

Farm Fresh, Inc. and United Food and Commercial Workers Union, Local 400, AFL-CIO. Cases 5-CA-17940, 5-CA-18407, 5-CA-18721, 5-CA-18912, 5-CA-18951, 5-CA-19147, 5-CA-19303, and 5-CA-19469

February 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On April 11, 1989, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief, and the General Counsel and the Respondent filed answering briefs.

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 only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent's discharge of Warren Carter and Walter Kent did not violate Section 8(a)(3) and (1) of the Act. We disagree.

In the winter of 1987² the Union engaged in an organizational campaign at various of the Respondent's grocery stores. Carter and Kent were both employed as baggers at the Respondent's 21st Street store where, on the night of February 25, 1987, they were observed by Store Manager Angelo Fasciocco as they met with nonemployee union organizers during their break periods in the store's snackbar. According to Kent's credited testimony, Fasciocco passed as close as 3 feet to the table where Kent was sitting and watched as Kent delivered his signed union authorization card to the union organizers who were seated with him. Carter similarly testified that he was seen by Fasciocco hand-

ing his authorization card to a union organizer and that while doing so, Fasciocco stood 10 to 20 feet away with a pen and pad in hand "marking something down." Carter was discharged within 3 days and Kent was fired a month later.

On these facts, the judge found that the General Counsel had not made a prima facie case under *Wright Line*³ because the record failed to show that antiunion animus motivated the discharges. Contrary to the judge, we find that the General Counsel has established the requisite elements of a prima facie case that Carter and Kent were discharged because of their union activity.

Applying *Wright Line*, we find clear evidence that the Respondent, through its highest management official, had knowledge of the discriminatees' union activity through Fasciocco's observance of Kent and Carter as they signed and delivered union authorization cards to the union organizers. Further, the unfair labor practices found by the judge, which we adopt, establishes the Respondent's antiunion animus. In this regard, the Respondent's surveillance of the union activities of Carter and Kent, described above, was unlawful under Section 8(a)(1) of the Act. In addition, at two of its other stores, the Respondent unlawfully interrogated an employee and ejected union organizers from its premises. Given these facts, as well as the timing of both discharges, we find that the General Counsel has established a prima facie case of discriminatory discharge.

Under *Wright Line*, the Respondent must then show that it would have discharged Carter and Kent even in the absence of their union activities. The Respondent clearly failed to make such a showing. The judge found, and we agree for the reasons set forth by him, that the one and only reason proffered by the Respondent for Carter's discharge was a "complete sham."⁴ Thus, having found that the asserted reason for Carter's discharge was false, we find that the Respondent has failed to rebut the prima facie case and conclude that it violated Section 8(a)(3) and (1) by discharging him.

As with Carter, we reject as pretextual the Respondent's reason for discharging Kent.⁵ According to the Respondent's head cashier, Laura Hilber, she established a rule that any employee who missed just 1 day of work, without notice or a good excuse, would be terminated. Hilber testified that she discharged Kent under this rule because, without prior notice or subsequent explanation, he failed to appear for work on Monday, March 30. Kent did not deny that he did not

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

As noted infra, we agree with the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by Store Manager Fasciocco's unlawful surveillance of the union activities of employees Warren Carter and Walter Kent. We therefore find it unnecessary to pass on the General Counsel's exceptions to the judge's failure to find that the Respondent also engaged in unlawful surveillance by the maintenance of a logbook at the Oyster Point store, by Night Manager Briley's observation of union organizers Hepner and Dixon in the snackbar of the West Mercury Boulevard store, and the posting of a memorandum in the West Mercury Boulevard employee breakroom regarding, inter alia, the recording of the activities of union organizers in that store. Such findings would be cumulative and would not materially affect the remedy in this case.

²All dates are in 1987 unless otherwise indicated.

³251 NLRB 1083 (1980), enf. 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).

⁴The pretextual reason advanced by the Respondent for Carter's discharge is further evidence of the Respondent's illegal motivation in his discharge. See *Active Transportation*, 296 NLRB 431 (1989); *Holo-Krome Co.*, 293 NLRB 594 (1989), remanded on other grounds 907 F.2d 1343 (2d Cir. 1990).

⁵The judge concluded that "one can suspect that Kent was discharged for reasons other than those stated by Respondent."

come to work that Monday. He testified, however, that when he telephoned the store the previous Sunday to find out when he was next scheduled, he was told by the employee who answered the phone that it was not until Tuesday.

