

Process Supply Incorporated and Plumbers & Pipefitters Local Union No. 625, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 9-CA-26766 and 9-CA-26863

November 23, 1990

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On July 11, 1990, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief 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, Process Supply Incorporated, Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Charging Party excepts to certain credibility findings made by the judge. It is the Board's established policy 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.

James E. Horner, Esq., for the General Counsel.
Fred F. Holroyd, Esq., of Charleston, West Virginia, for the Respondent.
Brian A. Powers, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on March 20 and 21, 1990, in Charleston, West Virginia. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting union discussions on its premises, impliedly promising a wage increase if employees abandoned their support of the Charging Party Union (the Union) and circulating a petition seeking to decertify the Union which represented its employees. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by restricting the movements of and denying overtime to employees Ben Holley and Tom Butta, and issuing a written warning to, and, later, causing the termination of Holley, all in

retaliation for their union activities. Further, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its vacation benefits policy and withdrawing recognition from the Union. The Respondent filed an answer denying the essential allegations in the complaint. The General Counsel, the Union, and the Respondent submitted briefs which I have read and considered.

On the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

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

Respondent, a corporation with an office and place of business in Charleston, West Virginia, is engaged in the fabrication of specialty pipe and fittings. During a representative 1-year period, Respondent purchased and received, at its Charleston facility, goods and materials valued in excess of \$50,000 directly from points outside the State of West Virginia. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On August 11, 1988, the Union won a Board-sponsored election among the Respondent's employees. On August 19, 1988, the Union was certified as the exclusive bargaining representative in the following unit of Respondent's employees:

All production and maintenance employees employed by Respondent at its PSI Circle, Charleston, West Virginia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Based on conduct which occurred both before and shortly after the Board election, and on filed charges, the General Counsel issued a complaint in Cases 9-CA-25514 and 9-CA-25656 alleging several violations of the Act. The case was tried before Administrative Law Judge Wallace Nations. On February 21, 1989, Judge Nations issued his decision in which he found that Respondent violated Section 8(a)(1) of the Act by engaging in various acts and conduct including threats of reprisal and interrogations, and Section 8(a)(5), (3), and (1) of the Act by making a number of unilateral changes in the terms and working conditions of employees. Judge Nations ordered Respondent to cease and desist from its unlawful conduct and to bargain in good faith with the Union. No exceptions were filed to Judge Nations's decision and, as a result, the Board, in an order dated April 3, 1989, adopted the decision and order as its own. On February 27, 1990, the United States Court of Appeals for the Fourth Circuit enforced the Board's Order.

After the Board's certification of the Union in August 1988 the parties entered into negotiations. Those negotiations stalled and the parties failed to reach an agreement.

On November 15, 1988, the Respondent's employees struck. The strike ended on March 28, 1989, when the Union made an unconditional offer on behalf of the striking employees to return to work. Some strikers were reinstated, but others were denied reinstatement because Respondent believed that they had engaged in strike misconduct. The Union filed charges alleging that Respondent's failure to reinstate strikers was discriminatory and violative of Section 8(a)(3) and (1) of the Act. The General Counsel issued a complaint alleging that Respondent's refusal to reinstate four strikers was violative of the Act. This Case 9-CA-26452 was heard before Administrative Law Judge Joel Harmatz in September and October 1989. On June 29, 1990, Judge Harmatz issued his decision finding that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate two former strikers and did not violate the Act by refusing to reinstate two others. Judge Harmatz also found that the strike was caused and prolonged by Respondent's unfair labor practices and was thus an unfair labor practice strike.

The parties continued bargaining, without reaching agreement, until Respondent withdrew recognition from the Union in September 1989. The instant case involves allegations concerning incidents which took place from the time some strikers were recalled in April 1989 until the withdrawal of recognition in September 1989. The incidents can be divided into three parts: the 8(a)(1) allegations, the allegations of discrimination, and the bargaining allegations.

