

Cardivan Company and Professional, Clerical and Miscellaneous Employees Local 995 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 31-CA-11619-1, 31-CA-11619-2, 31-CA-11734, and 31-RC-5220

31 July 1984

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

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

On 21 June 1983 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a response to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees,³ threatening them with loss of benefits, promising to reimburse their union initiation fees if the Union lost the election, and creating an impression that an employee's union activity was under surveillance.⁴ We agree. However, we do not agree

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

² In the absence of exceptions we adopt pro forma the judge's conclusion that the Respondent engaged in objectionable conduct and violated Sec. 8(a)(1) of the Act by making certain "zero bargaining" statements prior to the election.

³ In affirming the judge's finding that the Respondent unlawfully interrogated employees Ernandes and Arrigo by asking about their feelings toward the Union, Chairman Dotson relies on the fact that the interrogations occurred within the context of a patently pervasive and systematic pattern of 8(a)(1) conduct which could reasonably have tended to color the employees' perception of the character and reason for the inquiries. *NLRB v. Ajax Tool Works*, 713 F.2d 1307 (7th Cir. 1983), and *Peerless of America v. NLRB*, 484 F.2d 1108 (7th Cir. 1973).

⁴ Contrary to the judge and to his colleagues, Chairman Dotson finds nothing coercive in Neil Rosenstein's remark to Marilyn Cody at the close of the 18 November 1981 meeting. In that incident Cody, an active union adherent, introduced herself to Rosenstein and he responded, "Yes, I know. You're the Union organizer." In Chairman Dotson's view this comment does not without more create an impression that the employee's activities were under surveillance.

with the judge's finding that the Respondent did not violate the Act when Supervisor Gabe DiMartino told change girl Emma Oliver that employee Flo Dilger was removed from her store because of her union activity. The record discloses that Oliver and a bank runner named Bernie were engaged in a conversation in which the latter expressed his view that union representation would not benefit employees. Oliver challenged that employees needed union representation to "keep things [from happening] like what just happened to Flo Dilger. A little bit of protection." Referring to Dilger, DiMartino interjected, "Well, she was shuffled out of her store because of her union activity." Because the record is devoid of evidence concerning what, if anything, happened to Dilger, the judge declined to find that the comment constituted a threat of reprisal against employees for engaging in union activity. Under the circumstances we find the absence of such evidence to be inconsequential. DiMartino's statement is imbued with an unmistakable message that employees' organizing activity could lead to reprisals from the Respondent. Such a message has a tendency to coerce employees especially where, as here, employees were subjected to a repeated misconduct designed to interfere with their exercise of rights guaranteed in Section 7 of the Act. Accordingly, we reverse the judge's finding and find that the remark violated Section 8(a)(1) of the Act.

For the reasons set forth below, we also disagree with the judge's finding that the Respondent violated Section 8(a)(1) by announcing 2 days before the election that it was granting employees a Thanksgiving bonus of \$25, a stock option, assistance in obtaining loans to exercise the option, and free checking at a local bank. As to the first two items, the record establishes that the Respondent's new owner, Neil Rosenstein, traditionally gave a Thanksgiving bonus or turkey to employees of other companies he owned and that the stock option was formulated and approved well before the advent of union activity. Thus, the judge found, and we agree, that the actual grant of these benefits was lawful. Notwithstanding that, the judge concluded that the Respondent timed the announcement of the bonus and option unlawfully to influence the election and thereby violated Section 8(a)(1) of the Act. We reverse the judge's finding that the announcement itself constitutes an unfair labor practice. The Respondent here cannot be said to have unlawfully informed its employees of benefits which it could lawfully grant. This is particularly true in the instant case in which Rosenstein had only recently purchased the Respondent and as its new owner sought to implement his longstand-

ing practice of giving employees a holiday bonus, and in which, having simultaneously purchased a similar but separate corporation, he was attempting to align the companies' respective fringe benefit packages. We also note that this was Rosenstein's first meeting with his new employees.⁵

Regarding the announcement of other benefits, we also reverse the judge's finding that the Respondent violated Section 8(a)(1) by informing employees that it would provide loan assistance and would arrange for free checking for them. In its exceptions to the judge's decision, the Respondent asserts that it had no opportunity to litigate these charges. We find merit in the Respondent's exception. The record reveals that the promise of these benefits was not alleged in the complaint or at the hearing to be an unfair labor practice, and that, although two witnesses referred to them in their testimony, neither the General Counsel nor the Respondent examined witnesses about them or addressed these announcements in their posthearing briefs. Accordingly, we find that the promises of loan assistance and free checking were not litigated as unfair labor practices and we find that there is insufficient evidence on which to find such announcements unlawful. We similarly find that the parties did not litigate whether a statement possibly made by Rosenstein to employees on the direct bank deposit of paychecks was unlawful. On this basis we adopt the judge's finding that no violation occurred in this regard.

The Objections

Petitioner filed objections to the conduct of the election which in part correspond to the unfair labor practices charges alleged in the complaint. We affirm the judge's sustention of Objections 6, 7, and 16 and we find it unnecessary to pass on Objections 15 and 17 regarding the preelection benefits announcements which were also sustained by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law

⁵ In finding the announcement of these benefits to be lawful, Chairman Dotson agrees with the court of appeals' holding in *Raley's, Inc. v. NLRB*, 703 F.2d 410 (9th Cir. 1983), that the announcement of lawfully granted benefits even if timed to influence the outcome of an election is protected by Sec. 8(c) of the Act. For the reasons stated by the judge, Member Zimmerman would find the announcement of these benefits to be unlawful. In his view, it is clear that the timing of the announcement was made to influence the employees' vote in the upcoming election and was therefore unlawful. In this regard, Member Zimmerman notes that the announcement was made in the context of other statements at the meeting that have been found to constitute unfair labor practices and as part of the Respondent's overall calculated and sweeping attempt to coerce employees and abridge their exercise of free choice.

judge as modified below and orders that the Respondent, Cardivan Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interrogating employees about their union activities, sympathies, and desires; threatening loss of benefits if the Union is successful in organizing the employees; threatening employees with reprisals because they are engaged in union organizing; promising to reimburse employees for the payment of union initiation fees if the Union is rejected; creating the impression that employees' union activities were under surveillance; informing employees that if they selected the Union it would take a year and a half before anything was settled; and telling employees if they selected the Union they would lose their benefits and bargaining would commence from scratch."

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

[Direction of Second Election omitted from publication.]

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.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT interrogate our employees regarding their union activities, sympathies, or desires.

WE WILL NOT threaten our employees with reprisals because they are engaged in union organizing.

WE WILL NOT threaten our employees with loss of benefits if the Union is successful in organizing them.

WE WILL NOT promise to reimburse our employees for the payment of initiation fees if they do not

select Professional, Clerical and Miscellaneous Employees Local 995 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as their collective-bargaining representative.

WE WILL NOT create the impression with our employees that we are keeping their union activities under surveillance.

WE WILL NOT tell our employees that it would be futile for them to select the Union as their collective-bargaining representative.

WE WILL NOT tell our employees that if they select the Union as their collective-bargaining representative they will lose their benefits and bargaining will commence from scratch.

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.