Contrary to the Respondent's contentions, the record establishes that the Respondent did not uniformly discharge employees for violating its so-called "one no-show" rule. The General Counsel presented evidence, which the judge found to be credible, that at least two other employees who did not engage in any union activity violated the rule but were not terminated. Kenneth Godsey testified that 3 months after Kent was fired, he missed work twice in one week because he misread his schedule. After the first incident, he was advised by the assistant manager that he should be careful to pay more attention to the schedule in the future. After his second absence, Fasciocco counseled him and stated that, in light of his two missed shifts, he would be suspended for a week so that he could decide whether he really wanted to keep working. Employee Dan Robinson testified that, approximately 1 month before Kent was discharged, he failed to show up for work without providing advance notice. When confronted by his supervisor the next day as to why he missed work, Robinson said, "I just needed some time off. So I just didn't come in." No disciplinary action was taken against him. Given that neither Godsey nor Robinson were discharged for missing work, it follows that Kent, who had never before missed work, was treated in a disparate fashion by being discharged for his infraction.⁶

Consequently, having found that the Respondent's asserted "one no-show" defense to Kent's discharge was pretextual, we find, as we did with Carter, that the Respondent has failed to rebut the General Counsel's prima facie case and thus discharged Kent in reprisal for his union activity in violation of Section 8(a)(3) and (1) of the Act.

2. On the basis of our foregoing findings, we conclude, contrary to the judge, that the Regional Director properly set aside the settlement agreement signed by the parties and approved by the Regional Director on December 24, 1986. It is well established that an unfair labor practice will not be found based on presettlement conduct unless there has been a failure to comply with the settlement agreement, or subsequent unfair labor practices have been committed. *Nudor Corp.*, 281 NLRB 927 (1986). In the settlement agreement at issue here, the Respondent promised, inter alia,

⁶The Respondent contends that the "one no-show" rule applied only to baggers and cashiers working under Hilber's supervision in the front-end department. Accordingly, the Respondent contends that Kent was not disparately treated vis-a-vis Robinson and Godsey because they worked in the produce department under a different supervisor where the rule had no effect. We find no merit in this contention. As noted by the judge, Store Manager Fasciocco and Night Manager Karen Wood both testified that the "one no-show" rule applied storewide.

that it would refrain in the future from engaging in unlawful surveillance and interrogation of employees and threatening them with discharge. Yet, as found by the judge, within 3 months of this agreement, the Respondent committed another act of illegal surveillance and interrogation. In addition, we have found two acts of discriminatory discharge. Because this conduct clearly violates the terms of the settlement agreement, we conclude that the agreement was properly vacated. Accordingly, we shall order that the settlement agreement be set aside and that the case be remanded to the judge for the purpose of deciding the merits of the presettlement allegations.⁷

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4 and renumber the subsequent paragraphs accordingly:

"4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Kent and Carter because of their support for the Union."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order that the Respondent offer Warren Carter and Walter Kent immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges. We shall also order that the Respondent make Warren Carter and Walter Kent whole for any loss of earnings suffered as a result of their unlawful discharge, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall order that the Respondent remove from its records any references to the unlawful discharges of Warren Carter and Walter Kent, provide them with written notice of such removal, and inform them that the unlawful discharges will not be used as a basis for future personnel actions concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

ORDER

The Respondent, Farm Fresh, Inc., Norfolk and Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating any employee, threatening arrest of any union representative who is lawfully conducting

⁷Although the presettlement allegations were litigated at the hearing, the judge made no findings with regard to them in light of his reinstatement of the settlement agreement.

himself on the Respondent's premises, or conducting surveillance and creating the impression of unlawful surveillance of union representatives and employees.

(b) Discharging or otherwise discriminating against employees because of their engaging in protected activity.

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

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

(a) Offer Warren Carter and Walter Kent immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision. Warren Carter and Walter Kent and notify the employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

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

(d) Post at its Norfolk-Richmond, Virginia area stores copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, 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.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge David L. Evans for the purpose of considering the allegations in the presettlement agreement complaint in Cases 5-CA-17940 and 5-CA-18407 and to prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations, and that, following service of the supplemental decision on the parties, the provisions

of Section 102.46 of the National Labor Relations Board's Rules and Regulations, shall be applicable.

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 coercively question you about your union support or activities for United Food and Commercial Workers Union, Local 400, AFL-CIO.

WE WILL NOT threaten arrest of any union representative who is lawfully conducting himself on our premises.

WE WILL NOT conduct surveillance or create the impression of unlawful surveillance of you and union representatives.

WE WILL NOT discharge you or otherwise discipline you because you join or support United Food and Commercial Workers Union, Local 400, AFL-CIO, or any other labor organization.

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

WE WILL offer Warren Carter and Walter Kent full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, with interest.

WE WILL remove from our files all references to the discriminatory discharges of Warren Carter and Walter Kent and WE WILL notify them in writing that this has been done and that evidence of unlawful conduct will not be a basis for future personnel action against them.