B. *The Instant Case*

1. The 8(a)(1) allegations

Paragraphs 5(a) and 12 of the complaint allege that, on or about June 8, 1989, Respondent, through its president, James B. White III, promulgated and maintained a rule prohibiting union discussions on Respondent's premises in violation of the Act. In support of this allegation the General Counsel relies on the following uncontradicted testimony of employee Tom Butta. On that date, June 8, President White approached Butta and accused him of harassing another employee, Jim Thomas, about an upcoming union meeting. White told Butta that he did not want Butta talking about the Union on company property. Butta responded that he would abide by White's wishes. Employee Ben Holley testified that he was told essentially the same thing by White after the Board election and that he was also told of White's more recent conversation with Butta. White's pronouncement to Butta broadly prohibited union discussions on break or lunch times or other nonwork periods, and it thus unlawfully restricted union activity. See *T.R.W. Inc.*, 257 NLRB 442 (1981). Accordingly, I find that Respondent maintained and enforced an unlawfully broad restriction on union discussions in violation of Section 8(a)(1) of the Act. See *J.E. Steigerwald Co.*, 263 NLRB 483, 494 (1982).

In paragraphs 5(b) and 12 of the complaint, the General Counsel alleges that, in June 1989, President White made an implied promise to grant a wage increase if the employees abandoned their support of the Union in violation of the Act. In support of this allegation, the General Counsel relies on the testimony of employee Barry Quigley who was hired in January 1989 as a striker replacement. Quigley testified that, in about the second week in June 1989, he had a conversation with White about his desire to quit because he had not

received a promised wage increase. White told Quigley he had not received the raise "because of Union matters." White then promised that Quigley would receive "a dollar an hour raise" in August. In the same conversation, White told Quigley that a "piece of paper . . . was going to come around to force the Union into a vote to try to get them out of the shop." White said he had enough votes "to get them out of there." As a result of this meeting Quigley agreed not to quit and to continue his employment. He did not receive the promised August pay raise and he quit his employment for good on August 25, 1989.¹

Based on the credited testimony set forth above, I find that President White impliedly conditioned Quigley's raise either on his signing of the anticipated decertification petition or the success of that petition. It is true that, on cross-examination, Quigley admitted that he was told that he was getting a raise before he was told about the petition. But this is not the relevant point in the conversation. The relevant point is that White said that Quigley did not get an earlier raise because of the Union and that he would get one in August. This was the first time—1 year after the prior election—when a valid decertification petition could have been entertained. And it was this event, predicted with remarkable accuracy by White, which would trigger the raise. Ouster of the Union and the possibility of a raise were presented as two sides of the same coin. August was key for the raise because that was when the Union, which White held responsible for the failure to pay the earlier raise, would no longer be a factor in blocking a raise. In view of White's other antiunion remarks, both in this record and in the Judge Nations case, and indeed, in view of his remarks to Quigley that the Union was responsible for him not getting an earlier raise, it would not take a great leap of logic for Quigley to conclude that his August raise would come if the decertification petition were successful. It would also not be lost on Quigley that he could help ensure not only his raise but the petition's success by sticking around and signing it. This was the proverbial fist in the velvet glove. In these circumstances, I find that White's remarks to Quigley implied a pay raise if the employees abandoned the Union. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964), particularly the discussion of *Medo Photo Supply Corp. v. NLRB*, 324 U.S. 793 (1944); and see *NLRB v. Proler Intern Corp.*, 635 F.2d 351, 354 (5th Cir. 1981).

Paragraphs 5(c) and 12 of the complaint allege that Respondent, through its agent, employee John Bossie, circulated a petition seeking to decertify the Union. The evidence in support of this allegation is as follows:

¹The above is based on Quigley's credible testimony about this matter. Quigley impressed me as an honest and candid witness. White acknowledged having a conversation with Quigley in June about a possible pay raise. However, he denied that he mentioned anything about the Union or a petition to oust the Union in that conversation. I did not find White's testimony on this issue to have been reliable. I also note that other antiunion and indeed unlawful remarks by White were documented in Judge Nations' decision as well as in the finding I have already made in this case concerning his restriction on union discussions. I find it plausible that he made these similarly coercive statements to Quigley who, after all, was a striker replacement. I have considered that Quigley quit Respondent after not receiving the August raise. Actually this supports his credibility over that of White. Quigley was refreshingly candid in describing his disgust over Respondent's failure to deliver on its promise; White, on the other hand, spent more time than one would have thought proper in an attempt to disparage Quigley. In all the circumstances, including my assessment of the demeanor of both witnesses, I credit Quigley.

