack the testimony of opposing witnesses is an unfair labor practice. After this meeting Carr drafted a response to the complaint and chaired another meeting of the Committee, without management present, where his draft was amended in accord with suggestions from Committee members. This document was apparently then forwarded to the Board. Its disposition thereafter is unknown to me.

On August 6, Leonard Jacobs directed a letter to all employees announcing that the UAW was seeking to represent the employees and the Committee had demanded to be recognized and negotiated with as the employee representative and because of this Respondent had decided to poll the employees to determine whether either organization had majority support. He advised that the poll would be by secret balloting conducted by Deloitte, Haskins & Sells, an independent accounting firm, that there would be no reprisal for voting one way or another, and that Respondent would abide by the results.

The UAW requested recognition as the collective-bargaining representative of Respondent's production and maintenance employees on August 10, and filed a representation petition with the Board on August 11. It appears the petition was supported by 103 signed UAW organization cards. Jacobs replied to the UAW request for recognition by letter of August 11 referring the Union to Respondent's attorney. It is not established that Respondent received the petition on or before August 12.

Respondent urges, as did Jacobs' August 6 letter, that the August 12 poll was conducted after the Committee had requested recognition as exclusive collective-bargaining agent. I think not. Carr's vague recollection that he thinks a written demand was made on Respondent in July stands unsupported. No such document appeared at trial. The only written demand of record is that of the Association dated August 17, and I am persuaded this is the demand referred to by Carr. Jacobs made no reference to any such demand, and Mahoney merely testified that he advised Jacobs that in the light of the issuance of a complaint the Company should determine through independent means whether the Committee had majority status it claimed to have, or if the employee wanted the

UAW to represent them, or if they wanted no representative. The first complaint in this case issued July 9, 1982, alleging violations of Section 8(a)(2) and (1) of the Act. I am persuaded that, as Mahoney plainly states, this complaint, not any recognition demands, caused Respondent to commission the August 12 poll.

Deloitte, Haskins & Sells conducted a secret-ballot election of all hourly employees in the company cafeteria on August 12. A payroll register of August 11 was used as a voting eligibility list. No representatives of Respondent were present and no party on the ballot had an election observer present. There is no evidence the election itself was not fairly conducted or the secrecy of the ballot was not preserved. The results were 124 votes for the Committee, 66 for the UAW, 22 for no employee organization, and 1 abstention. The results were reported to Respondent, the Committee, and the Union by letter of August 12 from Deloitte, Haskins & Sells.

Within a few days of this poll the Committee hired an attorney and, on August 19, elected temporary officers, and commenced drafting a constitution, bylaws, and related documents for the purpose of becoming an independent labor organization denominated Jet Spray Employees Association. The Association also registered with the United States Department of Labor as a labor organization. By letter of August 17, the Association requested recognition as exclusive collective-bargaining agent on the basis of the August 12 results. By letter of August 19, Respondent, in reply to the UAW's August 10 request, declined to recognize the UAW. Then, on August 24, Respondent extended recognition to the Association as the exclusive collective-bargaining representative of the employees who were eligible to vote in the August 12 poll, and requested the Association to arrange bargaining meetings with Charles Mahoney.

Respondent and the Association commenced negotiations on November 23, and continued with bargaining sessions until a complete collective-bargaining agreement was reached effective January 1, 1983, and encompassing the wages, hours, and working conditions of the employees affected. This contract has a union-security clause requiring Association membership in good standing as a condition of continued employment after a 30-day grace period in the case of current employees and 90 days in the case of new employees. The contract also provides for employer deduction of Association dues from employee wages upon receipt of written authorization from the affected employees.

B. Conclusions

Jacobs testified that he had contacted another attorney in early April about solving the various communications and other problems resulting from the plant move. Why he contacted an attorney rather than some other professional versed in industrial relations is unexplained. This attorney referred him to Mahoney with whom Jacobs first spoke on April 15 or 16 and advised that he needed advice on labor relations and productivity problems. I note that the first employee/UAW contact took place on April 9. The timing of this sequence of events raises some suspicion that Jacobs knew or suspected union ac-

tivity, but it does not warrant a finding that Jacobs so knew or suspected as early as April 15 or 16. However, Mahoney's admission that Jacobs spoke to him on April 21 or 22 about reports of employee union activity and the possibility of union organization if Respondent did not remedy existing problems shows that Jacobs not only knew or suspected such activity existed before that time but was also seeking to fend off union organization by generating a more kindly feeling toward the Company among dissatisfied employees by addressing the sources of their discontent. To this end Jacobs wrote his April 23 memo soliciting employees to voice their complaints and promising to take steps to resolve them. Respondent argues that it was not required to ignore its problems because a union may have commenced organizing. That is not the point. The point is that the evidence indicates Respondent promptly undertook its solicitation and promises *because* it feared union organization and wanted to nip it in the bud. The move to Norwood from Waltham had been completed by January 1982. According to Jacobs, he noticed in January, February, and March that things were not going as they should and therefore he called the attorney. There is no credible explanation of his failure to seek assistance before April, and on his first meeting with Mahoney he coupled a need to correct existing problems with the presence of union activity. The record indicates there were indeed problems of communication, productivity, and profitability after the move, but I am persuaded his communication to Mahoney on April 21 or 22 warrants the conclusion that the prompt attention to employee concerns commencing April 23 was motivated by the reports of union activity.