FARM FRESH, INC.

Steven J. Anderson and Nathan W. Albright, Esqs., for the General Counsel.

⁸If 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."

A. W. VanderMeer Jr., Kelly O. Stokes, and Joseph D. McClusky, Esqs., of Norfolk, Virginia, for the Respondent. Thomas J. Flaherty, Esq., of Richmond, Virginia, for the Respondent. Carey R. Buttsavage, Esq., of Washington, D.C., for the Charging Party. Jeff Lewis, Esq., and James Hepner, of Landover, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me on 11 different dates between May 16 and July 15, 1988, in Norfolk, Virginia. The Charging Party is United Food and Commercial Workers Union, Local 400, AFL-CIO (the Union), and the Respondent is Farm Fresh, Inc. Because this case involves an alleged violation of a Board settlement agreement, there are really two cases, one before and one after the settlement agreement. The dates of the charges involved in the settlement agreement, which was approved by the Regional Director for Region 5 on December 24, 1986, are:

Case 5-CA-17940	March 25, 1986
Case 5-CA-18407	October 10, 1986

The record does not indicate if a separate complaint (or complaints) issued on those charges. The second case began with a second round of charges that were filed on these dates:

Case 5-CA-18721	Mar. 16, 1987
Case 5-CA-18912	Jun. 4, 1987
Case 5-CA-18951	Jun. 19, 1987

On June 30, 1987,¹ the Regional Director advised Respondent that the settlement agreement was being set aside based on the investigation of the subsequently filed charges. On August 31 the Regional Director (acting as the General Counsel on behalf of the Board) issued an order consolidating cases and a consolidated complaint based on all five of the then outstanding charges. On October 5 the Union filed the charge in Case 5-CA-19147; on December 14 the Union filed the charge in Case 5-CA-19303. On December 30 the Regional Director issued a complaint based on the charges in Case 5-CA-19147; and on January 26, 1988, the Regional Director issued an order consolidating all of the cases on which complaint, by that time, had issued (i.e., all except Case 5-CA-19303). On February 16, 1988, the Regional Director issued a complaint in Case 5-CA-19303 as well. On February 29, 1988, the Union filed a charge in Case 5-CA-19469. On that charge, and all prior charges and complaints, the Regional Director, on April 13, 1988, issue another order consolidating cases and a second consolidated complaint and notice of hearing (the complaint). This action set the entire matter for trial, including the issue of correctness of the Regional Director's setting aside of the December 24, 1986 settlement agreement.

Respondent duly filed answers admitting jurisdiction and the status of certain supervisors under Section 2(11) of the

Act but denying the commission of any unfair labor practices. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has retail stores in the Norfolk-Richmond area of Virginia where it is engaged in the business of the sale of groceries. During the year preceding the issuance of the complaint, Respondent, in the course and conduct of the business operations, received gross revenues in excess of \$500,000, and it purchased and received at its stores goods and materials valued in excess of \$50,000 directly from suppliers located at points outside Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Settlement Agreement Involved

The first question to be decided is whether the Regional Director was justified in setting aside the December 24, 1986 settlement agreement because of Respondent's postsettlement (second case) conduct. If the Regional Director was not so justified, the settlement agreement will be reinstated and the issues raised by the alleged presettlement (first case) conduct need not be addressed.

The settlement agreement provided that Respondent would not:

1. Promulgate or enforce any policy that prohibits lawful organizational solicitation by employees.
2. Deny nonemployee representatives of the Union reasonable access to store snack bars and parking lots for the purpose of lawfully soliciting off-duty employees.
3. Threaten the Union's representatives who are engaged in lawful employee solicitations with arrest "for failing to accede to unlawful demands to leave our snack bars or parking areas around our premises."
4. Photograph, in the presence of employees, the Union's representatives who are engaging in lawful employee solicitations.
5. Confiscate organizational literature from employees.
6. Engage in conduct intended to give the impression of unlawful surveillance.
7. Threaten employees with increased work assignments, loss of work, discharge, loss of benefits, loss of advancement opportunities, or store closings because of the employees' protected union activities.
8. Coercively interrogate employees.
9. Instruct employees not to meet with union representatives.
10. "In any like or related manner" interfere with statutory rights of its employees.

¹ All dates are in 1987 unless otherwise specified.