On August 22, 1989—1 year and 3 days after the Board certification of the Union—Respondent posted, on the bulletin board in the plant, a letter sent that same day to President White by Respondent's attorney regarding the procedure for decertifying the Union. The letter states that any decertification move "must be originated and carried out by employees without management assistance or suggestion" and that employees who inquire about the matter should be told that "it is up to them." The letter then describes what it calls the "simple" procedure for decertification:

(a) A "petition" is drawn up by employees who sign under a statement "I want the NLRB to conduct an election to decertify the Plumbers and Pipefitters Local Union No. 625." The petition must be dated by each individual signing. The NLRB requires 30% of the employees in the bargaining unit to sign for decertification.

(b) Once 30% of the employees in the bargaining unit sign the "petition" they should fill out a petition form provided by the NLRB for this purpose. The NLRB's address is as follows: [T]he address and phone number of the Board's Cincinnati Regional Office is given

(c) The petition with the employees' signatures and dates, together with the petition furnished by the NLRB should be sent to the Regional Office.

The letter stated that it was being sent in response to an earlier inquiry by White "regarding certain employees who have approached supervision and management concerning the possibility of decertification of the union." White testified that he "was asked by more than one employee that inasmuch as its been one year since the election how would they go about the process of decertification." He did not identify any of the employees or specify their numbers or what they said. There was no other evidence in this record about employee interest in decertification prior to the posting of Respondent's decertification letter. In view of my assessment of White's credibility as a witness I have serious doubts that there were any such conversations. Even if there were they were isolated and the testimony about them too conclusory and undeveloped to be useful in making findings of fact.

The day after the attorney's letter was posted, shipping department employee John Bossie² circulated a petition among the employees apparently asking for an election or ouster of the Union. I say apparently because this petition is not in evidence so there is no way of knowing specifically what it said or how many employees signed it. Nor was Respondent ever presented with the petition so far as the record shows. It was, however, on the top sheet of a yellow pad of paper which Bossie circulated throughout the working area of the plant on worktime. At about 6:15 a.m.—15 minutes after the beginning of the work shift—Ben Holley, a union supporter, approached and spoke with two supervisors to complain

²For some reason the General Counsel and the Charging Party tried to show that Bossie was a supervisor within the meaning of the Act. The theory of the complaint was that he was an agent of Respondent and the complaint did not allege that he was a supervisor. Of course a supervisor is almost always an agent but an agent need not be a supervisor. Indeed, this is why the General Counsel often pleads agency rather than supervisory status. In any event, even though Bossie is the head of the shipping department he is not a supervisor. Actually he voted in the Board election without challenge and the evidence does not warrant a finding that he is a supervisor.

about the petition being circulated on worktime. One told him to talk to the other supervisor and the second one told him to talk to Bossie.

Holley approached Bossie and attempted to tear off the top page of the petition to present it to President White as evidence of union-related activity which he understood Respondent prohibited on worktime. Actually, White had prohibited all union discussions on company property regardless of whether they were on worktime or not. In any event, Holley was not successful in wresting the petition from Bossie, and, after a very brief scuffle for the pad, Bossie fled the area.

Shortly after this incident the matter was reported to higher management, that is, Plant Manager Fred Boothe and President White. Boothe investigated the matter and, after talking with White, decided on a course of action. At about 11:30 a.m.—some 5 hours after the Holley-Bossie encounter—Holley was called to the office and issued a written warning for engaging in the scuffle with Bossie. He was accused of shoving Bossie, which he denied, and he refused to accept the warning for that reason. He did, however, accept another warning issued at the same time for a work-related dereliction the day before. Bossie was also issued a written warning for participating in the scuffle. His warning differed from Holley's in only one respect. Holley was accused of shoving Bossie. Otherwise both warnings spoke in terms of Respondent's refusal to tolerate the employees' behavior and the possibility of future discipline for "further acts of hostility or violence." There was no mention of a petition, the Union or worktime solicitation in either of the warnings.