As a vehicle for accumulating employee grievances, Respondent on April 23 directed the election be held that very day of employee representatives in numbers and at a specific hour set by Respondent, and instructed said representatives to gather and convey all employee "problems and concerns" to management representatives at a meeting set for 2:45 p.m. on April 28. Written instructions to this effect were distributed to departmental supervisors who then relayed the instructions to employees. Employees took no hand in the preparation or issuance of these procedures, but were merely directed to follow them. The instructions were prepared by Elaine Clement, Jet Spray director of personnel, pursuant to Jacobs' memo.¹⁴ The Committee resulting from this instruction was purely a creation of Respondent.

All meetings with the Committee composed of these elected representatives were held on company time and property at the pleasure of Respondent. The number and method of selection of its members were decreed by Respondent. The committee had no independent resources or existence of its own, and continued only because Respondent wished it to do so. Moreover, its only function was to bring employee grievances to the Company which might or might not remedy them as it pleased. The Committee had no recourse but to accept Respondent's decisions as final.

¹⁴ I do not credit Jacobs that he knew nothing of the instructions prepared by Clement.

Respondent not only used the Committee as a means of soliciting grievances and conveying promises of remedy to employees, but also utilized it as a forum to advise employees of their rights to organize and suggest the Committee as a viable option to the Union. Mahoney's statements to the Committee on May 5 and Jacobs' memo of May 6 were clearly calculated to convey that the Respondent wanted to deal with the Committee not the UAW and was willing to accord the Committee a larger role in the determination of working conditions and the resolution of grievances generally if employees would forswear the Union and support the Committee. Faced with company threats of lengthy litigation if they selected the Union, the blunt proposition expressed by Supervisor Doolan that they were choosing between the UAW and the Company which controlled their livelihood, and the promised and actual correction of some of their concerns, it was inevitable that the employees would react as they did in voting against the Union on May 6.

After the vote, the Respondent continued on its course of soliciting, promising to remedy, and remedying employee grievances through the use of the Committee as an intermediary between it and the employees.

Looking at the picture as a whole, a pattern of employer conduct designed to defeat union representation emerges. Jacobs told Mahoney of his apprehension of union activity. Thereafter, Respondent constructed the Committee, which existed only at its pleasure and was clearly dominated, supported, and controlled by Respondent, for the purpose of eliminating that activity. By so doing, Respondent violated Section 8(a)(2) and (1) of the Act. *Ace Mfg. Co.*, 235 NLRB 1023, 1029-1030 (1978); *Kux Mfg. Corp.*, 233 NLRB 317 (1977); *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978).

In furtherance of its efforts to discourage union activity other than that devoted to the Committee, Respondent utilized the Committee as a conduit through which it solicited employee grievances and promised to remedy them. Respondent did in fact take prompt steps to remedy such grievances and so advised the employees, taking care to let the employees know that benefits received had resulted from consultations with the Committee. Some of the problems raised by employees, notably safety concerns and the first aid facility, would have been remedied in any event, but here again Respondent's implementation of such remedies was announced under the guise of something negotiated with the Committee. The record requires a conclusion that Respondent's solicitation of grievances, promises to remedy them, and actual remedies thereof throughout the existence of the Committee were undertaken for the purpose of discouraging employee activity in any labor organization other than the Committee and were repeated violations of Section 8(a)(1) of the Act. See, e.g., *Kurz-Kasch*, supra.

The poll of May 6 was the result of Mahoney's suggestion that it would negotiate with the Committee if the employees voted to authorize the Committee to so negotiate. Respondent was motivated, I conclude, by its desire to give the appearance of legitimacy to the Committee whose existence it controlled and to placate em-

employees threatening to turn to the UAW. The vote was initiated and arranged by Respondent, and held on company time and property. Jacobs' May 6 memorandum to all employees clearly reflected Respondent's wish that the employees authorize the Committee to represent them. I agree with the General Counsel that this polling of the employees violated Section 8(a)(1) of the Act because it did not meet the standards set forth in *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967), where the Board stated:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

There were no unusual circumstances and none of the enumerated safeguards were observed.