B. Alleged Postsettlement Conduct

1. Statement of facts

a. Admitted and alleged supervisors and agents of Respondent

Individuals who are admitted to be, or who are stipulated to be, supervisors within Section 2(11) of the Act, and the stores at which they work, are:

Alan C. Adcock—Second Assistant Store Manager, West 21st Street Store, Norfolk
 Todd Briley Night—Manager, W. Mercury Blvd., Hampton
 James E. (Rickey) Davis—Manager, Southside Plaza, Richmond
 Angelo Fasciocco—Manager, West 21st St., Norfolk
 Charles Gilbert—Produce Manager, Merrimac Trail, Williamsburg
 Donald Gregory—Manager, Smithfield
 Laura Hilber—Head Cashier, W. 21st Street, Norfolk
 Gerald Mingee—Manager, Warwick Blvd., Newport News
 Tom Poyner—Produce Manager, Wards Corner, Norfolk
 Michael Sachs—Manager, Main Street, Suffolk
 Edward Sheedy—Assistant Manager, W. Mercury Blvd., Hampton

The following individuals are alleged in the complaint to be supervisors of Respondent within Section 2(11) of the Act; however, these allegations are denied:

Daniel Hoadley—Dairy and frozen food manager, Oyster Point, Newport News
 Laurie J. Knill—Front end supervisor, West 21st Street, Norfolk
 Karen Wood Front end supervisor and/or night manager, West 21st Street, Norfolk

The following individuals are alleged in the complaint to be agents of Respondent within Section 2(13) of the Act; however, these allegations are denied:

Robert Melody—Independent contractor
 J. D. Summerfield—Security guard at Wickham Avenue, Newport News
 K. C. (Casey) Walker—Security Guard, West 21st Street, Norfolk

b. Alleged violative conduct that is not directly related to the discharges

Except for those that are directly involved in the discharge cases of Warren Carter and Walter Kent Jr., this section will deal with all alleged postsettlement violations of Section 8(a)(1) of the Act.

(1) Denials of access and threats of arrest to nonemployee organizers

Paragraph 5 of the complaint alleges that, on certain dates, at certain of its stores, Respondent's agents "denied representatives of the Union, who were engaged in lawful union activity and were acting on behalf of employees, access to

its property by demanding that said Union representatives vacate Respondent's property, including its snackbars and/or parking lots."

Paragraph 6 of the complaint alleges that, on certain dates, at certain of its stores, Respondent's agents, "threatened and/or caused the police to threaten representatives of the Union, who were engaged in lawful union activity and were acting on behalf of Respondent's employees, with arrest if they did not vacate Respondent's property."

January 29; Wards Corner; Paragraph 6. Union Representative Terry Dickson testified that he entered the store between 5:45 and 6 a.m. He went to the snackbar and purchased a cup of coffee. He saw two employees; approached them, gave them union authorization cards, and asked if he could speak to them about the Union. The employees replied that they would get back to Dickson. Dickson went back to his chair in the snackbar and was approached by Tom Poyner, produce manager. According to Dickson:²

As I was standing there, I was talking to another person, the cashier that had waited on me, Andre Tynes . . . [Poyner] walked up and showed me some union authorization cards and asked me had I been passing out cards? I said, "yes," [that] I had been talking to his employees while they were off the clock.

He asked me did I read the no solicitation sign hanging up in the front of the store and I said "yes," but [that] I wasn't talking to those people on the clock. He said he was going to have to ask me to leave because he was going to call [store manager] Mr. Harmon.

I told him I had a right to be in the store, and he said, "If you don't leave, I'll have you arrested." So I proceeded to walk out as he did [sic], and I asked him, I said, "so are you saying I don't have access to the employees." He said "yes," so I left.

On cross-examination Dickson testified that at the time he spoke to Tynes she was seated at a snackbar table, taking a break, and not doing her cashier duties.

Poyner testified that before seeing Dickson another employee had approached him and told him that Dickson had given her a union pamphlet while she was on duty and that the employee gave Poyner the pamphlet. Poyner went to the snackbar where he saw Dickson giving another copy of the pamphlet "to an employee that was on duty at the time." The employee, whose name Poyner did not know, was standing before a snackbar table at which Dickson was sitting. Poyner asked Dickson if Dickson had a right to do what he was doing and Dickson replied that he did. Poyner replied that he was going to call the store manager and, "[Dickson] got up; he got real boisterous, and I said, 'fine, I'll go call the store manager.'" Poyner looked around and found the assistant store manager, Al Cook. As Poyner was telling Cook what was happening, "then Mr. Dixon came up and said he was going to bring charges against me, and I asked him why. And he said, 'violating his rights.'" Dickson then left the store. Poyner denied telling Dickson that he was going to call the police; he denied even asking Dickson to leave the store.

Cook was not called to testify by Respondent, and no reason for not doing so was advanced. Poyner advanced specu-

²Punctuation of this and subsequent quotations of testimony is supplied.

lation, but no reason to believe, that the snackbar employee was "on duty at the time." Finally, Poyner did not deny that in his initial exchange with Dickson, he referred to a general "no solicitation" rule posted at the front of the store. Because of these lapses, and his more credible demeanor and logical account, I credit Dickson.

