

Sears Roebuck and Company and United Steelworkers of America, AFL-CIO, CLC. Cases 18-CA-11010 and 18-CA-11038

November 30, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On April 24, 1990, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception with a supporting brief. The Respondent and the General Counsel each 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,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sears Roebuck and Company, Maplewood, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

Frances I. Brammer, Esq., for the General Counsel.
S. Richard Pincus, Esq., for the Respondent.

DECISION

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Minneapolis, Minnesota, on February 7 and 8, 1990, pursuant to charges and amended charges filed by United Steelworkers of America, AFL-CIO, CLC (the Union) on September 6, 21, 25, and 29, 1989, and served the same dates, and consolidated complaint issued October 31, 1989, alleging Sears Roebuck and Company (Sears or Respondent) has violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies these allegations.

On the entire record, and after considering the demeanor of the witnesses and the able posttrial briefs of the parties, I make the following findings and conclusions.

I. THE RESPONDENT'S BUSINESS

The complaint alleges, Respondent admits, and I find that Respondent is a corporation with an office and place of business in Maplewood, Minneapolis, where it is engaged in the operation of a retail department store, including automobile service and repair, and during the calendar year ending December 31, 1988, derived gross revenues in excess of \$500,000 from that business and purchased and received goods and materials valued in excess of \$5000 at its Maplewood, Minnesota facility which came directly from points outside the State of Minnesota. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been at all times material to this proceeding.

II. THE UNION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The allegations before me concern conduct occurring on or about March 20, 1989,¹ and thereafter. Prior to these events the Union had petitioned the Board for a representation election among Respondent's automotive center employees on June 8, 1988. Thereafter an election was held, pursuant to that petition and a stipulation of the parties thereto, on August 26, 1988. The Union lost the election. A year later, after the March 20 conduct complained of, the Union filed another election petition on August 25, but withdrew it on September 13. Bryon Rassier, a mechanic, was the chairman of the Union's in-plant organizing committee in both 1988 and 1989, and was the person who each time contacted the Union and persuaded its representatives to commence organization efforts. Steve Jorgenson and Denes Mathe, both of whom were members of the in-plant committee, and Rassier received suspensions in September 1989 which are alleged to be violations of Section 8(a)(3) and (1) of the Act. The other allegations consist of a threat of job loss by Gerald Engberg, Respondent's automotive center manager, Engberg's conduct in prohibiting Rassier from wearing a hat supportive of the Union, and the unlawful prohibition of employee handbilling on Respondent's property or the property of the shopping complex where Respondent's store is located.

The March 20 Incident

According to Bryon Rassier, when he was in the office on March 20 discussing some irregularity concerning his absence on St. Patrick's Day, he complained about the smallness of his pay raise to Engberg and Dorsey. They advised they could do nothing about it, but, testifies Rassier, Engberg said that because of the past union activity he had received a bad rating, did not get a raise, and there was a good chance both he and Rassier would lose their jobs if the union stuff got started again. Rassier adds that during this meeting, Dorsey said he had received an anonymous phone call from someone purporting to represent the Machinists Union, and therefore concluded that union was coming in and he could do nothing to stop it.

¹Unless otherwise noted, all dates are 1989.

Engberg's version is that after Rassier voiced his dissatisfaction with his raise, he (Engberg) told Rassier that "because of what went on here last year" he had a bad review, got no raise, and would probably be fired "if anything continued in the next year." Engberg further explains that he was referring to the activity that had taken place, the poor morale, and the failure to make the profit that had been projected. He concedes the previous year's activity he spoke of to Rassier included the union activity. He denies saying Rassier would be fired if organizing activity resumed. He does not recall whether the Machinists Union was mentioned in this meeting, but concedes it may have been.

Dorsey agrees that Engberg said he might possibly lose his job, and adds that he understood Engberg to be referring to union activity, but denies that Engberg said Rassier would be terminated. Dorsey professes no recollection of mentioning the Machinists Union, but is somewhat uncertain on the point.² It does not appear the Machinists were in fact attempting to organize Respondent's employees at the time. It seems clear from Engberg's spontaneous exposition of the problems caused him by the previous union campaign and the effect further union activity might have on his position, that he resented that activity because of its adverse effect on his employment status and strongly opposed its resumption because it might well cause his termination. He was speaking in the heat of the moment to one he well knew to be a leading union adherent by virtue of Rassier's public service as a union election observer the year before. Rassier's version of what was said had the ring of truth, including his recitation of Dorsey's reference to the Machinists Union which has not been convincingly rebutted and does not strike me as the sort of thing Rassier would invent because there would simply be no purpose to such invention. Rassier was, I find, the more impressive of the three in terms of believability and consistency. Moreover, with Rassier as well as other current employees testifying contrary to their superiors it is well to need the wise words of Judge Lieberman; adopted by the Board, in *Unarco Industries*, 197 NLRB 489, 491 (1972), where he stated:

"The average employee [providing information in a proceeding to which his employer is a party] is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for necessary job references essential to employment elsewhere." Bearing this truism in mind, it is plain to see that the employee witnesses who testified against Respondent . . . did so knowing that they were in considerable peril of economic reprisal. Having thus much to lose, their testimony, adverse to Respondent was in a sense contrary to their own interests and for this reason not likely to be false.