As indicated, Bossie was not warned against or told that he should not be circulating a petition or discussing union-related issues on worktime. Nor was there any announcement to employees that Bossie should not be circulating the petition on worktime. Indeed, there is uncontradicted testimony that, as late as 1 p.m. that day, Bossie was attempting to get signatures from employees in another department on worktime.³

The law is clear that an employer must stay out of any effort to decertify an incumbent union. After all, the employer is duty bound to bargain in good faith with that union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such a petition where the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes planting the seed for the circulation and filing of a petition, providing assistance in its wording, typing, or filing with the Board, and knowingly permitting its circulation on worktime. See *Marriott In Flite Services*, 258 NLRB 755, 768-769 (1981); *Silver Spur Casino*, 270 NLRB 1067, 1071 (1984); *Weiser Optical Co.*, 274 NLRB 961 (1985); *Central Washington Hospital*, 279 NLRB 60, 64 (1986). Of course, if an employee with apparent authority circulates the petition, the

³Boothe testified that when he investigated the incident, he "gave [Bossie] a letter of reprimand telling him that he had a job to do and that he should not be conducting any other type of business when he had a job to do." According to Boothe, Bossie said "he would not do it anymore." Bossie did not testify in this proceeding. I do not credit Boothe's testimony on this point. Bossie's letter of reprimand is in evidence and it does not say what Boothe says it did. Bossie's warning contains nothing about worktime solicitation.

Respondent is accountable under settled principles of agency. See *Technodent Corp.*, 294 NLRB 924 (1989).

Under these authorities, it is clear that Respondent's role in the circulation of Bossie's petition was such that it violated the Act. Here, Respondent provided unlawful assistance and sponsorship. It posted on the employee bulletin board a letter from its attorney setting forth the details about how a petition should be worded, circulated and filed. That letter clearly planted the seeds of the decertification effort. There was no prior evidence of employee disaffection except for the unreliable testimony of a discredited witness. That same witness, Respondent's president, had told an employee 2 months before—at a point when Respondent should have been bargaining in good faith with the Union—that a petition would be circulated at this time. Moreover, the petition was actually circulated the day after the attorney's letter was posted. It was circulated on worktime with the knowledge and acquiescence of management officials and the employee solicitor was not warned or disciplined for his worktime solicitation. Accordingly, I find that Respondent's sponsorship and assistance in the circulation of the petition was violative of Section 8(a)(1) of the Act. Indeed, I further find that Respondent's conduct in failing to disavow Bossie's worktime solicitation, together with its posting of the attorney's letter which virtually invited the circulation of the petition, created in the minds of employees the impression that Bossie was acting as its agent in the circulation of the petition. At the very least Bossie had Respondent's apparent authority to circulate the petition. Accordingly, I also find that Respondent can be deemed to have circulated the petition in violation of Section 8(a)(1) of the Act.⁴

2. The discrimination allegations

Paragraphs 6(c) and 13 of the complaint allege that, since employees Butta and Holley returned to work after the end of the strike, Respondent discriminatorily restricted their movements in the plant in violation of Section 8(a)(3) and (1) of the Act.

In Case 9—CA—25514 (Judge Nations' case), the Board found that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by promulgating a rule, in August 1988, that required employees to notify supervisors before leaving their work areas. One basis for the finding was that the Respondent's rule was discriminatorily promulgated (see *infra*). The rule was apparently not rescinded and was still in effect when some strikers returned to work in early April 1989. Plant Manager Boothe notified returning strikers—among them Butta and Holley—of this rule at a meeting when they reported back to work.

Holley's uncontradicted testimony was that he followed the rule, at least for several months after he returned to work. When he deviated from the rule, by leaving his work area without permission, even to go to the restroom or to get a drink of water, he was told by his supervisors that he was required to seek permission before leaving his work area. Holley also testified that other employees left their work

areas without permission and were not criticized by supervisors.