January 29; 21st Street; Paragraph 6. Union Representative James Hepner testified that he went to the store about 9 p.m. accompanied by Dickson. The representatives introduced themselves to Night Manager Allen Adcock and told Adcock that they would be going to the snackbar and talking to off-duty employees. Adcock told them, "okay." At the snackbar Dickson and Hepner purchased drinks and sat down at a table. They first spoke to a female employee at a nearby table who indicated that she was not interested. Then Dickson got up and went to the rear of the area, where two other employees were taking their breaks, and Hepner remained to talk to the first employee. Then a female police officer, subsequently identified as Carey C. Walker, entered the snackbar and walked directly to where Dickson was. According to Hepner:

. . . and she just said, you know in a pretty loud voice, "you can't do this. You're going to have to leave the store. I mean now." . . . I walked over behind [Walker] and Alan Adcock had come in. He came in behind her, but not real fast, and he kind of walked down with me and I said, "excuse me, is there a problem here?" And she wheeled around and she kind of put her hand back on her gun and she said, "yeah, somebody's going to jail; that's what the problem is." And I said "wait a minute. . . . let's calm down. . . . I don't want to go to jail. . . . we're not doing anything wrong." She said, "yes, you are." She said, "there's union in the store," and she said, "they're going out."

Hepner further testified that he and Dickson showed Walker and Adcock a reprint of the settlement agreement. Adcock and Walker read the settlement agreement for several minutes and both Hepner and Dickson told Adcock that there should be a copy posted in the store. Further, according to Hepner:

And Alan Adcock said, "I'll check it out," and then he left the snack bar, and the police officer [Walker] had [sat] down with some of the other employees that had come in, you know, during this exchange.

Hepner testified that he and Dickson stayed around the snackbar for another 10 minutes, but Adcock did not return. He and Dickson decided to leave. As they walked by the manager's podium at the front of the store, Adcock said to them, "[W]ell, sorry guys; can't blame a guy for trying."

Dickson testified consistently with Hepner, except that he added: (1) When Walker said that "somebody was going to jail," Hepner responded, "no, no one's going to jail tonight"; and (2) as Adcock told them that he was leaving the snackbar to check out what they had said about the settlement agreement, Adcock also told them to "carry on."

Adcock's account was:

I was in charge of the store that night, and it was during the busy time of the night; I was restricted to the

podium area, which is at the front of the store where the cash registers were.

The security guard, which was a Norfolk police officer, brought to my attention that there was some Union officials in the store, and we went to find them, and to my knowledge at the time was, the procedure was to ask them to leave the store, that there was no soliciting and I approached the two that were there, and I told them, "I am sorry, but we don't allow soliciting in the store," and [I] asked them to leave. At that time, they brought out an article in the paper, with some type of sheet of paper saying that they were authorized to be in the store as long as they were [sic] in the break room where the employees took a break and as long as the employees were on their break[s]; and I told them that I wasn't knowledgeable to that information, that I would go check on it, and I would be right back with them.

And I tried to see if I could find some type of information, and I couldn't, so I called the store manager [Angelo Fasciocco], and asked him. [Fasciocco] said that they were allowed in the break room at the time, as long as employees were on break. So, I went and I apologized to them, and I said, "I'm sorry . . . I have checked, and you are allowed here," and then I had to proceed back to the podium.

Adcock testified that he did not hear Walker say anything in the snackbar; specifically, he did not hear her say anything to the union representatives; and specifically, he did not hear Walker threaten anyone with arrest.

Walker testified that she is a full-time police officer for Norfolk. She was, at the time in question but not at the time of trial, working evenings as a security guard at the 21st Street store. Her usual duty covered "anything in a criminal capacity as far as violations were concerned." Walker's account of the incident was:

. . . basically it was [that] two men that came into the store, that introduced themselves as members of the Union. They went around the store and talked to several employees. There was nothing that was said at that time. About 15 minutes later Mr. Adcock, who is the assistant manager of the store at the time, came to me and approached me and stated that he wanted to go back and talk to the Union members. They were back in the snack bar of the store. I accompanied him back there. He introduced himself. I introduced myself. I was working in plain clothes at the time. I explained to them that I was a police officer in charge of security of the store and I was for criminal purposes only. That was the only conversation that I exchanged with them.

Mr. Adcock talked to the Union members. They pulled out some type of flyer about some type of union regulation. [They] exchanged conversation briefly again, and that was the end of it.

When asked what the exchange was, Walker testified:

It was basically, [Adcock] was asking them not to bother the employees that were working on the clock. . . . [The organizers] said [that] they had no problem with that. They said, according to the law, they were

able to pass out flyers. . . . [Adcock] said he had no problem with them talking to employees that were off the clock, during their break. And he went on about his business, and they stayed back in the snack bar and I left.