The purpose of the August 12 poll was, I conclude, not to determine the truth either of a majority claim by the Committee which had made none other than to report the results of Respondent's unlawful poll of May 6, or of a majority claim by the UAW who made its bargaining demand and claimed a majority by letter of August 10, 4 days after Jacobs' August 6 letter announcing the poll. I am persuaded Respondent's true purpose of the poll, in the face of a complaint alleging violations of Section 8(a)(2) of the Act, was to take the chance that its grants of benefits and previously expressed preference for dealing with the Committee would persuade the employees to vote for the Committee and thus provide Respondent with an argument that the Committee was a bona fide independent labor organization.

Whether or not my conclusion on motivation is correct, the purpose of the poll was not the one required by *Struksnes*, supra, nor was the poll conducted in an unfair labor practice free atmosphere. Accordingly, the poll violated Section 8(a)(1) of the Act. Moreover, the results of the poll are entitled to no deference because the Committee was formed, dominated, and assisted by Respondent, and this, combined with Respondent's other unfair labor practices, removes any reasonable possibility the vote for the Committee was indicative of an uncoerced or unassisted majority.

After Respondent became aware of UAW activity, it announced new rules on solicitation where there previously had been none. Jacobs' May 5 announcement of a rule forbidding employees from discussing matters other than work on company time is separable from the injunction not to disturb others at work and is ambiguous. *T.R.W. Bearings Division*, 257 NLRB 442 (1981). The concluding phrase "and so forth" is even more ambiguous. There is no evidence that this ambiguity was resolved by an explanation to the employees of the times they might engage in union activity or what "and so forth" meant. Jacobs' announced rule was therefore un-

lawfully broad and violated Section 8(a)(1) of the Act as did the application of that rule to Vautour and Mullins. Moreover, the threat of warnings for infractions of the unlawful rule violated Section 8(a)(1) of the Act because it tended to restrain employees from engaging in lawful union activity.

Mahoney's statement of May 18 that solicitation in the plant at any time or on company property would not be tolerated and that violators of this policy would be terminated was unlawful on two counts. The rule itself was unlawfully broad under both *T.R.W. Bearings* and its predecessor *Essex International*, 211 NLRB 749 (1974), which *T.R.W.* overruled, and its announcement violated Section 8(a)(1) of the Act. The threat to terminate violators of the unlawful rule plainly tended to restrain and coerce employees in the exercise of their statutory rights to engage in union and protected concerted activity, and violated Section 8(a)(1) of the Act.

Certain other statements by Respondent's agents violated Section 8(a)(1) of the Act. On April 28, Mahoney threatened employees with extended litigation if they selected a union other than the Committee to represent them. A statement of this nature can reasonably be expected to deter employees from engaging in legitimate union activities and therefore violates Section 8(a)(1). The same is true of Mahoney's ominous prediction of consequences which, though ambiguous, conveyed a threat of unspecified reprisals.

John Doolan's questioning of his subordinates Vautour and Aucoin on May 4 with regard to their attendance at a UAW meeting, the size of the group attending, and the content of the meeting were probings into employees' union activities of a type which reasonably tend to coerce employees in the exercise of their Section 7 rights and are violative of Section 8(a)(1). See, e.g., *Holland American Wafer Co.*, 260 NLRB 267, 273 (1982). Similarly, Supervisor Roger Messier's questions posed to Leonard Murgio on May 14 were coercive interrogation into the union sympathies and activities of Murgio and others which violated Section 8(a)(1).

On July 9, Jacobs' statement to Mullins that he knew Mullins was heavily involved in the UAW created an unlawful impression of surveillance of Mullins' union activities. By so doing Jacobs violated Section 8(a)(1) of the Act. *Clements Wire Mfg. Co.*, 257 NLRB 206, 212 (1981). Jacob's further statements to Mullins that he wanted Mullins to help save the Company and it would be a much better Company without the Union constitute a solicitation of Mullins to abandon his union activity and an implied promise of benefit if such activity ceased. Both the solicitation and the promise were patent efforts to persuade Mullins to abjure his union activities and support Respondent, and solicitation and promise were each individual violations of Section 8(a)(1) of the Act.

The questions posed with respect to the Association are whether it is (1) a dominated labor organization, (2) an assisted labor organization, or (3) a bona fide independent labor organization free of either domination or assistance.