²Dorsey's testimony in response to questions by Respondent's counsel regarding the Machinists Union was as follows:

Q. Did you say anything regarding the IAM or the International Association of Machinists?

A. No, not that I recall.

Q. During the course of that meeting?

A. No.

Q. Are you quite certain of that?

A. Um—I do not recall that I ever said anything about the IAM, I don't know what the—I am not aware of what that was see.

This principle has since been consistently applied where applicable,³ as it is here.

For the reasons set forth above, I credit Rassier's version of the March 20 meeting, and conclude and find that Engberg did, as the complaint alleges, violate Section 8(a)(1) of the Act by threatening known union adherent Bryon Rassier with possible loss of employment if Respondent's employees again resorted to union activity. By so doing, Respondent, by its agent Engberg, interfered with, restrained, and coerced Rassier in the exercise of rights guaranteed him in Section 7 of the Act.

Interference with Handbilling

Employees Denes Mathe and Mike Masler were distributing union literature on the sidewalk about 6 feet from the Sears auto center entrance at about 8:30 a.m. on September 22, 1989, when they were approached by George Welder, the store general manager, and Michael Bradshaw, Sears' security manager. Mathe and Magler were not scheduled to work that day and were distributing the literature on their own time. All agree generally that Welder conveyed the message he did not want Mathe and Magler to distribute where they currently were standing, but there is disagreement regarding exactly what was said.

According to Denes Mathe, when he and Magler were approached by Welder and Bradshaw, Welder pointed to a sign on the building prohibiting solicitation without permission of Sears, and asked what he and Magler were doing. Mathe said they were distributing union leaflets which brought forth a reply from Welder to the effect he would notify the proper authorities and bring charges against Mathe and Magler because they had to be off Sears' property to distribute. Mathe denies that Welder suggested the distributing be done in the parking lot. After Welder's remarks, Mathe and Magler ceased their distribution and entered Sears' facility, as did Welder and Bradshaw. What transpired thereafter is irrelevant to the issue before me.

Magler recalls that when Welder approached and asked if he and Mathe were soliciting, Mathe said they were not. Welder repeated his question, whereupon Mathe said he did not know what you would call it but he knew they had a right to do it. Magler continues that Welder then pointed to a sign that said "No Soliciting," and said he considered what they were doing to be soliciting and that he was going to press charges. Magler adds that Welder asked for a leaflet and said Magler and Mathe could not do the distributing on Sears property but could do it anywhere else. Welder was given a leaflet, and all four entered the building. Both Magler and Mathe deny they were blocking the entry to the facility or were told they were.

Welder's version is as follows: He asked Magler and Mathe what they were doing, and was told they were passing out literature. He then asked whether they were on their own or company time, and was told their own time. He then asked for and received a copy of the literature they were distributing, told them he did not want them standing in front of the door because there was only one entrance, and asked why they did not go to the parking area where employees parked. When one of them protested that what they were doing was legal, he said he was not questioning the legality

³See, e.g., *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988).

of the literature, but suggesting they go to a different location. They asked where. He answered out in the parking area. Welder denies saying he would notify the authorities and have charges filed, or that he told them they could not distribute on Sears' property or had to be on the other side of the property line.

Bradshaw, not a particularly impressive witness, agrees with Welder that Welder did not say he would notify the authorities or have charges filed, or that the men were not allowed to distribute on Sears' property. His testimony differs from that of Welder in that, although he relates that after Welder examined the literature he asked Mathe and Magler not to distribute it where they were but could distribute in the parking lot, he recalls Welder saying they could not distribute where they were standing in front of the entrance. On cross-examination, he reaffirms that Welder told the two they could not pass out the literature "there" or "in front of the door," he can't recall which, but believes the reference was to the door.

There is no evidence literature was passed out to anyone other than Welder when he and Bradshaw were present. Bradshaw saw none being passed out then, and I conclude none was. Moreover, there is no evidence anyone other than these four witnesses were present or passing into the facility.