CARDIVAN COMPANY

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. These matters were heard in Las Vegas, Nevada, on June 15, 16, 17, and 18, 1982, and February 24, 1983.¹ The charges in Cases 31-CA-11619-1 and 31-CA-11619-2 were filed on October 22, 1981, and a consolidated complaint was issued on December 18, 1981.² The charge in Case 31-CA-11734 was filed on November 30, and was consolidated with the two other unfair labor practice cases on March 31, 1982. On the latter date, the Regional Director also issued a "Report on Objections, Order Consolidating Cases and Order Directing Hearing and Notice of Hearing," wherein a hearing on objections in Case 31-RC-5220 was consolidated for hearing with the unfair labor practice cases. The objections to the election allege conduct substantially similar to certain conduct alleged as unfair labor practices in the consolidated complaint, which also alleges a discriminatory discharge. Respondent denies it engaged in conduct alleged to be unlawful and objectionable.³

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

¹ The hearing was initially closed on June 18, 1982. Due to the failure of the reporter to transcribe significant portions of the testimony of several witnesses, the hearing was reopened and additional testimony was received on February 24, 1983.

² All dates hereafter are in 1981 unless stated otherwise.

³ The consolidated complaint initially alleged an unlawful refusal to bargain. On August 6, 1982, the Union made a request to withdraw the 8(a)(5) portion of the charge in Case 31-CA-11734. On August 13, 1982, the General Counsel recommended approval of the withdrawal request. By Order dated August 26, 1982, I approved the withdrawal and dismissed the applicable 8(a)(5) paragraphs of the consolidated complaint.

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

FINDINGS OF FACT

I. JURISDICTION

Cardivan Company, herein called Respondent, a Nevada corporation, is engaged in the business of operating slot machine concessions in retail establishments. Its annual gross revenues exceed \$500,000 and it annually purchases and receives goods or services valued in excess of \$5,000 directly from suppliers located outside the State of Nevada. It is admitted and found that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that Professional, Clerical & Miscellaneous Employees Local 995, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent is engaged in the operation of slot machines in space leased from supermarket and drug chain stores in Las Vegas and the surrounding area, Reno and Carson City, Nevada. The Las Vegas facility is the only one involved in these proceedings. One change girl per shift is employed at each of the stores to provide change and other incidental services to customers who play the slot machines. Respondent also employs in its Las Vegas operation bank runners, coin wrappers, and slot machine mechanics, who, together with the change girls, comprise an appropriate collective-bargaining unit. Prior to June 30, Respondent was owned and operated by Emmett Sullivan, its sole stockholder. Jackpot Enterprises, Inc., a wholly owned subsidiary of Bristol Gaming Corporation, both Nevada corporations, was formed by the latter company for the purpose of acquiring two established "slot machine route businesses" operating primarily in the areas of Las Vegas and Reno, namely the Respondent and Corral United, a partnership. Option to purchase agreements which were to expire on July 1, 1981, were entered into with Corral United on May 23, 1980, and with Sullivan on October 30, 1980. In order to raise funds for the purchase of the two companies, a public offering was made of Jackpot Enterprises stock. The final prospectus dated June 23 filed with the Securities and Exchange Commission and the Nevada Gaming Control Board includes a "Non-Qualified Stock Option" plan which, pursuant to the Tax Reform Act of 1981, was amended in October to meet the requirements of a qualified stock option plan. The plan provided for the granting of options to "key employees" of Jackpot and its subsidiaries. The term "key employees" included everyone employed. During negotiations leading up to the acquisition of Corral and Respondent, it was noted

that a disparity of wages and benefits existed between the two companies in that Corral change girls received a higher rate of pay, but that Respondent's change girls received better fringe benefits. According to Neil Rosenstein, the chief financial officer, chairman of the board of directors, and president of Jackpot Enterprises, in July, after the acquisition of Respondent had been completed, he had discussions with Sullivan regarding company policies and what should be done to bring wages and benefits of the two newly acquired businesses into alignment. While each of the companies employed a bookkeeper, it was decided a controller should be hired. Accordingly, Pam Gioeli was hired as controller. Her first job, which was completed the first week of September, was to undertake a study of the disparity in wages and benefits between the two companies. Prior to its acquisition by Jackpot, Respondent's policy had been to grant wage increases after Federal licenses were paid at the end of each June. On August 24, Sullivan distributed the following letter over his signature:

To All Change Girls:

We are presently evaluating our wage/benefits program. I expect it will be 30 to 60 days before a final decision is made. I am sure wage increases will be the result of this survey and we will make them retro-active to September 1.

I hope this arrangement meets with your approval. In the meantime keep up the good work and **PLEASE DO NOT BELIEVE ANY RUMORS YOU HEAR UNLESS THEY ARE IN WRITING AND ORIGINATE FROM THIS OFFICE—THEN THEY AREN'T RUMORS.**

Thanks

Ann Hann, the alleged discriminatee, testified she first became dissatisfied with employment conditions in June and talked to another employee, Marylyn Cody, about representation. Through Cody's husband, they were able to contact a Teamsters representative. The two women contacted the change girls at the various store locations about a union meeting which was held on August 31. The first union authorization cards were distributed and signed at that meeting. Thereafter, various employees passed out authorization cards among their fellow employees. On September 29, the petition in Case 31-RC-5220 was filed by the Union. Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted on November 20, which the Union lost by a vote of 67 to 35. On November 30, the Union filed timely objections to conduct affecting the results of the election. On March 31, 1982, the Regional Director issued his "Report on Objections, Order Consolidating Cases, Order Directing Hearing and Notice of Hearing," wherein he recommended that Objections 3, 5, 8, 9, and 14 be overruled and that a hearing be held on Objections 1, 2, 4, 6, 7, 10, 11, 12, 13, 15, 16, and 17. On April 22, 1982, the Board adopted the Regional Director's recommendations.

B. Alleged 8(a)(1) and (3) Conduct

Paragraph 11 of the complaint alleges numerous unlawful acts attributable to Pat Thomas, an assistant supervisor whom the Respondent admits was its agent and supervisor. Subparagraph (a) alleges that, on several dates in early October, Thomas interrogated employees about their and other employees' union activities, etc. Subparagraph (e) alleges that, in October, Thomas, in a telephone conversation, asked an employee to obtain a union authorization card. Employee Floy Swartz testified that in October she received a telephone call at home from Thomas who "asked me if anyone from the union had come to the store . . . and passed out any papers and I told her yes She asked me if I knew who it was and if it was anyone from our company and I said no She said she had to cut the telephone conversation short because she had about 15 other calls to make." Helen Nicholson also received a telephone call from Thomas the first or second week of October. She testified:

Well, Pat asked me did I have one of the cards? And I said, "Not at this present time. I don't have one on me."

She says, "Well, I thought maybe you did have one." Because she would like to have one. And I just told her I didn't have it. And she asked me was I being harassed by the Union? I says, "No, I'm not being harassed by the Union." And have I been approached by any of the girls? And I says, "No, I have heard conversations and discussions, you know, through the grapevine about, you know, going to organizing the Union, but I haven't been harassed on it." Or "No Union member haven't harassed me."

As Thomas did not testify regarding any alleged interrogations or threats, the foregoing is not refuted. On the basis of the testimony of Swartz and Nicholson, I find that Thomas unlawfully interrogated them as alleged in paragraph 11(a). While it is further clear from Nicholson's testimony that Thomas asked her if she had an authorization card, which I deem an unlawful interrogation falling within subparagraph (a) of the complaint, it does not constitute a request that she obtain a card as alleged in subparagraph (e). I therefore recommend dismissal of paragraph 11(e) of the complaint.