Other employees testified that they were not restricted in their movements or required to seek the permission of their supervisors before they left their work areas. One, Barry Quigley—the striker replacement—was not even told about the rule. Jim Gallion—a former striker—was told about the rule, but he never followed it and his supervisors never enforced the rule.

Curiously, Butta did not testify that the rule was enforced against him—maybe because he was not asked; but Gallion did. He testified that Butta, who worked near him, was the only employee he knew specifically who asked his supervisor for permission everytime he left his work area. Quigley confirmed that Butta was the only employee he observed following the supervisory permission rule. Thus I find that the rule was enforced against Butta as well as Holley.

The evidence not only shows that the discriminatorily promulgated supervisory permission rule—so found in the Judge Nations case—was enforced solely against Holley and Butta, but that it was enforced for discriminatory reasons. Holley had been a strong union activist who was a union election observer and a member of the Union's negotiating team. Butta worked alongside Holley and had participated in the strike. He was told by President White not to have union discussions on company premises. These employees were obviously the focus of the discriminatory rule because of their union activities. No other reason appears in this record. The Respondent offers no valid business reason why Holley and Butta should have had their movements restricted while other employees were not so restricted. Indeed, in view of the previous Board finding as to the illegality of the rule, it is hard to see how Respondent could conceivably defend its application in this case. Accordingly, I find that Respondent unlawfully restricted the movement of employees Butta and Holley in violation of Section 8(a)(3) and (1) of the Act.

Paragraphs 6(a) and (b) and 13 of the complaint allege that Holley and Butta were discriminatorily denied overtime after their return to work in violation of Section 8(a)(3) and (1) of the Act.

The evidence on this issue shows that Holley and Butta worked in the pipe lining department. One other employee, Joe Carter, worked in that department, and he was the most senior of the three. Holley was next in seniority and Butta was last. Butta and Holley testified that, after they returned to work in April 1989, they received little or no overtime whereas the remainder of the employees, including Carter, received considerable overtime. This presumably included other returning strikers. They testified that they were not even permitted to work overtime outside their department as they had done prior to the election. However, the evidence shows that, at this time, the Respondent was completing its move to a new facility and was using employees to do much work out of their departments in connection with the move.

Respondent's plant manager, Boothe, credibly testified that, except in rare circumstances, employees' overtime is restricted to work in their departments. This is especially true, he said, of the pipe lining department which sometimes produces an oversupply of inventory. After the pipe is lined it goes to employees who perform other functions on the pipe before it is completed and shipped. There is no relationship between the overtime needs of the pipe lining department

⁴ Respondent's admonition in the posted letter that only employees should circulate the petition does not defeat this finding. Calling conduct lawful does not make it so. The principles of agency apply notwithstanding what the principle contends. If the law were otherwise there would be no need for lawsuits. Here, the Respondent gave a wink to the letter of the law but its conduct belied the attempt to attribute the petition to spontaneous employee sentiment.

and the rest of the plant, unless there is a surge in business which depletes the stock of lined pipes. Boothe has had trouble in the past in getting people to work overtime—Butta and Holley had refused overtime in the past—and, as a result, he implemented a mandatory overtime system. There is no contention that the system itself or its original implementation was unlawful.

Pipe lining overtime works like this: If overtime is needed, it is offered to employees in the department in order of seniority, namely, Carter, Holley, Butta; if all refuse, it is mandatorily assigned in reverse order of seniority, namely, Butta, Holley, Carter. At the time in question, there was no great need to line pipes after working hours; the existing inventory was sufficient to meet Respondent's needs. What overtime was necessary usually went to Carter, in accordance with Respondent's facially nondiscriminatory overtime policy.

The General Counsel is unable to show discrimination against Holley and Butta in terms of departmentwide overtime. He does not seriously attack Boothe's testimony in this respect and has not shown that business conditions were not as Boothe testified. Nor has the General Counsel shown that overtime out of one's department was anything but isolated or that Respondent's policy in restricting overtime within departments was discriminatory or not justified by business considerations. Moreover, whatever overtime Butta and Holley worked in the past, when the Respondent moved into the new plant or when business conditions were different, this evidence could not be used to show that overtime was required to be assigned to them between April and September 1989. At this point Holley quit his employment, and, as explained hereafter, Butta started receiving considerable overtime—in his department. Accordingly, I find that, despite evidence that Respondent was discriminatorily restricting the movement of these two employees, the General Counsel has not convincingly shown that Respondent discriminatorily denied them overtime.