Walker denied that she told the union organizers that they were going to be arrested or that “somebody is going to jail tonight.”

On cross-examination, Walker testified that she was there only as a witness and that Adcock did not tell her to remove the union representatives. She added that Adcock had told her that some employees had reported to him that the union representatives had bothered them while they were working, and that was the reason Adcock had approached them, bringing her along as a witness. She further testified that Adcock did not ask the union representatives to leave the snackbar.

Of course, Adcock acknowledged that he initially told Hepner and Dixon that Respondent did not allow solicitation in the store and that he asked them to leave. I firmly believe, contrary to his and Walker’s denials, that he instructed Walker to convey the impression that Walker was there to stop solicitations, which (until he was shown the settlement agreement and spoke to Fasciocco on the telephone) he believed Respondent did not allow. I further believe, and find, that Walker did so by telling Hepner and Dixon that “someone [was] going to jail” that night.

February 19; Southside Plaza; Paragraph 6. Frank Davis is a butcher who is usually employed by one of Respondents organized competitor. In 1987 he worked as a paid organizer on the Union’s staff. Davis testified that on February 19 he went to Respondent’s Southside Plaza store where Ricky Davis was the manager. According to Frank Davis, he first walked around the store and:

I guess I had been in there about 5, maybe 10, minutes and I was walking past the deli. And one of the employees was walking by, going behind the case and he had a drink and some kind of a sweet roll or cupcake, or something. And he told the girl back there, he says, “I’m back.” And she says, “Well, I’m going.”

So she picked up her purse and put it on her arm and she came around to the front of the deli case, the fridge case, whatever it was, and I approached the girl and I told her who I was, that I was an organizer for Local 400. And I gave her a piece of literature. . . . She put the literature in her purse.

On cross-examination, Davis acknowledged that his pretrial statement did not refer to the employee with the sweet roll or the woman’s remark to that employee.

Davis further testified that he then began looking at the meat in Respondent’s meat counter and he was approached by Davis. Then:

And [Ricky Davis] told me, he says, “You’re going to have to leave these premises or I’m going to have you arrested. . . . You were interfering with that young lady’s work.”

Frank Davis further testified that he protested to Ricky Davis that the employee was on break, but Ricky Davis again said that, if Frank Davis did not leave the store, Ricky Davis

would call the police and have him arrested. Frank Davis then left the store.

Trudi Donati, who was not employed by Respondent at time of trial, testified that she was standing in a doorway to the delicatessen when “a man” approached her and gave her a union pamphlet. She testified that she was not on break at the time, and did not have her purse with her. She testified that she gave the pamphlet to Assistant Store Manager Danny Bollier and, “I told him that it was [from] a union man in the store.”

Bollier testified that Donati had brought the pamphlet to him, stating that “there was a gentleman who had given her this pamphlet,” and he took the pamphlet to Ricky Davis. He and Davis walked through the store until they found Frank Davis. When they did, Ricky Davis told Frank Davis, “that it was not allowed to hand out literature to his employees while they were on the clock.” Frank Davis then told Ricky Davis that he had thought that the employee was on break. Ricky Davis replied that she was not, and he asked Frank Davis to leave the store. Bollier denied that Ricky Davis mentioned arrest or the police.

According to Ricky Davis:

When I approached [Frank Davis], he introduced himself to me. I inquired whether or not he was aware of the fact that he was not allowed to pass out pamphlets to employees while they were working. He, in turn, said that he thought she was on her break. I replied that if she was on her break she would not have been behind the counter working. I, in turn, asked him to leave the store.

Ricky Davis denied that he threatened to call the police or have Frank Davis arrested.

I credit Donati about the distribution of the pamphlet; and I credit Ricky Davis and Bollier about what Ricky Davis told Frank Davis. Frank Davis’ account of the exchange between Donati and the employee with the sweet roll smacked of pure fabrication; I believe Frank Davis concocted it to support his account of why he believed Donati was on break. Donati was a former employee with nothing to gain by her testimony, and there was nothing in the accounts or demeanors of Donati, Ricky Davis, or Bollier to cause me to suspect their credibility.

March 2 and 3; Midlothian Store; Paragraph 6. Union Organizer Frank Davis testified about several visits to the Midlothian store where Ricky Green was the manager. The first date he mentioned was February 24. Davis testified that, on that date and whenever he would enter the store, a public address announcement would be made that “all department heads go to the sales floor.” Davis testified that on February 24, and “every occasion [that] I was in that store,” “he was followed by up to eight department managers as he walked around the store and went to the snackbar.