Paragraphs 11(b)(1), (2), and (3) allege that about October 1, at Albertson's Market, Thomas unlawfully interrogated an employee, threatened a loss of benefits if the Union was successful, and promised increased benefits and improved terms and conditions of employment by soliciting employee complaints and grievances. Juanita Roberts testified that Thomas approached her on the job at Albertson's Market in early October and "asked me if anyone had approached me about the Union . . . that she would hate to see the Union get in because we would lose a lot of our Company benefits I had told her that I went to the Union meeting. And she asked me what the main complaint of the girls seemed to be." Her testimony is not refuted. The General Counsel

has proven paragraphs 11(b)(1) and (2). I do not view the request that Roberts inform Thomas of the "main complaint of the girls" as a promise of increased benefits and improved terms and conditions of employment as alleged in paragraph 11(b)(3), and therefore recommend its dismissal.

Paragraphs 11(c)(1) and (2) allege that about October 2 or 9, at Albertson's Market, Thomas (1) unlawfully interrogated an employee and (2) threatened loss of benefits if the Union was successful. Florence Belk, whose testimony was not contradicted, testified that, in early October, Thomas "asked me if I had been approached by the Union"; that "she did ask me if I realized that I would not get the benefits by joining the Union that I was getting with Cardivan Company"; and that on another occasion Thomas asked if she had paid her initiation fee. On this evidence I find the General Counsel has proven the allegations in paragraphs 11(c)(1) and (2) of the complaint.

Paragraph 11(d) alleges that about October 14, at Skaggs Drug Store, Thomas threatened that employees would lose benefits if they selected the Union. Carolina Bernier testified, without contradiction, that prior to the election Thomas came to her jobsite and "she mentioned that her husband was a retired Teamster and she didn't care for the union and she said, 'Well, I don't know why the girls want to lose all those benefits.'" At the very least, this statement is an implied threat of loss of benefits and is unlawful. The General Counsel has proven paragraph 11(d).

Paragraphs 11(f)(1) and (2) allege that, about the end of October, Thomas (1) unlawfully interrogated an employee and (2) promised benefits to an employee if employees rejected the Union. Brigitta S. Arrigo testified that on a Thursday or Friday morning before the election Thomas told her that "if I had joined the Union and I paid the \$25 and the Union does not get in, then the Company, upon a receipt from the Union, will reimburse \$25." While this indeed constitutes a promise of benefit if the Union is rejected, as alleged in paragraph 11(f)(2), it does not amount to unlawful interrogation as alleged in paragraph 11(f)(1). I recommend dismissal of paragraph 11(f)(1).

The General Counsel concedes in his posthearing brief that no witness testified to incidents alleged in paragraphs 11(g)(1) and (2). Accordingly, I recommend their dismissal.

Rosalie Ernandes testified without contradiction that, sometime in the beginning of November, Thomas came to the Alpha Beta Store she was working in and "she just asked me what was my feelings towards the Union?" This was unlawful interrogation as alleged in paragraph 11(h).

Paragraph 11(i)(1) alleges that, about November 17, Thomas created the impression of surveillance by telling an employee that Respondent had learned that she supported the Union. Subparagraph (2) alleges unlawful interrogation. Without contradiction, Helen Nicholson testified that a few days before the election Thomas came to the store where she was working and stated, "I understand that the union have you wrapped up," which Nicholson denied. While Thomas' words did not say that she

or any other supervisor or agent actually engaged in physical surveillance, they clearly suggest surveillance in that they imply knowledge that the employee favors the Union.⁴ Furthermore, the statement begs for a reply, either that the employees admit the Union has her "wrapped up" or that it does not. Uttering a statement which demands a reply regarding an employee's union sympathy constitutes an attempt to interrogate in violation of Section 8(a)(1).⁵ Nicholson testified that Thomas went on to state that she would like for Nicholson to vote nonunion, and asked that she call Carol Dyke, an admitted supervisor and agent, and let her know that "I'm in her corner one hundred percent." Thomas' words clearly requested that Nicholson disclose her sympathy regarding the Union, either pro or con, by calling Dyke to indicate that she was against the Union or by not calling and thereby indicating her pronoun sympathy. Interrogation by implication is no less unlawful than direct interrogation. Accordingly, I find the General Counsel has proven paragraphs 11(i)(1) and (2) as alleged.

Paragraph 11(j)(1) alleges unlawful interrogation and subparagraph (2) alleges that an employee was promised reimbursement of \$25 paid toward the Union's initiation fee if the Union was not voted in. Ione Skelton testified without contradiction that on a day prior to the election Thomas approached her on the job and asked if she had "joined the Union," to which Skelton replied affirmatively. Thomas asked "why" and went on to explain what Sullivan had done for the employees. She went on to state that "if the Union does not get in, he [Sullivan] will reimburse you the \$25." The General Counsel has proven paragraphs 11(j)(1) and (2) as alleged.

Paragraph 11(k)(1) alleges Thomas unlawfully interrogated an employee regarding the Union about November 3.⁶ Joan Shupe testified as follows regarding a conversation she had with Thomas on November 3 at the store she was working in:

Well, she asked me if I had signed a card for the union and I said, yes, I did. She asked me why and I told her I was very unhappy because I hadn't gotten my raise when I was promised, and I thought that the union might bring our wages up, and then we had a discussion about the union. She asked me if they had promised me anything and I said no, but I thought that each girl could decide for herself what she wanted. I told her, "Pat, I am very busy." I had lots of customers. I said, "I cannot talk to you now about the union."

The General Counsel has proven paragraph 11(k)(1) of the complaint.

Paragraph 12 alleges that, on October 17, Gabe DeMartino, an admitted supervisor and agent, impliedly threatened an employee with reprisals if she engaged in

⁴ See, for example, *Maxwell's Plum*, 256 NLRB 211 at 216 (1981).

⁵ See, for example, *Fruehauf Corp.*, 237 NLRB 399 (1978).

⁶ Par. 11(k)(2) alleges Thomas promised to reimburse an employee for initiation payments if the Union was not voted in. The General Counsel concedes this allegation was not proven. I recommend its dismissal.

union activity by telling her another employee had been transferred and scheduled for fewer hours because of her union activity. The basis for this allegation is a statement made by DeMartino, who was present during a conversation between employees Emma Oliver and Bernie (last name unknown), a bank runner. Oliver testified:

Well, Bernie started it off by asking me what was going on with the Union. And I think at that time, I started telling him about whatever was coming up or whatever had been done so far. And then he started in talking about not having a—"a Union wouldn't do you any good," or something like that. And I said, "You've got to have a Union to represent you to keep things like what just happened to Flo Dilger. A little bit of protection."

And Gabe said, "Well, she was shuffled out of her store because of her Union activity." So I asked Gabe, "Gabe," I said, "can you hire and fire?" And he said, "Yes." And Bernie also asked me, he said he'd like to see my ballot. He said I would vote "no."

While the statement made by DeMartino may be evidence available to establish a motive for what may have happened to Flo Dilger, I do not view it as an implied threat of reprisal against Oliver. It is not alleged, nor was it established, that Dilger was subjected to any unlawful treatment, either with respect to tenure or any term or condition of employment, nor was there evidence, either direct or hearsay, that she was subjected to being scheduled for fewer hours. In these circumstances, the remark attributed to DeMartino is far too nebulous upon which to base the alleged violation of the Act. I recommend dismissal of paragraph 12.