The General Counsel and the Charging Union argue that the Association is dominated by the Respondent. I

cannot agree. The Committee effectively ceased to exist when its members hired an attorney, after the August 12 vote, for the Association. The attorney requested recognition on the Association's behalf on August 17. This request was premature because the Association did not formally exist until August 19. By the time Respondent extended recognition to the Association it had elected officers and begun its existence as a labor organization. Its organization had its genesis among Committee members, but it is an entirely different organization de jure and de facto rather than a disguised continuance of the Committee. There is no evidence Respondent initiated, financed, or otherwise participated in the formation or subsequent operations of the Association. After recognition the Association and Respondent had numerous negotiating sessions culminating in a collective-bargaining agreement. On the record before me I find no evidence that the negotiations were not bona fide collective bargaining between the parties as equals, as opposed to the relationship of master-servant between the Committee and Respondent. The mere fact that the contracting parties may have agreed to adopt some existing policies previously worked out by Respondent and the Committee establishes nothing, nor does the election of former Committee leaders to office in the Association. Although I am reasonably certain, given Respondent's fear of an outside union, that Respondent did not oppose the formation of the Association there is simply no evidence preponderating in favor of a conclusion that the Association is or has been dominated by the Company.

Turning to question (2), I find that Respondent violated Section 8(a)(2) and (1) of the Act by recognizing the Association after a valid petition for an election had been filed with the Board by the UAW and the UAW had requested recognition. *Bruckner Nursing Home*, 262 NLRB 955 (1982). Moreover, the Association requested recognition and was recognized on the basis of the unlawful August 12 poll yielding a majority for the Committee. The Association did not exist at the time of the poll and the authorization cards it later obtained from employees postdated the request for recognition and were not the basis on which Respondent recognized the Association. The Association argues that because the Respondent committed itself on August 6 to recognize the winner of the August 12 vote its later recognition of the Association was properly based on its prepetition commitment. The Association was not on the ballot, and neither the Association nor Respondent can change that simple fact. Moreover, the result of the August 12 vote is unreliable for reasons noted above. Either the Association is the same entity as the Committee under a different name, in which case it is a dominated labor organization, or it is a new entity which received assistance in the form of recognition at a time the UAW petition was on file and on the basis of a vote for an entirely different entity. In either case, Respondent violated Section 8(a)(2) and (1) by extending recognition. I find Respondent unlawfully assisted a new entity rather than continued to deal with the existing dominated group under a sham identity designed solely to hide the truth of its domination.

CONCLUSIONS OF LAW

1. Respondent Jet Spray Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Jet Spray Employees' Committee, and Jet Spray Employees Association have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

3. By dominating the Jet Spray Employees' Committee, Respondent violated Section 8(a)(2) and (1) of the Act.

4. By recognizing, bargaining with, and executing a collective-bargaining agreement containing a union-security clause with the Jet Spray Employees' Association at a time that a valid petition for representation election had been filed with the Board by another labor organization, Respondent gave unlawful assistance to Jet Spray Employees' Association in violation of Section 8(a)(2) and (1) of the Act.

5. By soliciting, promising to remedy, and remedying employee grievances on numerous occasions in 1982 for the purpose of discouraging lawful employee union activity, Respondent violated Section 8(a)(1) of the Act.

6. By causing polls for the purpose of ascertaining its employees' union preference to be conducted on May 6 and August 12, 1982, without lawful purpose or observance of the required safeguards, Respondent violated Section 8(a)(1) of the Act.

7. By promulgating, implementing, and enforcing overly broad rules on solicitation by employees, Respondent violated Section 8(a)(1) of the Act.

8. By threatening employees with warnings and discharge for violations of its unlawful solicitation rules, Respondent violated Section 8(a)(1) of the Act.

9. By threatening employees with extended litigation and other consequences if they select a union as their representative, Respondent violated Section 8(a)(1) of the Act.

10. By coercively interrogating employees with respect to their union activities and sympathies and those of others, Respondent violated Section 8(a)(1) of the Act.

11. By creating the impression that employee union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

12. By soliciting an employee to abandon union activity, Respondent violated Section 8(a)(1) of the Act.

13. By promising benefits to employees conditional on the cessation of employee union activity, Respondent violated Section 8(a)(1) of the Act.

14. The unfair labor practices found above have affected and are affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease and desist and notice posting requirements my recommended Order will require Respondent to withdraw and withhold recognition of the Association as the collective-bargaining represent-

ative of its employees and to cease giving effect to the collective-bargaining agreement with it effective January 1, 1983, or to any renewal, modification, or extension thereof, until such time as the Association shall have been certified by the Board as the exclusive representative of the employees in question. However, nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to the performance of that agreement. I shall further order Respondent to reimburse all present and former employees for all initiation fees, dues, and

other moneys which may have been exacted from them by, or in behalf of, the Association pursuant to the union-security and dues-checkoff provisions of the aforementioned collective-bargaining contract, together with interest thereon. *Vernitron Electrical Components*, 221 NLRB 464 (1975), *enfd.* 548 F.2d 24 (1st Cir. 1977).

Although the Committee no longer exists, I believe it prudent in this case to ensure no resurrection of the Committee in that or any other guise by issuing the customary disestablishment order. I shall do so.

[Recommended Order omitted from publication.]