I do not believe Mathe and Magler invented the "No solicitation" sign. Accordingly, I conclude there was such a sign, and I credit Nagler and Mathe that Welder pointed to it and advised he would notify appropriate authorities and caused charges to be pressed against them if they distributed there. I credit Magler and Mathe because their versions were believable and delivered with certainty, and I do not believe they were likely to deliberately testify falsely against who is the top-ranking management official at their place of employment.⁴ I also credit Mathe and Magler that Welder told them they could not distribute on Sears' property, noting particularly that Bradshaw recalls Welder directing the employees to cease distributing where they were, which was apparently on the sidewalk abutting the facility. Whether this was actually Sears' property or not is an open question, but it is clear to the undersigned that Welder asserted dominion over the location on behalf of Sears, his principal.

Tri-County Medical Center,⁵ on which General Counsel relies, and which clearly applies, explains that a no-access rule concerning off-duty employees is valid only if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity," and that "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid."

The record does not show what the written rule posted on the facility says, but it is certain that welder's application of a no-distribution directive, whether promulgated on the spot or not, was invalid and violated Section 8(a)(1) of the Act because it prohibited off-duty employees from access to non-working areas outside the facility, thus contravening criteria (1) of *Tri-County Medical Center*, has not been shown to

have been clearly disseminated to all employees as required by criteria (2), has not been shown to apply to employees other than those engaged in union activity as required by criteria (3), and the exclusion from an outside nonworking area has not been shown to be justified by business reasons. There is no convincing evidence Magler or Mathe were in any way impeding ingress or egress, and, in fact, there is no evidence anyone even tried or wanted to enter or leave while they were present. In short, Respondent presents no valid reason for Welder's conduct which I conclude did not meet *Tri-County Medical* standards and therefore violated Section 8(a)(1) of the Act.

The Hat Rule and its Application

The General Counsel alleges that Respondent violated the Act by prohibiting Bryon Rassier from wearing a hat supportive of the Union on September 8, and by suspending Rassier, Denes Mathe, and Steven Jorgenson on September 27 for refusing to remove such a hat. Respondent's position is that it has a valid policy prohibiting certain categories of employees from wearing hats at work other than those furnished by Sears, that the September 8 conduct was valid enforcement of the policy, and that the September 27 suspensions were meted out because the three affected employees refused to remove the non-Sears hats they were wearing and were therefore insubordinate. There was no hat policy in 1988. General Counsel does not contest the validity of the policy subsequently adopted, but contends its application referred to in the complaint was disparately applied to the wearing of hats bearing the Union's name and message.

The handbook for all automotive center employees effective in 1975, revised in May 1987, and effective at least through June 1989 contains the following instruction:

Uniforms

All Automotive Center personnel wear uniforms on the job. Uniforms immediately suggest to our customers that Sears offers professional quality services. They imply that here is a well-organized operation of highly trained personnel.

The center manager will tell you the type of uniform to wear and make arrangements for you to get a supply of them.

Automotive Center personnel do in fact wear the prescribed uniforms at work. In December 1988, Respondent received a Sears Automotive Standard of Service book applicable to all Sears automotive facilities nationally. This book contained the section quoted below in relevant part:

MECHANICS/SERVICE ADVISORS

Sears Automotive mechanics and service advisors are required to wear uniforms. The code is as follows:

Mechanics—Navy Blue Pants, Light Blue Shirt/Blouse; Navy Blue Coveralls, etc; and Navy Blue Cap
Service Advisors—Navy Blue Pants: White Shirt/Blouse and Supervisor Coat

Color coordinated jackets, coats and windbreakers are also available.

On December 9, 1988, Respondent ordered 60 navy-blue baseball-style caps in one size fits all from Star Headwear, Chicago, Illinois. The caps were delivered on March 27,

⁴ *Federal Stainless Sink*, supra.

⁵ 222 NLRB 1089 (1976).

1989. They are sometimes hereinafter referred to as hats. Prior to the receipt of these caps, some automotive center employees wore various kinds of head coverings bearing the logos of tool companies and forth. Others wore no head coverings at all. As the policy states, service advisors were not assigned caps as part of their uniform.