In support of his argument the General Counsel contends that Holley and Butta were told by supervisors that they were not being assigned overtime in other departments because of their union activities. The contention is unpersuasive. Holley testified that he was told by his supervisor, John Thaxton, that he could not be moved to another work area because he was a "cardholder," presumably a union member. Even accepting this testimony, I am not convinced that Thaxton meant to deny Holley overtime because of his union activities. The words attributed to Thaxton sound like a reference—perhaps a distorted reference—to the Union's apparent position in bargaining that employees could not be transferred unilaterally. There is no evidence that Thaxton had any authority to grant overtime in another department or had any involvement in Respondent's policy of keeping overtime within departments. Thus, I cannot find that this single statement by a low level supervisor impugns Respondent's otherwise lawful policy. Butta did not initially testify about any such statements. However, he was recalled as a rebuttal witness by the Charging Party and he testified that he was also told by Thaxton that he could not be moved because he was a cardholder. The same considerations as mentioned above apply to this testimony, but, here, I must say that I found Butta's testimony on the point less than clear and, frankly, unbelievable. In any event, neither Holley nor Butta had per-

formed much work out of their department in the past so it is difficult to see why they would have expected very much, if any, during a period when business and other conditions were different.

In addition, the General Counsel argues that Butta worked overtime in his department after Holley left, and the Charging Party argues that Holley's replacement, Travis Waldorf, also worked overtime in that department. The suggestion is that because overtime was available after Holley left there must have been overtime available before he left. However, this is not necessarily true. The short answer to these arguments is that business conditions changed. Butta testified that when he started working overtime, no one told him that he should. He simply started working later just to "keep up." Before Holley left, according to Butta, the three employees in the pipe lining department were able to "keep up" and, indeed, to accumulate a backlog in inventory. This not only tends to buttress Boothe's testimony about business conditions and the flow of work in the plant, but it also explains Thaxton's alleged statement to Butta that he, Butta, had Holley to thank for his overtime. Holley had quit at a time when business picked up and Holley's replacement did not come on board until about a month later. As a result Butta received more overtime. In any event, Boothe's uncontradicted testimony is that, unlike the period April—September 1989, where there was an oversupply of lined pipes and no great need to work overtime, later, after September 1989, there was an upturn in business and a greater need for overtime in that department. This does not add up to discrimination. It appears that the General Counsel and the Charging Party focused on certain lack of overtime without inquiring into the need for overtime or effectively questioning Respondent's explanations as to the need for overtime.

In these circumstances, I find that the General Counsel has not shown that a reason for the failure of Butta and Holley to receive overtime during the relevant period was their union activity, and, even if he had, I would find that the Respondent showed that their failure to receive overtime was based on legitimate business reasons and would have occurred even in the absence of their union activities. Accordingly, I shall dismiss this allegation of the complaint.

The complaint also alleges that Respondent discriminatorily issued a warning to Holley on August 23, 1989, and discriminatorily caused him to quit his job on September 21, 1989, in violation of Section 8(a)(3) and (1) of the Act. I find that here too the General Counsel has not proved the violations by a preponderance of the evidence.

The alleged unlawful warning was the one relating to the Holley-Bossie confrontation wherein Holley attempted to wrest the antiunion petition from Bossie. Although Respondent thought Holley pushed Bossie, both employees were issued warnings, with no mention of union activities, for their part in the confrontation. In these circumstances, it is difficult to see how Holley's warning can be called discriminatory. It is not enough for the General Counsel to show that Holley did not push Bossie. Perhaps he did not, but Respondent cannot be faulted simply for being wrong. Respondent was not off the wall in blaming Holley perhaps more than Bossie for the scuffle. Holley did initiate the confrontation by attempting forcibly to take the petition away from Bossie. Even allowing that Respondent's role in circulating the petition on worktime was unlawful and that

Holley was understandably outraged, this is no excuse for self-help on Holley's part. The warning was justified. The case might be different if Bossie had been spared for his part in the confrontation. But that is not this case. Both employees were penalized equally for equivalent conduct. Although Respondent paid the price for not disciplining Bossie for circulating the petition on worktime—in terms of a finding against it on that score—its discipline of Bossie for participating in the scuffle with Holley effectively absolves it from a charge of discrimination based on Holley's warning. I shall dismiss this aspect of the complaint.