On March 2, according to Davis, the same announcement was made as he entered the store. Then:

And I was walking around the store. It was supposed to have been renovated, and I really had never taken a good look at it. So I said [apparently to himself], “I have a little bit of time to kill. I’ll just walk around.”

And I had gone all the way around the perimeter of the store and gotten back in front of the dairy case and

the store manager, Mr. Ricky Green, approached me and there were 6 or 8 other department heads around me.

And [Green] told me to get out of the store or he was going to call the police and have me arrested for loitering.

When asked by the General Counsel what he did then, Davis replied, "I went straight to the snackbar and bought a cup of coffee." Davis testified that Green and five of the department heads followed him into the snackbar. Davis did not testify that any employees were within earshot when Davis told him to leave.

Davis testified that he returned to the Midlothian store on March 3. When he entered the store the "department heads to the sales floor" announcement was made on the public address system. Further according to Davis:

I went into the snack bar area, bought a cup of coffee and sat down. Approximately 10 to 15 minute later . . . Green asked all of the department heads to come to the snack bar area. They also bought coffee.

[Green] finished his. He walked up behind me and placed his right hand on my left shoulder and bent over and he says, "You get out of this store as soon as you finish your coffee or I'm going to have you arrested."

The General Counsel asked by leading question if Green had spoken in a loud voice, and Davis replied, "Yes sir. He made it nice and loud so the employees could hear and the department heads could hear." When asked what he did thereafter, Davis testified:

Well, I finished my coffee. And after about 10 minutes I got up and went over and purchased another cup of coffee and sat down. I stayed there for another hour-and-a-half.

On cross-examination Davis acknowledged that he would regularly walk the aisles when visiting the Midlothian store to greet the employees.

Green testified that, beginning in late January and "approximately 90 straight days" thereafter, Davis came to the Midlothian store. Davis, whom Green had known for some time before, would walk right by the manager's booth so that Green could see him. Davis would walk the aisles of the stores for 45 minutes to an hour and a half, go to the snackbar for similar periods, then walk the aisles for a similar period. Green saw Davis purchase something from the aisles only once during this 90-day period. On March 2 Green saw Davis give dairy department employee Gino White a union authorization card while White was working. Green approached Davis and told Davis that Green had noticed that Davis had been walking around the store for about 45 minutes, that he knew that Davis had purchased nothing, and that he considered Davis to be loitering. Further, according to Green, "I asked him to leave the store." Davis did not reply; he just smiled and walked to the snackbar. Green denied that he threatened to have Davis arrested on March 2.

Green testified that thereafter, until about April 1, he followed Davis each day that Davis walked around the store.

Green described the March 3 incident as follows:

I was sitting in the snack bar, and it was approximately nine thirty that morning, and I was having a cup of coffee. I was finishing up my coffee. As I was leaving, Mr. Davis was coming into the snack bar [where he purchased a small cup of coffee]. I went on about my business, and I went to my office and started some paperwork About an hour to an hour and a half later, the department manager paged me back over into the snack bar. I went over there and took care of a problem, that she had, and I noticed that Mr. Davis was still sitting in the same booth.

The snack bar was beginning to fill up. I went up to Mr. Davis, asked—I told him that I did not see him purchase anything but that cup of coffee, would he mind at that time leaving because the snack bar was filling up. He refused to do so. He sat there for about approximately 30 minutes, got up and then [sic] started walking around the aisles again.

Green denied that he touched Davis or that he threatened to have Davis arrested.

Green impressed me far more favorably as a witness and, to the extent their testimonies differ, I credit Green over Davis about the events of March 2 and 3 at the Midlothian store.

May 12; Wickham Avenue; Paragraph 5. The Wickham Avenue store is smaller than Respondent's other stores involved herein; it has no snackbar in which employees can take breaks. They take breaks in the manager's office, which is about 6-feet square, or, weather permitting, on the sidewalk immediately outside the front door.

Hepner testified that after 5 p.m. on May 12 he, along with Dixon and Union Representative Vernon Thomas, drove to the store and parked in the lot. Employees taking breaks and denizens of the neighborhood had congregated on the sidewalk immediately in front of the store. Thomas and Hepner were talking to these individuals when Hepner noticed a Newport News police car entering the parking lot. A uniformed officer, J. D. Summerfield, got out and went into the store. About 10 minutes later:

[Summerfield] walked over to the car. We had [sat] in the car because everybody left when he got there and, you know, he said, "Are you the guys from the Union?" And [Dixon] was sitting up in the driver's side and he said, "yeah." And [Summerfield] said, "Well, I'm going to have to ask you guys to leave the property." And we said, "Why?" He says, because [Night Manager Noralene "Jeannie" Maxey] wants you to leave. He said, "You know, I don't want any problem." He said, "You guys are going to leave or I'm going to have to have you arrested."