On receipt of the caps, Automotive Center Service Manager John Dorsey and Automotive Center Manager Gerald Engberg, Dorsey's superior, passed them out to the tire, battery, and lubrication employees, installers, and technicians. Engberg only distributed a couple. Most were distributed by Dorsey. The two credibly testified that the recipients were told this cap, which bears the Sears name, was the only head covering they could wear. Some chose not to wear any, which was permissible. I credit Dorsey that he so told Rassier. I do not credit Rassier that he was first offered such a cap in July 1989. Denes Mathe agrees Dorsey distributed caps in early spring and said that type of cap was the one Mathe should wear if he wanted to wear a hat. Steve Jorgenson, a not particularly credible witness, says he knew in August 1989 that he could not wear any hat other than the Sears issue. John Klarich recalls the Employer handing out Sears hats close to the fall of 1989 along with the instruction, they were the only hats to be worn, but says it could have been March or April. Respondent has no objection to Klarich wearing bandannas, which he does, has never cautioned Klarich on this score, and has given him express permission to wear a union button about an inch and a half in diameter on his bandanna, which he has also done from time to time, but cautioned him about wearing the button on his uniform shirt. Mathe also now wears a bandanna. Part-time installer Tim Buchholz asserts Dorsey gave him a Sears cap around the time Rassier was suspended, and told him he should wear that if he wore a hat. Notwithstanding the varied recollections of the employees, the testimony of Dorsey and Engberg on the question of when the caps were distributed is corroborated by Mathe, and is the most probable of the various scenarios advanced because it is more likely than not that the caps would be distributed as soon as possible after their receipt in view of the December 1988 requirement they be worn. The various claims of employees that the caps were first distributed at a later date are not credited.

Until October 1989, service advisors were not required to wear Sears headwear. The absence of that requirement from the Sears Automotive Standard Service book received by Respondent in December 1988 was rectified by Respondent on or about October 30, 1989, when it posted a notice to "all Automotive/Recreation Associates," signed by Engberg and Dorsey, reading as follows:

PLEASE TAKE NOTE OF THE PICTURES AND DESCRIPTION⁶ OF THE AUTHORIZED HEADWEAR TO BE WORN IN PUBLICLY VISIBLE AREAS OF THE AUTOMOTIVE CENTER OR ON THE SALESFLOOR DURING "WORKING TIME." THE ONLY OTHER AUTHORIZED HEADWEAR WILL BE A NAVY BLUE STOCKING HAT WITH A SEARS LOGO ON THE HAT, WHICH WILL BE PROVIDED BY THE COMPANY.

⁶The notice contains pictures of three baseball-type caps bearing the word "SEARS."

THERE WILL BE NO DEVIATION FROM THIS POLICY WHAT-SO-EVER!!

IF YOU WISH TO WEAR A HAT, THESE ARE AGAIN THE ONLY AUTHORIZED HATS TO BE WORN. IF, IN THE EVENT, YOUR HEADWEAR BECOMES WORN OR DIRTY, PLEASE SEE YOUR SUPERVISOR WHO WILL PROVIDE YOU WITH A NEW AUTHORIZED SEARS HAT OF YOUR CHOICE.

Engberg testified that because the service advisors and other employees in the automotive center, who were not covered by the previous rule which was primarily directed at mechanics, were wearing many different types of hats the Respondent decided to make the rule cover everyone in the automotive center and thus attain uniformity among those who wished to wear a hat. As previously noted Respondent's rules are not in issue. They are valid, but now we must turn to the enforcement of the policy which is at issue.

Bryon Rassier was wearing a union cap on September 8 bearing the message "Vote yes." Engberg told him he could not wear that hat because Respondent was not providing the hats. Engberg left, but returned sometime later with a Sears cap which he gave to Rassier who then doffed his "Vote yes" hat and donned the Sears cap. Rassier knew of the cap policy issue since the spring of the year. He concedes knowing of the policy since July. Rassier was again wearing the "Vote yes" hat at about 8:30 a.m. on September 27 when Dorsey asked if he knew he could not wear that cap.⁷ Rassier said he did and removed it. Later that morning, about 9:50 a.m. or 10 a.m., Dorsey again saw Rassier wearing the "Vote yes" cap. He told Rassier to remove it. Rassier refused on the ground he was exercising a right guaranteed by the Act.⁸ Dorsey reported this to Store Manager Welder. At about 3:30 p.m., Rassier was called into the office where he met with Engberg and Welder. Engberg told Rassier he was insubordinate, read him the following statement and suspended him for 5 working days:

On 9/7/89, at approximately 8:15 A.M., I told Bryon to remove his unauthorized hat and wear a Sears hat. I reminded him of our uniform policy. I asked if he had an authorized Sears hat and he said "no." I brought Bryon an authorized Sears hat, and he removed the unauthorized hat.

On 9/27/89, at approximately 9:30 A.M., John Dorsey told Bryon he could not wear his non-authorized hat. He asked him if he had an authorized Sears hat, and he said he did. It appeared Bryon was going to remove his unauthorized hat. At approximately 10:30 A.M., John noticed Bryon still had an unauthorized hat on. John asked him to remove it and Bryon said he would not remove the unauthorized hat because he was allowed to wear it.