Holley quit his employment on September 21, 1989, and signed a statement to the effect that he was voluntarily quitting his employment. The General Counsel nevertheless argues that Respondent caused the termination, or to use another description of what allegedly happened, constructively discharged him. The General Counsel correctly cites *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), for the applicable principle in this type of case. There the Board laid down the following two requirements for a finding of unlawful constructive discharge:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

The General Counsel has not proved an unlawful constructive discharge. Holley testified that he quit because he was having financial difficulties: In particular, he testified that he needed money to pay premiums on his car insurance, and, if he quit, he could obtain a lump sum profit-sharing payment from Respondent. The implication here is that the alleged unlawful denial of overtime put Holley in his straightened condition. I find this insufficient to meet the first part of the *Crystal Princeton* test, namely that Respondent made Holley's working conditions so difficult or unpleasant that he was forced to quit. Holley did not tell any management official that he was quitting because he was being denied overtime. In any event, the denial of overtime was not unlawful thus causing a failure to meet the second part of the test. Nor does the one instance of actual discrimination against Holley help the General Counsel's constructive discharge case. Even though, for a few months, Holley's movements were unlawfully restricted, for the last month and a half of his employment, Holley stopped asking for permission to leave his work area and Respondent apparently did nothing about it. Here again, Holley did not tell anyone he was forced to quit for this reason. Nor would this reason, or even the discriminatory denial of overtime—had it been found—be sufficient to force someone to quit and thereby hold Respondent liable for the quit. Butta suffered both these impediments but he stayed on.

It is clear to me that Holley needed money because his personal finances were in bad shape. His situation was not caused by Respondent in any direct or legally recognizable manner. He saw a way out by quitting and cashing in his profit sharing benefits. Holley was not forced to quit and his union activities had nothing to do with his quitting. This aspect of the complaint will also be dismissed.

3. The bargaining allegations

Paragraphs 10 and 14 of the complaint allege that, in April 1989, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its vacation benefits policy. The evidence does not support this allegation and neither the General Counsel nor the Charging Party seriously urge this violation in their briefs. The allegation was apparently based on testimony from Butta that he received 3 days less vacation in 1989 than he did in 1988. This apparently reflected the fact that he was on strike for a number of months in late 1988 and early 1989. Respondent's rule on this matter—which was in effect since sometime in 1986, well before the onset of the Union—states that employees earn 1 day of vacation for every 5 weeks of work. This has been applied to employees who miss work for all kinds of reasons including illness or injury. It is clear therefore that Respondent did not unilaterally change its vacation policy in violation of the Act. I shall accordingly dismiss this allegation of the complaint.

Now to the most significant issue in the case. Paragraphs 11 and 14 of the complaint allege that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain with it. The evidence in connection with the withdrawal of recognition—which is not contested—is as follows.

On August 29, 1989, Bossie filed a so-called RD petition—on a Board form—with the Board's Regional Office in Cincinnati. On the form Bossie asserted that the RD petition was supported by 80 percent of the employees in the unit. The RD petition itself was apparently based on the petition that Bossie had circulated at the Respondent's plant 1 week before. A copy of the RD petition—but not Bossie's petition of signatures—was sent by the Regional Office to the Respondent's attorney the next day, August 30, 1989.

On September 25, 1989, Respondent's attorney wrote the Union a letter canceling the negotiating session scheduled for September 27 and withdrawing recognition from the Union. The reason given for the withdrawal of recognition was that a "vast majority of our employees have advised the NLRB that they want to decertify your union." The Respondent concedes that it relied only on the RD petition filed with the Board, particularly the representation that 80 percent of the employees supported the RD petition. The Respondent never claimed to have been presented with Bossie's petition of signatures and thus had no way of verifying the 80-percent assertion.