Paragraph 13 alleges five unlawful acts on November 18 attributed to Rosenstein. Subparagraphs (a) and (b) allege he created the impression that employees' union activities were under surveillance by telling an employee that he knew she and another employee were union organizers. Marylyn Cody testified that, following a meeting of employees on November 18 at which Rosenstein spoke, she went up to Rosenstein, introduced herself, and the following conversation occurred:

So after the meeting, I went up and I said, "Mr. Rosenstein, nobody know who 'Jackpot' was and who you were and they couldn't find out anything." And I said, "I found out through a friend to the Gaming Commission what 'Jackpot' was." And he says, "Yes, I know. You're an organizer for the Union." He said, "But I don't care." And I said, "And Ann?" And he said, "Yeah, and Ann." And I talked—told him about the other girl that had worked for nine years with the Company that had been fired. And he says, "I don't know anything about her." But I don't remember who the other girl was. I can't recall her name. But she hadn't been . . . an organizer.

Rosenstein did not deny Cody's testimony in this respect. While Cody was not an entirely credible witness in other respects, in the absence of Rosenstein's denial, and in

light of the fact Thomas admitted knowledge that Hann, Cody, Oliver, and Merrill had been passing out authorization cards, and in further light of Thomas' extensive unlawful interrogations, I find that the General Counsel has proven paragraphs 13(a) and (b).

Paragraph 13(c) alleges Rosenstein promised employees benefits, including a Thanksgiving bonus, a pay raise in January and every 6 months thereafter, the opportunity to buy stock in the Company at a fixed price, and other unspecified benefits. Paragraphs 18 and 20 allege the granting of a wage increase retroactive to September 1 and on January 1 and March 1, 1982, as unlawful. Paragraph 21 alleges the granting of the stock option plan as unlawful, and paragraph 22 alleges the granting of the \$25 Thanksgiving bonus as unlawful. Paragraphs 13(d) and (e) allege that Rosenstein informed employees it would be futile for them to select the Union to represent them, and that if they did so they would lose all their benefits and have to begin bargaining from scratch. On November 18, 2 days prior to the Board-conducted election, Respondent held two meetings with employees which have been characterized as a Thanksgiving brunch and party, one in the morning and the other in the evening. Rosenstein addressed the assembled employees. Cody's account of the morning meeting is:

Okay. We had the brunch. Mr. Rosenstein—Mr. Sullivan got up and introduced Neil Rosenstein to the girls. This was the first time that we had met him. And Mr. Rosenstein told the girls, he said, "I'm sup—because of the Union, I'm not supposed to say anything. My lawyers advised me against it. But I'm going to say what I want to anyway."

So he told the girls that they were going to get a 25-cent-an-hour raise in January and a 25-cent-an-hour every six months, and there was more in the hopper. He also told us that Valley Bank—he had made arrangements with Valley Bank to give us free checking and deposit of our paychecks—automatic deposit of our paychecks, and if any of us needed a loan, he'd help us with that.

And he also said that we were going to [be] able to buy shares in the Company, and the number of shares depending on the number of years that the girls had been with the Company. And then the girls started asking him about what happens if the Union comes in? And they asked about the insurance, and he said, "Well, you're not going to have any insurance as good as the one you have now."

They said, "Well, is everything going to stay the same?" He says, "No," he says, "If the Union comes in, you'll have nothing and it will take a year to a year and a half before you get to the bargaining table."

And he said, "I will not have a Union and you'd better vote 'No.'"

He said, "I know that some of you girls have paid \$25 to the Union." He says, "I don't know what it was for," but he said, "I'm going to give you a \$25 Thanksgiving Day bonus," and he says,

"You can do what you want to with it." And we received it a week later.

...
 Ah—during the meeting, he said, "I don't know why you girls are—got this Union going." He said, "If there was something wrong, why didn't you come to me and discuss it with me."

Floy Swartz, who also attended the evening meeting, testified in pertinent part as follows:

Q. [By Mr. Selvo] What was said and by whom to the employees?

A. Mr. Sullivan introduced Mr. Rosenstein as our new owner of the company and Mr. Rosenstein did most of the talking.

Q. What did Mr. Rosenstein say?

A. Well, he said quite a bit but I don't remember everything. I do remember that he said that he was talking about the union and he said that if the union—he was a very stubborn man and if the union came in that it would take at least a year, a year and a half before anything was settled.

...
 Q. Do you recall anything more that he said?

A. Well, there was talk about profit sharing plan and questions asked of Mr. Rosenstein.

...
 A. He said that we were getting a Thanksgiving bonus which we did get.

Q. Did he say how much?

A. Twenty-five dollars.

...
 Q. [By Mr. Selvo] Do you recall whether Mr. Rosenstein said anything about what kind of man he was?

A. Oh, at the Thanksgiving meeting?

Q. Yes.

A. He said he was a very stubborn man and that if the union vote was yes that it would take a year to a year and a half before anything would be settled.

Rosalie Ernandes testified as follows regarding the evening meeting:

Q. [By Mr. Selvo] What did Mr. Rosenstein say?

A. Well, he had told us that we were going to get a Thanksgiving bonus of \$25. And then he said that regarding the Union, he said, "If the Union comes in, we will start from 'ground zero.'"

Q. Do you recall—did he say anything more?

A. Yes, he had referred to—we were going to get a paper with what we were entitled to shares. That everybody would get a paper and it would be a sealed envelope and it would tell us how many shares we were entitled to.

Q. Was this on a stock option.

A. Yes. It depended on how long we worked there.

Kathleen Humphry, who also attended the evening meeting, testified:

A. He [Rosenstein] introduced himself. Told us he was the new owner of the Company and that everybody had a right to their own way of thinking and to vote whichever way they wanted to; that everybody had a mind of their own. And he said that if we "went Union," our jobs weren't guaranteed by the Union because they didn't sign our paychecks and that we'd have to start from the beginning again.

Q. Okay. Do you recall anything more that he said?

A. He said that he knew that quite a few of us had spent \$25 that we could ill afford and that he would give each and every one of us a check for \$25 to buy a Thanksgiving turkey with.

...
 A. He told us that we could buy shares in the Company.

Q. Did he talk about a stock option?

A. That's what I mean by "shares."

Q. Do you recall anything more?

A. He said that each and every one of us would be given an envelope as we went out and I guess everybody got an envelope.

Q. Do you recall anything more?

A. I think he said something about arrangement were being made with a bank for loans to buy the shares with. Or the stock with.

Rosenstein did not delineate between the brunch and evening meetings. His account of his presentation was:

A. I told them that I was very pleased that I had the opportunity to talk to them, that they must have thought I was a phantom because they never saw me; that I was glad to have the opportunity to meet them and know them; that I wanted them to know that we were making substantial changes in the company; we were buying several million dollars worth of new equipment which would produce greater revenues for the company, greater tips for them, we hoped, and more ease, less repairs, less down time; that we had a policy of giving every employee who worked for us option; that we wanted them to know that we were in this business to stay; that the company had not paid any money in previous years to talk about, but we hoped to be able to generate a substantial income out of this, pay for equipment, expand the company, make their stock options worth something; that we were going to replace the profit-sharing plan with this option plan; that we were going to continue with Christmas bonuses . . . that we had done before; that we wanted all of their cooperation to help us build this company; we wanted them to feel like owners in the company; that we were going to give every employee of the company an amount of money—which was \$25—with which they could buy a turkey because this thing was sort of hastily thrown together.

As far as the \$25 goes, it was to buy each individual a turkey. We didn't know if they had large

families, small families or whatever. We distributed it to every CARDIVAN employee in Reno and wherever.

It was just a general—I suppose—getting-to-know-you type of thing. I offered each and every employee the right to come and talk to me. I said I would be around, you know, come over and say hello, I would be glad to meet you. You are my guests for dinner so I like to greet my guests.