Bryon must understand that if he wants to wear a hat on company time, he must wear an authorized Sears hat. In the future, if Bryon refuses to remove the unau-

⁷The accounts of Dorsey and Rassier generally agree. Where they differ, I have credited the version that seemed the more believable when I heard it.

⁸I conclude Rassier and Steve Jorgenson were, like Mathe who so states, told by a representative of the Steelworkers Union that they had a statutory right to wear the union cap.

thorized hat, it will result in further discipline up to and including termination.

The same day, at about 3:30 p.m., Dorsey Denes went to Mathe who was wearing a union cap like that worn by Rassier. Dorsey called Mathe into the office and, after some discussion about Mathe's knowledge of the policy on headwear, asked him to remove the union cap. Mathe refused. Dorsey sent Mathe back to work. Shortly thereafter, Mathe was called into a meeting with Welder and Engberg where he was read the following prepared statement; which he like Rassier, signed:

On 9/27/89, at approximately 3:35 P.M., John Dorsey enforced Dene Mathe that he was wearing an unauthorized hat. John Dorsey explained again why Sears had issued authorized Sears hats to be worn as part of the uniform instead of hats with all kinds of names and advertising on them, such as Copenhagen.

Denes Mathe told John Dorsey he had a right to wear any hat he wanted to, and that he would not remove that unauthorized hat.

Denes understands that if he was to wear a hat, (on Company working time), he must wear an authorized Sears hat. In the future if Denes refuses to remove the unauthorized hat, it will result in further discipline up to and including discharge.

Denes is suspended for 5 (five) working days beginning Thursday 9/28/89, Saturday, 9/30/89, Monday 10/2/89, Tuesday 10/3/89 and Wednesday 10/4/89. Denes will be expected to report at his scheduled starting time on Thursday 10/5/89.

Still that day, about 4:45 p.m., Dorsey called Steve Jorgenson, who was also wearing a union hat, into the office, explained the hat policy to him, and asked him to remove the union hat. Jorgenson refused. Dorsey again asked. Jorgenson again refused. As with Mathe and Rassier, Jorgenson was then called to meet with Welder and Engberg, and was read the following statement which he signed:

On 9/27/89, at approximately 4:45 P.M., John Dorsey informed Steve Jorgenson that he was wearing an unauthorized hat. John Dorsey explained again why Sears had issued authorized Sears hats to be worn as part of the uniform. Mr. Jorgenson, at this point, said he understood that.

John Dorsey asked Steve Jorgenson to remove the unauthorized hat and put on the Sears authorized hat if he chose to wear a hat.

Steve Jorgenson refused to remove the unauthorized hat.

Steve is suspended for five scheduled working days as follows: Friday, 9/19/89, Saturday, 9/30/89, Sunday, 10/1/89, Tuesday, 10/3/89, & Thursday, 10/5/89.

Steve will be expected to report to work on his next scheduled working day.

Steve understands he must wear an authorized Sears hat, on Company working time. In the future if Steve refuses it will result in further discipline up to and including discharge.

Jorgenson agrees he received the following letter from Engberg dated September 29:

This is to further clarify the reasons for your memorandum of Deficiency Interview of September 27, 1989 and your current suspension.

In March of this year, we purchased and provided, at Sears' expense, caps bearing the Sears logo and colors for all of our Sears uniformed automotive center associates. That was done because some of our automotive center associates were wearing a variety of caps bearing non-Sears insignias. We felt those caps distracted from the Sears supplied pants and shirt uniform which you and others are required to wear while on duty and the professional and standardized appearance we wanted to project to our customers. You and others have been informed if you desired to wear a hat or cap, you would have to wear the authorized Sears cap bearing our colors and logo.

On September 27th, you were observed wearing an unauthorized cap in your working area. You were informed you could not wear an unauthorized cap at your working station during your working time where you can be and are observed by customers. You may, of course, wear the unauthorized cap in non-public areas as, for example, the break room, or in other non-public areas of the store. While on duty and working in the automotive center, any hat you wear must conform to the Sears uniform requirement. Despite this explanation, you insisted you would continue wearing the unauthorized cap. As a result, you left us no choice except to suspend you from employment for five days.

We hope you reconsider your decision to continue wearing your unauthorized cap in your work area within the automotive center when you return to work on Friday, October 6th. Your failure to conform to Sears' legitimate uniform policy could result in further discipline including your discharge.