On November 7, 1989, the Regional Director sent Bossie a letter, with copies to Respondent and its attorney, indicating that the RD petition was being dismissed because, after investigation, the Board determined that the "Employer solicited the showing of interest to support the petition by circulating it among its employees." Thus, as the Regional Director stated in his letter, "the petition [was] not supported by an uncoerced 30 percent of the employees in the bargaining unit." Respondent did not rescind its withdrawal of recognition even though the RD petition on which it had relied in withdrawing recognition had now been dismissed, and it continues to refuse to bargain with the Union.

Absent unusual circumstances, an incumbent union enjoys an irrefutable presumption of majority status during the first year following its certification. After that year the presumption may be rebutted by an employer who refuses to bargain with the union and shows that, at the time of the refusal, the

union did not in fact have majority status, or that the refusal itself was based on a good faith and reasonably grounded doubt, supported by objective considerations, of the union's majority status. *Robinson Bus Service*, 292 NLRB 70 (1988), and cases there cited. An employer may not lawfully withdraw recognition in the context of its own unfair labor practices, particularly if the withdrawal is based on a decertification petition which it circulated or was responsible for circulating. See *Marriott*, supra, 258 NLRB at 768-769 and cases there cited. Nor may an employer lawfully withdraw recognition by relying solely on the filing of an RD petition, particularly one that is later dismissed. See *Dresser Industries*, 264 NLRB 1088, 1089 (1982); and see *Central Hospital*, supra, 279 NLRB at 65-66.

The authorities cited above compel the finding of a violation here. Respondent relied solely on the filing of an RD petition which was later dismissed. It had no basis for relying on the 80-percent disaffection allegation in the RD petition. In any event, it was responsible for the circulation of Bossie's petition which was the underpinning for the RD petition. Moreover, the refusal to bargain occurred in the context of other unfair labor practices—not only those found herein but also those found by the Board in the Judge Nations case. It can hardly be argued that Respondent remedied the earlier unfair labor practices when it continued to commit others as found herein. One does not stop unlawful conduct by simply posting a notice; he stops violating the law. In these circumstances, I find that Respondent's withdrawal of recognition was ineffective and violative of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By ordering an employee not to engage in any union discussions on company property without regard to the times of those discussions, by implying that wage increases would be granted if employees rejected an incumbent union, and by circulating, and sponsoring and assisting in the circulation of, a decertification petition, Respondent has violated Section 8(a)(1) of the Act.

2. By discriminatorily restricting the movement in its facility of employees Ben Holley and Tom Butta, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The Union is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

All production and maintenance employees employed by the Respondent at its PSI Circle, Charleston, West Virginia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By withdrawing recognition from the Union as the exclusive bargaining representative of its employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The violations set forth above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease

and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Process Supply Incorporated, Charleston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ordering employees not to engage in union discussions on company property.

(b) Implying that wage increases will be granted if employees reject a union.

(c) Circulating, or sponsoring and assisting in the circulation of, a decertification petition.

(d) Discriminatorily restricting the movement, in its facility, of employees because of their union activities.

(e) Withdrawing recognition from, or refusing to bargain with, the Plumbers & Pipefitters Local Union No. 625, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by Respondent at its PSI Circle, Charleston, West Virginia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(f) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Charleston, West Virginia copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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

⁵If 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.

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT order employees not to engage in union discussions on company property.

WE WILL NOT imply that wage increases will be granted if employees reject a union.

WE WILL NOT circulate, or sponsor and assist in the circulation of, a decertification petition.

WE WILL NOT discriminatorily restrict the movement, in our facility, of employees because of their union activities.

WE WILL NOT withdraw recognition from, or refuse to bargain with, the Plumbers & Pipefitters Local Union No. 625, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees employed at our PSI Circle, Charleston, West Virginia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

PROCESS SUPPLY INCORPORATED