I asked them to ask me any questions that they had on their minds and not to tell me everything was fine if it wasn't fine.

I told them there was an election coming up. The company was very much in favor of them voting; they should all exercise their rights. I would prefer if they didn't have a union. I felt that they would do better with us as individuals and working for a company as shareholders, as part of the organization and I left the floor open to questions.

I do remember one thing I told them, for them to trust me.

Q. Do you remember anything else you told them?

A. I told them that regardless of their preference—union or non-union—that their jobs were not in jeopardy; that if they ever felt for any reason at any time that there was the slightest implication that they were being discriminated against for any reason, harrassed, or anything else and they couldn't get satisfaction, to come directly to me because I wouldn't stand for it and wouldn't put up with it.

I told them that this country was build on whatever, that my family—I am the first born in the United States. I am fully aware of the union—I was fully aware of it and I don't think that one belonged to our company, and I would hope that they would have enough confidence to trust me and let me run this company without the union so that we could follow through with out [sic] plans.

Then if they didn't like what we did, go have an election, just go seek another protection.

Thanksgiving bonus. It is clear that Rosenstein informed the employees that they would receive \$25 for Thanksgiving. He further testified that, as the "chief operator in many businesses," it was his custom to provide Thanksgiving bonuses for employees, either in the form of cash, a turkey, or a ham. All employees of Respondent, including those located in Reno and Carson City, and thus beyond the scope of the Las Vegas unit involved herein, received the bonus.⁷ While the Corral United employees did not, Rosenstein explained that effective control of Corral did not pass to the board of directors of Jackpot Enterprises until January 1, 1982, and that the purchase price of Corral United was based on earnings from June 30 to December 31. Therefore, Jackpot could not direct Corral United to do anything that might affect its earnings. Several employees, however,

⁷ The parties stipulated that approximately 155 persons received a Thanksgiving bonus.

testified that, when Rosenstein informed them of the \$25 Thanksgiving bonus, he also made reference to reimbursing employees for the amounts they had paid for union dues.

Buy stock. With respect to the announcement that the employees would have an opportunity to buy stock, Respondent has shown that the stock option plan was adopted prior to any employer knowledge of union activity. To this effect, the Jackpot Enterprises prospectus, which was issued on June 23, long predates any union activity. The employees, however, were not informed of the fact they were entitled to purchase stock options until 2 days prior to the election.

Unspecified benefits. While the General Counsel's brief does not point out what "unspecified benefits" were alleged to have been promised, I presume the allegation is intended to cover Cody's testimony that Rosenstein had made arrangements with the Valley Bank to give employees free checking, automatic deposit of paychecks, and help in getting any loan, presumably for the purpose of exercising the stock options. While I have difficulty with the concept that automatic deposit of paychecks is a benefit to the employees, there can be no doubt that free checking and assistance in obtaining loans are indeed benefits.

It is well settled that Section 8(a)(1) of the Act prohibits employer conduct "immediately favorable to employees which is undertaken with the express purpose of impinging upon the freedom of choice for or against unionization and is reasonably calculated to have that effect." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1963). Thus, an employer violates the Act when it promises to grant benefits to its employees in an attempt to dampen their enthusiasm for union representation. *NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880, 882-883 (1st Cir. 1978); *NLRB v. Otis Hospital*, 545 F.2d 252, 255 (1st Cir. 1976); *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 6 (1st Cir. 1981). Such action by an employer represents an improper use of economic power (the "fist inside the velvet glove") and is proscribed by Section 8(a)(1). *Exchange Parts*, 375 U.S. at 409.

On the foregoing facts and authorities, I conclude that Respondent's conduct 2 days before the election in announcing a Thanksgiving bonus and informing employees they would receive options to buy stock, free checking accounts, and assistance in obtaining loans for the purpose of exercising the stock options was for the express purpose of impinging on their freedom of choice and was an attempt to dampen their enthusiasm for union representation, and therefore violative of Section 8(a)(1) of the Act. Accordingly, the General Counsel has proven paragraph 13(c) insofar as it covers promising a Thanksgiving bonus, opportunity to buy stock options, free checking accounts, and assistance in obtaining loans 2 days prior to the election. Such conduct represents an improper use of economic power. *Exchange Parts*, supra.

Pay raises. Cody testified Rosenstein said the change girls would receive a 25-cent raise in January, a like amount in 6 months,⁸ and "there was more in the

⁸ Brigitta Arrigo corroborated Cody with respect to the raises.

hopper." Swartz testified Rosenstein said they would receive a 50-cent wage increase on January 1, 1982, and another 50 cents in 6 months. As early as August 24, prior to knowledge of union activity, Sullivan notified the employees in writing that the Company was evaluating its "wage/benefits program," that a final decision would be made within 30 to 60 days, and that he was sure wage increases would result which would be retroactive to September 1.⁹ It was further established that there was an imbalance between the wages paid Cardivan and Corral United employees, with the latter enjoying a higher pay scale and Cardivan employees having better benefits. Pam Gioeli was hired in late August as the controller for both Respondent and Corral. Her first job was to prepare a wage and benefit analysis of the two companies. Her report was completed the first week in September. She testified that the decision to grant an across-the-board raise and semiannual raises thereafter was made by Rosenstein on September 6, 7, or 8, thus prior to any showing of employer knowledge of union activity. The record shows that on October 9 Sullivan held two change girl meetings, at which time he informed them, as his August 24 letter had predicted, that they would receive a 40-cent-per-hour raise retroactive to September 1 and another 25-cent raise on January 1, 1982, but would have to wait and see what happened thereafter.¹⁰ The announcement was made within the 30- to 60-day estimate made in the August 24 letter. Paragraph 14(a)(1) of the complaint alleges that, in October, Sullivan promised employees benefits, including a retroactive 40-cent-per-hour raise and a raise in January and every 6 months thereafter, in order to discourage them from selecting the Union. In light of all the forgoing circumstances, it is concluded that the General Counsel has not shown that either Sullivan's October announcement, Rosenstein's November further announcement, or the actual granting of the pay raises were motivated by the employees' organizing activities. I recommend dismissal of paragraphs 13(c), 14(a)(1), and 20 insofar as they allege any unlawful conduct connected with the promise or granting of pay raises.

With respect to subparagraphs (d) and (e) of paragraph 13, as noted infra, Cody testified Rosenstein told the change girls "if the Union comes in, you'll have nothing and it will take a year to a year and a half before you get to the bargaining table . . . I will not have a union." Swartz testified he said that "he was a very stubborn man and if the Union came in that it would take at least a year, a year and a half before anything was settled." Hernandez testified he stated, "If the Union comes in, we will start from 'ground zero.'" Arrigo testified Rosenstein stated, "If the Union gets in, we will be right back where we started from." Humphry testified that "he said that if we 'went union,' our jobs weren't guaranteed by the Union because they didn't sign our paychecks and that we'd have to start from the beginning again." The General Counsel has proven subparagraphs 13(d) and (e).

⁹ R. Exh. 12.

¹⁰ Pursuant to Sullivan's testimony and a stipulation between the parties.

Paragraph 14(a)(2) alleges Sullivan threatened employees with loss of their Christmas bonus if they selected the Union to represent them. Cody testified that, in response to a question about what would happen to the Christmas bonus if the Union came in, Sullivan said, "Won't be any." Sullivan denied making that statement, and a tape recording of the meeting corroborates his denial. Cody is not credited.¹¹ I recommend dismissal of paragraph 14(a)(2).