Jorgenson testified he had been told seven or eight times to take off a hat bearing a MAC logo, and did so each time. He received another suspension on October 28, when he was wearing a red MAC hat, was asked to put on a Sears hat, and then, after saying he had none, put on his union hat; was then told by Engberg to take it off and go home. A memorandum of deficiency interview dated, October 31 and signed by Engberg and Jorgenson reads as follows:

On 10/28/89, at about 10:00 A.M., Lloyd Linaman observed Steve Jorgenson wearing a red unauthorized hat. He asked Steve to remove the hat and put on his authorized Sears hat or no hat at all. He said he did not know where his Sears hat was.

About 10:08 A.M., I observed Steve wearing an unauthorized blue hat and asked him where his Sears hat was, and he stated that he did not have one.

He was issued a winter hat, and that same day was observed wearing his Sears summer hat. I told Steve he was released for the day and if he was scheduled Sunday, not to come in, and I would call him on Monday if he was going to return to work.

Steve has been talked to on many occasions regarding unauthorized uniform dress. About one month ago,

Steve was suspended for insubordination for five days, and for the second time on 10/28/89, I suspended Steve for two days for insubordination. Steve has read our policy on uniforms and is well aware that one more violation or act of insubordination will result in his termination.

Because Jorgenson signed this memorandum and because he is inclined to incredible explanations of his conduct⁹ and generally impressed me as one careless of authority and given to defiance of supervisory instruction. I conclude the memorandum is accurate. There is no allegation this suspension violated the Act.

The General Counsel points to testimony that a considerable number of automotive center employees wore hats other than those authorized by Sears at various times after March 1989, when I have found the hats were distributed. Of these, two were service advisors and one a dispatcher not covered by the hat policy until October 1989. With respect to testimony that employees wore "Nick's Helper" hats during the Christmas season, I am persuaded these hats were issued by Sears as part of a Christmas promotion and were therefore not covered by the policy. The approximate times of this alleged wearing of unauthorized caps remains uncertain, and the record is not always clear as to whether this was at work stations or not, but the gist of the testimony is that employees wore non-Sears hats or caps in the presence of Engberg and/or Dorsey without taking them off after the prohibition took effect. Several employees testified they were not aware of any hat policy until the October posting. If these employees mean they had seen no written policy until then they are probably accurate, and I conclude this must be their intent because the evidence is convincing that they were made aware of the policy by oral instruction when the hats were distributed in late March or early April. Notwithstanding the lack of specificity in much of the employees' testimony, there is some hard evidence Respondent did not always diligently enforce its policy. Tim Buchholz, an installer, credibly testified he wore a tool company hat, a red MAC racing hat, and a blue St. Paul Linoleum and Carpet hat while at work in the shop area and while conversing with Engberg and Dorsey in that area in March and April and later, and was not asked to remove any of his non-Sears headgear, which he continued to wear, until late September when he ceased wearing it at Dorsey's request.¹⁰ It is also clear that John Klarich and Denes Mathe have worn and continue to wear bandannas tied around their heads in lieu of other head covering. Engberg testified that he does not consider these bandannas to be a hat within the meaning and intent of the policy. This is not convincing because a stated

purpose of the policy was to promote uniformity in dress. I fail to see how the wearing of a bandanna promotes uniformity or conforms with the policy posted on October 30, which refers to "authorized headwear," shows pictures of the Sears baseball caps, and flatly states, "The only other authorized headwear will be a navy blue stocking hat with a Sears logo on the hat, which will be provided by the company." Mathe started wearing a bandanna with the Union's initials on it after his suspension. On the day the three employees were suspended, Klarich was told by Dorsey that he could not wear his union button on his uniform, but could wear it on his bandanna, which he did. I place little weight on events occurring during or after the suspensions because they do not reveal what the prior practice was and could be, might not be, but could be an indication of after the fact efforts to establish a practice. I note, however, apropos the display of prounion material, that employees have been permitted throughout the union campaigns to affix bumpersticker-size union placards to their tool boxes in the shop area.

Finally, Dorsey's recitation of his persistent correction of employees who wore other than Sears hats is not convincing. He testified that he kept notes of the times he told employees to change hats, but the seven documents presented at trial on February 8, 1990, as notes he has made, assuming for the moment they are authentic,¹¹ indicated he only talked to two employees in January 1990 about their inappropriate headwear, one in December 1989, one on September 8, 1989, one on June 28, 1989, and to Steven Jorgenson on July 24 and September 13, 1989. I do not believe, in view of the employee testimony to the contrary, that only two employees other than the three suspendees wore other than the prescribed hats in the presence of Dorsey, who was regularly on duty in the work area, on or before the date of the suspension. There is no evidence that anyone other than Rassier, Mathe, and Jorgenson have been suspended or otherwise disciplined for violating the rule. On the other hand, there is no evidence any other employee refused to remove a hat when requested to.

There is evidence on either side of the hat policy application argument. The policy is conceded to be valid, and its enforcement would therefore normally be considered appropriate and lawful. On the other hand, if the enforcement was disparately directed at union activists, the enforcement is discriminatory and unlawful. Applying the teachings of *Wright*

⁹On questioning by me Jorgenson says he kept wearing MAC hat after seven or eight warnings because those warning him did not say it was against store policy. He added that sometimes he just forgets he is wearing this hat. I do not believe a word of this testimony.

¹⁰Engberg's bare denial that he saw Buchholz wear a non-Sears hat after the March-April distribution is not credited. Buchholz, still an employee, was more believable. Dorsey's testimony, set forth below, is given no weight because it amounts to nothing more than his attorney's testimony, see *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977), thus the testimony reads:

Q. Prior to the time that you spoke to him did you have occasion to observe him [Buchholz] wearing any of those hats.

A. Um—my recollection he rarely, if ever, wears a hat.

Q. So the answer to that is "no"?

A. Is no, right.

¹¹After the close of the hearing, counsel for the General Counsel moved for leave to submit the original of one of the notes for analysis on the grounds there were questionable impression marks on the document. She had put the original document in evidence during the trial. The motion was denied as an untimely motion to reopen the record because it was not newly discovered evidence and because General Counsel, by taking possession of the questioned exhibit from the court reporter, without my permission, and retaining it in the Region's office safe had created problems of continued possession that made the submission untimely in any event unless and until the appropriate employee or employees of the General Counsel gave evidence to show a continuing chain of possession and the physical handling of the document in question. Pursuant to my ruling and order the document was returned in a sealed packet, which I have opened and ascertained to contain the document in question, which has now been bound in the official exhibits file. General Counsel's motion to reconsider made in the posttrial brief is denied for the reasons stated in my previous Order and Ruling which is a part of the Board's case file in this proceeding.

Line,¹² as I must, it is clear that General Counsel has set forth a prima facie case that union activity was a motivating factor in the directives to Rassier, Mathe, and Jorgenson that they remove their union caps, and the suspensions. All three were members of the Union's in-plant organizing committee in 1988 and 1989. Rassier was the chairman of that committee and was obviously known to be a leading union activist by virtue of his service as an election observer for the Union, as was Mathe who had been observed attempting to distribute union literature. Moreover, as evidenced by Engberg's March 20 statements to Rassier, Respondent¹³ clearly resented Rassier's activism on behalf of the Union and believed he had a major role in the union organizing. Welder's unlawful conduct toward Mathe and Magler further underscores Respondent's concern about union activism. Given the attitude expressed by Engberg, the August 25 filing of a new election petition must have startled him, and by extension the Respondent. Fourteen days later, on September 8, he saw Rassier wearing the USA cap and therefore knew Rassier continued to espouse union representation. The petition was subsequently withdrawn by the Union on September 13, but, just as Respondent could reasonably believe the organizing activity had subsided, Mathe and Magler were seen distributing union literature on September 22 and Dorsey spotted Rassier, Mathe, and Jorgenson with the USWA hats on September 27. When they refused to remove them on the ground the Act protected their right to wear them, Respondent was put on notice by this common response there was a continuing organizing, and that these three were acting in concert. I believe Respondent, consistent with Engberg's March 20 threat, was particularly concerned with retaliating against Rassier, but having first suspended Rassier, it was essential the other two be treated likewise in order to maintain a semblance of equal treatment.¹⁴ Whether this latter conclusion be accurate is subject to question, but it is not unreasonable in the circumstances. The three were in violation of the valid hat policy, but the testimony of Buchholz and other employees, the failure to prohibit the wearing of bandannas despite the posted ban on other than the Sears hats referred to as the "authorized headwear," the paucity of evidence the policy was otherwise strictly enforced, and the unbelievable testimony of Dorsey that he enforced the rule whenever he saw an infraction, are sufficient to prima facie show disparate application against those who wear union caps. For the foregoing reasons, the prima facie case has been established by General Counsel. The baton now passes to Respondent to show that the treatment of Rassier, Mathe, and Jorgenson would have been the same in the absence of any union activity.¹⁵