Paragraph 15 alleges Supervisor Gary Skelton unlawfully interrogated an employee. Brigitta Arrigo testified that, on an unspecified date, Skelton came to the Alpha Beta market where she was working and asked if she had gone to any of the union meetings, and, on learning she had gone to one, stated she should have gone to more because then she would have found out how many lies the Union told. Her testimony was not denied. The interrogation was unlawful as alleged.

Paragraph 16 alleges Supervisor Carol Dyke unlawfully interrogated an employee in a telephone conversation in early November. Arrigo testified that she received a telephone call at home from Dyke "something about work," and that Dyke asked what she thought about the Union. The unlawful interrogation was not denied. Paragraph 16 has been proven.

Paragraph 17 alleges that on November 11, in an item of campaign propaganda, Respondent "impliedly promised its employees increased benefits and/or materially misstated the law relating to changes in employee terms and conditions of employment while a question concerning representation of said employees exists." On November 11, over the signatures of "Harriet" and Carol Dyke, the following was issued to all employees:¹²

Dear Fellow Employees:

Throughout the years we have worked together through both bad and good times. Recently a very good thing happened, and of course, a bad thing, which, if we don't stick together, could get worse.

The good thing that we are thrilled about is the fact that our new owners are terrific. They have kept their word with us on everything they have said they would do for us, and in fact have kept the Company's word about retroactive pay. They are people persons and are truly concerned that all of our employees benefit both in wages and working conditions. For example, we know about their stock option plan and recently they have inquired of us if we are all interested in participating. We learned that stock options are free at the time of their receipt and if the Company makes money and the stock price rises, we all stand to make extra money.

¹¹ Cody also falsely testified with respect to the date Barbara Echols signed a union authorization card. Echols testified she signed a card in December, after the November 20 election, and backdated it at Cody's request. The General Counsel recalled Cody, who testified Echols had signed the card on November 11 "at Albertson's at Decatur and Washington." Respondent's work schedule for the week of November 5 through 11 shows that Echols did not work on November 11.

¹² "Harriet" Bohr is the office manager. She was not alleged to be a supervisor. Dyke is an admitted supervisor.

I know that they would like to do much more in stabilizing wages and working conditions for all of our employees, but the law prohibits them from doing anything while this Union petition is pending. In any event, we believe that what they say is good and what they will do is even better.

Of course, the bad thing that has happened is that a group of outsiders, the Teamsters, have sought to upset us, divide us and sow seeds of hate and discontent. We are very unhappy that they have chosen to do this and we believe the only reason is they they want to collect from us dues and initiation fees. We have heard a lot of things they have told our fellow employees and we know them to be untruthful, but the one thing they won't admit is that they can't guaranty anybody a job. Only the Company can, and only the Company pays the wages of employees; not the Union.

Fortunately, we have enough time to prevent this bad thing from getting worse. On November 20, we all have the right to exercise our free choice in the privacy of a voting booth. We believe our fellow employees don't want a Union and we know no one needs a Union. If nothing more, we must give these new owners a chance.

We always have time to run to a Union, but to not give Mr. Rosenstein and his associates an opportunity is in our opinion very unfair. We see no reason to not give them a chance before we commit ourselves to monthly union dues and initiation fees with no guarantees whatsoever. The truth is, the Union can't make any guarantees and any statements to the contrary are just utterly false.

We thought it important to write each and every one of our employees and tell them how we felt. We believe a vote for the Union is a disaster and thus, we urge each and every one of you to vote "NO" on November 20, 1981.

As established earlier, the plans for a stock option plan and retroactive wage increases were announced prior to knowledge of any union activity. I recommend dismissal of paragraph 17.

Paragraph 18 alleges that in October Respondent unlawfully granted a wage increase retroactive to September 1. As outlined above, the intent to grant a retroactive wage increase predated knowledge of union activity. To have withheld a planned increase because of union activity would have been unlawful. I recommend dismissal of paragraph 18.

Paragraph 19 alleges that in mid-October Respondent granted benefits in the form of periodic step wage increases which it failed to observe previously. It appears from the record that it was Respondent's practice to hire change girls at the minimum wage and to grant periodic raises every 3 months until the maximum rate paid by Respondent was reached. At the October 9 meetings with the change girls, wherein Sullivan advised them of the wage increase retroactive to September 1 as contemplated in his August 24 letter, several women stated they had failed to receive their periodic increases. Sullivan explained that everyone made mistakes, and that the affect-

ed employees should check with the office and, if the facts as claimed were true, the employees would receive their past due raises retroactively. That this was not a newly instituted policy is clear through the tape recording of a portion of Sullivan's talk. Emma Oliver, one of the principal union organizers, stated at that meeting that she had received a retroactive wage increase after she had informed management she thought it was due. The record fails to establish by a preponderance of the evidence that granting the retroactive periodic step increases was unlawfully motivated as alleged in paragraph 19.

With respect to paragraph 21, which alleges the granting of the stock option plan to employees as unlawful, it is clear from Rosenstein's testimony and the Jackpot Enterprises prospectus which was issued on June 23 and long predates any union activity that, despite the unlawfulness of the timing in announcing it, the actual granting of the stock options was unrelated to union activity. I recommend dismissal of paragraph 21.

Paragraph 22 alleges that the granting of the Thanksgiving bonus violated Section 8(a)(3). While I have found that announcing the Thanksgiving bonus 2 days before the election was an unlawful attempt to dampen employee enthusiasm for the Union, I do not find that the granting of the bonus was unlawful as alleged in paragraph 22. In this regard, Rosenstein testified that he had been the chief operator of many businesses and that it has been his policy to provide Thanksgiving bonuses to all employees. It is further noted that, while Corral United employees did not receive the bonuses, Rosenstein was not in a position to affect its profit picture until he obtained full control after the first of the year. Also, Cardivan employees located in Reno and Carson City, who were not within the election unit, also received the bonus.

C. Ann Hann's Discharge

Paragraphs 24 and 25 of the complaint allege Hann was discharged on September 29 because she joined or assisted the Union or engaged in other protected concerted activities. The record shows the idea for organizing originated with Hann in June when she talked to Cody about it. In late July, through the efforts of Cody's husband, they were put in contact with a union representative. She and Cody then contacted the change girls in the various stores and arranged for meetings with union representatives at the union hall in the latter part of August. While the date of the meetings was not definitively established, the first authorization cards were signed on August 31. I conclude, therefore, the first meeting was on August 31. Hann signed an authorization card on September 4. Both she and Cody appear to have been equally active in soliciting the signatures of other employees. Employees Oliver, Merrill, and Knocks were also active card solicitors. Assistant Supervisor Thomas admitted that in August and September she had heard rumors there was going to be a union meeting, and that Hann, Cody, Oliver, and Merrill were passing out cards. She told Carol Dyke about the rumor of union activity, but denied she told Sullivan or that she had anything to

do with Hann's ultimate discharge. On September 26, Hann was working the 2 to 10 p.m. shift at Albertson's Market. About 5:30 or 6 p.m. on that date, Susan Kromidas, then an office clerical employee of Respondent, stopped by the store on her way home from work, as was her custom, to buy groceries. She observed Hann standing about 20 to 25 feet outside the store shaking a mop. She noted that Hann was wearing her change belt (an apron with pockets for coins) and money changer.¹³ This was wrong, according to Kromidas, because Hann was away from the slot machines and was outside with money. Kromidas testified she had visited stores where Hann worked for years and had never seen her outside with a changer on before. The following day, September 27, Kromidas told Harriet Bohr that she had seen Hann outside with her changer on. Bohr, who was the office manager and in charge of the change girls, told Sullivan.¹⁴ Sullivan's immediate response to Bohr was "fire her." Hann did not work on September 27 and 28. The morning of September 29 she received a telephone call at home from Supervisor Carol Dyke, who asked her to come to the office with her vest, apron, and key. Hann's account of what was said when she reported to the office was:

A. Well . . . the first thing she [Dyke] said to me, did I have my keys. I said, "Yes," and I gave her my key. And she looked—took the key and looked my vest over and looked my apron over, which were acceptable—totally clean and acceptable. And then she put her hand on me and she told me she wanted me to have no hard feelings towards [sic], but it was either her job or my job.