As previously noted, Respondent has permitted any and all employees who wish to do so to affix large USWA stickers to their tool boxes at all times during the union campaigns. It has also permitted Mathe to wear a USWA bandanna around Christmastime. Klarich currently wears one as well as a union button affixed to his bandanna. These wearings after

the complaint have little evidentiary weight. The fact employees are permitted to use the USA stickers on their tool boxes is some evidence tending to counteract a finding of antiunion animus, but it does not outweigh Engberg's clear threat to Rassier, keeping in mind that Engberg is the highest ranking management representative in the automotive center. I have carefully read the record, and considered Respondent's well-written brief, but I cannot agree with Respondent that the evidence shows a consistent uniform application of the policy at issue. To the contrary, the evidence shows instances of employees wearing nonconforming headwear in the presence of supervisors and continuing to wear it after leaving the supervisor's presence, and there is no valid reason shown for permitting the wearing of bandannas. If this is not "headwear," why not? The bandannas, of which Klarich has several of different kinds which he wears, certainly do nothing to promote uniformity. Would Respondent let all the automotive center employees wear bandannas despite the written policy and the issuance of Sears caps? I doubt it. Finally, the claim the suspensions were valid because they were based on insubordination, i.e., the refusal to remove the USWA caps, has no merit because the insubordination was provoked by the disparate enforcement of the hat policy against known union supporters, which was itself an unfair labor practice. For these reasons, I conclude Respondent has not shown by a preponderance of the evidence that the instruction to Rassier to remove his USWA hat on September 8 and the September 27 suspensions would have taken place in the absence of the union activity, and General Counsel has therefore proved her allegations by a preponderance of the credible evidence. Accordingly, I find the September 8 instruction to Rassier to remove the USA cap had a reasonable tendency to interfere with, restrain, and coerce him in the exercise of rights guaranteed under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act. Further, Respondent violated Section 8(a)(3) and (1) of the Act by suspending Rassier, Mathe, and Jorgenson on September 27 in order to discourage union membership.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By suspending Bryon Rassier, Denes Mathe, and Steven Jorgenson for 5 working days on September 27, 1989, in order to discourage union membership, Respondent violated Section 8(a)(3) and (1) of the Act.
4. By threatening Bryon Rassier with possible loss of employment if he engaged in union activity, Respondent violated Section 8(a)(1) of the Act.
5. By prohibiting employees from wearing hats supportive of the Union, Respondent violated Section 8(a)(1) of the Act.
6. By prohibiting off-duty employees from distributing union handbills in nonworking areas, Respondent violated Section 8(a)(1) of the Act.
7. The unfair labor practices found above have an affect on commerce within the meaning of Section 2(6 and (7) of the Act.

¹² 251 NLRB 1083 (1980), enfd. 662 F. 2d 899, (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹³ It is settled that statements of supervisors are attributable to the employer.

¹⁴ Compare *Martin-Brower Co.*, 261 NLRB 752 (1982), the layoff of McCann.

¹⁵ *Wright Line*, supra.

THE REMEDY

In addition to the usual cease-and-desist order and posting requirements, I shall recommend Respondent be required to make Bryon Rassier, Denes Mathe, and Steve Jorgenson whole for wages lost as a result of their unlawful suspension on September 27, 1989, with interest as provided in *New Horizons for the Retarded*,¹⁶ and remove from its files any reference to these suspensions, and notify these employees in writing this has been done and evidence of the suspensions will not be used as a basis for future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

Respondent Sears Roebuck and Company, Maplewood, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing any rule prohibiting off-duty employees from distributing union literature in nonworking areas where there is no justifiable business reason therefor.

(b) Threatening employees with possible loss of employment if they engage in union activity.

(c) Disparately enforcing rules regarding the wearing of company uniforms against employees engaged in union activities.

(d) Suspending or otherwise discriminating against employees by disparately enforcing rules on wearing unauthorized headwear against employees wearing headwear displaying a union message.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act. 25

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

(a) Make Bryon Rassier, Denes Mathe, and Steve Jorgenson whole for any loss of pay they may have suffered by reason of their unlawful suspension for 5 working days on September 27, 1989, with interest as set forth in the remedy section of this decision.

(b) Remove from its files any reference to the September 27, 1989 suspension of Rassier, Mathe, and Jorgenson, and notify them in writing that this has been done and that evidence of their suspensions will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

¹⁶ 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

¹⁷ 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.

(d) Post at its West Maplewood, Minnesota facility copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 18, 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.

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

¹⁸ 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.

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, CLC, or any other labor organization, by suspending any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT threaten our employees with loss of employment or other reprisals because of their union activities.

WE WILL NOT maintain or enforce any rule prohibiting off-duty employees from distributing union literature in nonworking areas when there is no justifiable business reason therefor.

WE WILL NOT disparately enforce our rule regarding the wearing of company uniforms against employees engaged in union activity.

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

WE WILL make Bryon Rassier, Denes Mathe, and Steve Jorgenson whole for any wages lost as a result of the unlawful 5 working days suspension levied against them on September 27, 1989, together with interest, and WE WILL remove from our files any reference to the suspensions of Bryon Rassier, Denes Mathe, and Steve Jorgenson on September 27, 1989, and WE WILL notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.