Q. [By Mr. Selvo] Okay. What occurred next?

A. She said that Mr. Sullivan was going to be very, very generous to me and I was the only employee they had ever given two weeks severance pay to. And then she had file there, but she never open it. She said I had always been a good employee and that's why I was getting the severance pay. And then with that, Harriet came out and she had a piece of paper and she handed me the paper and she put her hand on me and said she was sorry. Just sorry. There wasn't too much conversation, but then she said, "Ann, you're going to get your stock plan right away and here's the paper and [you] can go to the bank and receive your check in a few days."

And then a lady came out from in the inner offices and brought a little piece of paper and she slipped it underneath my file and Carol picked up my file, looked underneath it and looked at me, and then she said, "Now I can tell you why you're being terminated." And I turned to Carol and I

¹³ The change girl uniform consists of a change belt, red vest with the word "change" on the back, changer, a wallet on a chain, and a key to the safe which is normally on a key ring connected to a retriever.

¹⁴ Kromidas testified on June 18, 1982. The court reporter failed to transcribe all of her testimony. At the reopened hearing the parties stipulated that Kromidas would testify that she was not aware that Hann or any of the change girls were involved in union activity, and that she also told Sullivan she had seen Hann outside the store with her changer on.

said, "Carol, I know why I'm being terminated." And she never answered that.

And she looked at me again and she said, "You're being fired because you were caught going outside shaking the mop, and that with your uniform on, and that's a 'no-no.'"

And I looked at her and I said, "Carol, you've got to be kidding." Those were my exact words. I said, "I've done that for five years—shook the mop out."

Q. Okay. Was that the end of the conversation?

A. Just a little bit about telling me to—where I could get my stock plan, and she never referred to what [I] said about shaking the mop out all those years, no. That was almost the end of the conversation.

Q. Now, had you done what you were accused of?

A. Yes.

She testified that the change girls were expected to clean up the area every night before they left, that she had purchased a mop for that purpose which the Company paid for, and that she had gone outside the store to shake it for 5 years. While admitting she had worn the changer outside on September 26, she denied ever going outside with the wallet. The wallet, from which jackpots are paid, was supposed to contain \$50. She testified the changer would hold in excess of \$20 but that she kept the amount of change in the changer down to about \$2 because the girl coming on the graveyard shift would have to pay her for it.¹⁵ She also testified on direct examination that the change girls were never to go outside with their wallet on. On cross-examination she testified that she had locked up her wallet and the change from her apron, but that she may have worn the changer outside. She acknowledged that when she was hired she was informed one of the rules was "No money outside the store."

Sullivan testified that the problem with having a change girl outside a store with her change belt was twofold: (1) it endangered her life, and (2) she was risking Respondent's money. He testified that the Company is extremely security conscious, and that armed robberies are a constant problem in the stores and average about one a month. According to Sullivan, "When [a change girl] is outside with that money apron on, whether it's full or empty, and whether the wallet's in it or not, people recognize that that apron usually has money in it. And if she's outside the store, just lucky that somebody didn't hit her in the head to take that apron off of her. In addition to which, she is risking our money." He explained the basis for the Company's policy: "[N]umber one, they're liable to get hurt; number two, we're going to lose our money, and probably lose our keys on top of it, which would mean changing all the keys." Sullivan denied knowledge of Hann's union activity or of any union activity prior to receiving a copy of the petition in

¹⁵ The testimony shows she was seen outside about 6 p.m., which is several hours before she was to be relieved by the graveyard shift change girl.

Case 31-RC-5220, which was filed on September 29. He testified that approximately 10 or 15 years ago he terminated another change girl for making "a quick trip to the bank and back" across a shopping center parking lot. A mechanic who was making a service call had reported her absence and observed her returning from the bank.¹⁶ While Respondent employs a detective agency to watch the slot machines for cheaters and to report on infractions by the change girls, the office clericals are encouraged to report on them also.

Discussion

The General Counsel contends Hann was discharged for her union activities, pointing out that she was one of the primary card solicitors; that the discharge occurred the same day the Union's petition was filed with the Board; and that Thomas was aware of the union activity and that Hann was one of several card solicitors. He argues the fact the change girls are required to clean up by the end of their shift and yet not work overtime makes it impossible not to break the rule against wearing any part of the change girl's equipment outside, and that, besides, Hann had gone outside the store to shake the mop for the last 5 years wearing her "equipment," except her wallet, and had not been discharged.

Respondent argues that Sullivan was solely responsible for determining Hann's discharge; that he had no knowledge she was involved in union activities; and that, even if Thomas' testimony imputes knowledge of Hann's union activity, the evidence shows her discharge was not discriminatorily motivated. Respondent additionally points out that no action was taken against Merrill, Cody, or Oliver or against any change girl who signed a union authorization card for the reason that they, unlike Hann, did not commit a dischargeable offense.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board held that a violation is established where the General Counsel has shown that an employer's opposition to protected conduct was a "motivating factor" in a disciplinary decision, and the employer, in the face of such a showing, has failed to "demonstrate that the [discipline] would have taken place even in the absence of the protected conduct."¹⁷ In my view, Respondent has met its burden of showing that Hann would have been terminated regardless of her union activity. In so concluding, I am mindful of the fact that the complaint alleges, and I have found, numerous instances of 8(a)(1) violations, all of which postdate the filing of the representation petition. Except for those immediately preceding the election, and obviously intended to influence its outcome, the balance is attributed to Thomas in the form of interrogations and promises or threats of loss of benefits, and commenced in October. Nor is there any doubt that Thomas was aware of the organizing activities and that Hann, Cody, Oliver, and Merrill were among those circulating authorization cards. On the other hand, the evidence shows that Hann was aware of the rule that no

money was to be taken outside the store, and it is not in dispute that, except for her wallet, Hann was indeed 20 to 25 feet outside the store about 6 p.m. the evening of September 26 with her uniform on, including the change belt and changer containing money.¹⁸ Sullivan's testimony with respect to reasons for the rule appear to me to be valid in light of the fact that armed robberies are not uncommon. Thus, Respondent's policy shows a concern over the safety of the employee who might go outside with money, with the loss of the money, and with the loss of the key to the safe. In addition, going outside meant the employee was not watching the slot machines, itself a violation of company rules. It seems clear to me that, but for her conduct of being outside the store with her change belt and changer on, Hann would not have been terminated. Her going outside to shake the mop while wearing the change belt and changer, for which she was terminated, was not a protected concerted activity. With respect to the General Counsel's argument that Respondent's rules—clean up by the end of the shift but not work overtime—make it impossible not to break the rule against wearing change girl equipment outside, it is well settled that an "employee may be discharged by an employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *NLRB v. Condenser Corp.*, 128 F.2d 67, 75 (3d Cir. 1942). To the same effect: *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954). As the Court of Appeals for the Eighth Circuit said in *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 at 490 (8th Cir. 1946):

In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities of affiliations of the employees.

Thus, whether Hann's termination was merited or unmerited, just or unjust, or too drastic is not for me to decide. I am limited to determining whether Hann was terminated for engaging in concerted activities or for supporting or assisting the Union. The General Counsel has failed to prove by a preponderance of the evidence that Hann was terminated unlawfully as alleged in the complaint.

D. Objections to the Election

Objection 1 alleges:

On or about October 9, 1981, Cardivan Coin Company gave raises to all employees in the "change person" classification. The raise was forty cents (40¢) per hour and was retroactive to September 1,

¹⁶ Another change girl was discharged in February because she would not stay in the slot area and watch the machines.

¹⁷ 251 NLRB at 1089.

¹⁸ While Hann testified she kept her changer money at a minimum because her successor had to purchase her change, I note that she was not due to go off shift for another 4 hours.

1981; with a promise of twenty-five cents (25¢) per hour starting in January of 1982.

Complaint paragraphs 14(a)(1) and 18 allege the same matters. I have recommended dismissal of those paragraphs. Accordingly, I recommend that Objection 1 be overruled.

Objection 2 alleges that Respondent:

Advised employees they would have to close the plant down if the Teamsters Union had been successful in winning their election. This was quoted by Mr. E. Sullivan.

No evidence was offered in support of this objection. I recommend Objection 2 be overruled.

Objection 4 alleges:

The employer, through its agents, forbade employees to further engage in the discussion of union activities.

No evidence was offered in support of this objection. I recommend Objection 4 be overruled.

Objection 6 alleges:

The employer, through its agents, threatened the employees that if they voted for the union they would forfeit all benefits and be forced to start all over again.

Having found merit to complaint paragraphs 11(b)(2), 11(c)(2), 11(d), and 13(e), I recommend Objection 6 be sustained.

Objection 7 alleges:

The employer, through its agents, interrogated employees regarding their union sympathies [sic].

Having found merit to complaint paragraphs 11(a), 11(b)(1), 11(c)(1), 11(h), 11(i)(2), 11(j)(1), 15, and 16, I recommend Objection 7 be sustained.

Objection 10 alleges:

The employer stated that regardless of the outcome of the election . . . there would *never* be a union at Cardivan Coin Company.

No evidence was offered in support of this objection. I recommend Objection 10 be overruled.

Objection 11 alleges:

The employer, through its agents, interrogated employees regarding conversations with other employees pertaining to the union, voting and authorization signatures.

No evidence was offered in support of this objection. I recommend Objection 11 be overruled.

Objection 12 alleges:

Mr. E. Sullivan, at the November 18, 1981 morning meeting, informed all change persons that they would be given a twenty-five cents (25¢) per hour raise every six months starting January 1, 1982.

Complaint paragraph 14(a)(1) alleges the same matter. I have recommended dismissal of that paragraph. Accordingly, I recommend that Objection 12 be overruled.

Objection 13 alleges:

On November 18, 1981, at the party held at the Royal Americana Hotel at 7:30 P.M., Mr. Neil Rosenstein (owner) informed the employees that they would be given a fifty-cents (50¢) per hour raise every six months until they reach their counterpart level, beginning January 1, 1982.

This allegation is one of several allegations in complaint paragraph 13(c). While I found merit to the other allegations, I found no merit to that portion covering pay raises. For the reasons set forth in my consideration of complaint paragraph 13(c), I recommend Objection 13 be overruled.

Objection 15 alleges:

At the party held on November 18, 1981, Mr. Rosenstein informed the employees who had paid \$25.00 toward their \$100.00 initiation fee with the Teamsters union [they] would receive their \$25.00 back in check form from the Cardivan Coin Company before Thanksgiving [sic] (which in fact, they did receive).

This allegation is included in complaint paragraph 13(c). The record shows that, at the time Rosenstein informed employees that they would receive a \$25 Thanksgiving bonus, he also made reference to reimbursing employees for the amounts they had paid for union dues. Accordingly, I find merit to Objection 15 and recommend it be sustained.

Objection 16 alleges:

The employees were told by Mr. Rosenstein, owner, that if the Teamsters, Local 995 won the election, he would stall the negotiations for two years. During which time, the Teamsters would become discouraged and forsake the employees . . . leaving them "high and dry."

Having found merit to complaint paragraphs 13(d) and (e), I recommend Objection 16 be sustained.

Objection 17 alleges:

On the 18th of November, 1981, Mr. Rosenstein gave the employees of Cardivan Coin Company an option to purchase stock in the Company; according to the Length [sic] of their employment. Also, he would aid the employees in securing a loan for his stock through the Valley Bank of Nevada.

Having considered these matters with respect to complaint paragraph 13(c), and having found Respondent's purpose in announcing these benefits 2 days before the election impinged on their freedom of choice and constituted an attempt to dampen their enthusiasm for the Union in violation of Section 8(a)(1) of the Act, I recommend Objection 17 be sustained.

To recap, I recommend that Objections 6, 7, 15, 16, and 17 be sustained. Such conduct having occurred prior to the election held in Case 31-RC-5220, I find that it interfered with the employees' free choice of representative and was of sufficiently substantial nature to affect the results of the election and to require that the election be set aside and a new election be held. As I have found that Respondent did not engage in objectionable conduct as alleged in Objections 1, 2, 4, 10, 11, 12, and 13, I recommend their dismissal.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

As it appears most of Respondent's employees report directly to their jobsites, I shall recommend that, in addition to posting notices in its offices, Respondent provide signed copies of the notice and names and addresses of employees so that notices can be mailed to all those who were employed by Respondent from the first week in October 1981, the date Respondent commenced its unlawful conduct, until the time of compliance with this Order.¹⁹

On the basis of the foregoing findings of fact and the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, sympathies, and desires; by threatening loss of benefits if the Union is successful in organizing the employees; by promising increased benefits and improved terms and conditions of employment; by creating the impression that employees' union activities were under surveillance; by informing employees that if they selected the Union it would take a year and a half before anything was settled; and by telling employees if they selected the Union they would lose their benefits and bargaining would commence from scratch, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Cardivan Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, sympathies, and desires; threatening loss of benefits if the Union is successful in organizing the employees; promising increased benefits and improved terms and conditions of employment; creating the impression that employees' union activities were under surveillance; informing employees that if they selected the Union it would take a year and a half before anything was settled; and telling employees if they selected the Union they would lose their benefits and bargaining would commence from scratch.

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

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

(a) Post at its office and principal place of business in Las Vegas, Nevada, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 31, 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.

(b) Furnish to the Regional Director for Region 31 the names and most recent addresses in its possession of all employees employed by the Respondent from the first week of October 1981 until the time of compliance with this Order, and sign a sufficient number of copies of the attached notice marked "Appendix" for mailing by the Regional Director to each of these employees.

(c) 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 ALSO ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein, specifically paragraphs 11(b)(3), 11(e), 11(f), 11(g)(1), 11(g)(2), 11(k)(2), 12, 14(a)(1), 14(a)(2), 17, 18, 19, 20, 21, 22, 24, and 25.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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."

¹⁹ See *Batchelor Electric Co.*, 254 NLRB 1145 (1981).

IT IS FURTHER RECOMMENDED that Objections 6, 7, 15, 16, and 17 be sustained, and the election held on November 20, 1981, be set aside and that a new election be con-

ducted at such time as the Regional Director deems appropriate.