Dixon, further according to Hepner, told Summerfield that the Union had a right to be there and he showed Summerfield a copy of the settlement agreement. Summerfield told the three representatives that he would show the settlement agreement to Maxey, "but . . . we're going to have to do what she says." Summerfield went back into the store and came out "more than 15 minutes" later, Summerfield told them:

All right, guys. . . . [Maxey] said the reason she wants you to leave is [District Manager] Patterson had told her that you all violated this agreement and it's no good anymore and if the Union comes, throw them off the property, have them taken to jail. . . . But she can't get in touch with [Patterson]. She said you all could stay out here but you're not to enter the store. You stay out here for the afternoon, but you're not to enter the store.

Hepner further testified that, "after [Summerfield] talked to us, an employee came out of the store, and I introduced myself to her, and she ran."

On cross-examination Hepner acknowledged that, at some point in his discussions with Summerfield, Summerfield told him that Maxey had told Summerfield that union representatives had been inside the store (at an unspecified time) and distributed literature to employees who were working, and that Hepner replied to Summerfield that none of the three representatives had been inside the store that day. Hepner further acknowledged that when Summerfield told them that they could not go into the store, Hepner replied that they had no intention of going into the store anyway. Hepner further acknowledged that he and Thomas had been at the store for "two or three hours" earlier in the day; at that time they were soliciting employees who were outside on breaks; and the union representatives were not interrupted. Finally, Hepner acknowledged that after his last exchange with Summerfield, the union representatives stayed in the parking lot as long as they wanted to.

Dixon was present throughout the hearing, and testified on other matters, but did not testify on this point.

Summerfield, who was still employed part time by Respondent as a security officer at the store, was called by Respondent and testified as follows:

On that date, when I reported for duty at the store, I reported to duty in complete uniform as [a] Newport News police officer. I was met by the manager at the office, a Ms. Noralene Maxey, and advised that there were Union people on the premises in violation of an agreement that they had with [Respondent] at that particular time.

I asked what type of violation [sic] they were in violation of and she advised that, previously, somebody had come into the store and was handing out a pamphlet, talking to employees at the cashier line; something to this effect.

I asked her how that was a violation. She advised that she had contacted Mr. Patterson, the District Supervisor, and there was some question about the agreement that the Union had with [Respondent], and that that was a violation of that policy and he wanted them off the property.

I advised her at that time that this was only an allegation as far as I was concerned and, based on what Mr. Patterson said, I was not going to put anybody off the property because I didn't know what the contract [sic] said.

Summerfield further testified that he thereupon went out and talked to the union representatives. He expressed union sympathies of his own and told them that he was not asking

them to leave. Summerfield denied that he either asked or told the union representatives to leave the premises. He further denied that he told the union representatives that they could not enter the store. He did testify that the union representatives told him that under the settlement agreement they had a right to solicit in snackbars, and he told them that there was no snackbar at that store. He further testified that he told them that they could come into the store and shop. Summerfield further testified that the union representatives told him that they had a right to solicit employees in front of the store, and he told them that that was "fine."

To the extent they differ, I credit Summerfield. He had a credible demeanor, and his account was convincing to me. On the other hand, I am suspicious of Hepner's account. He added the threats of arrest that are not included in the complaint and that appeared to be factual embellishments. Moreover, Hepner is not supported by either Dixon or Thomas. Both of those union representatives were present at the incident; neither was called to testify on the point; and Dixon was present throughout the hearing and testified on other issues. No reason is suggested by the General Counsel for this failure to present Dixon and Thomas.

September 30; Main Street; Paragraph 5. On this date, Dixon and Union Representative Joe Metille went to the store at which Michael Allen Sachs is the manager. Dixon testified that he and Metille went to the snackbar and:

We were sitting at a table and a girl walked by our table and she had her coat with her and her apron draped across her arm.

Joe said, "excuse me," and gave her a union authorization card. The girl proceeded on out of the snack bar.

. . . .
The girl left the snack bar and Mr. Sachs walked over to us, said the girl was on the time clock and asked us to leave. . . . Joe and I both tried to explain to Mr. Sachs that she appeared to be off the time clock, wasn't on Farm Fresh's time, and he got real hysterical. Raised his voice and said if we didn't leave, he'd have us escorted out of the store.

. . . .
We tried to explain to Mr. Sachs that we had the right to talk to people and we didn't intentionally talk to people on the time clock. He said if we didn't leave he'd call the police.

Dixon and Metille went back to the snackbar and sat down. Within a few minutes the police arrived and asked them to leave, which they did.

Sachs testified:

I was standing in the presence of George Eason [Respondent's district manager] and my meat manager, Paul Keller, near the salad bar and we were discussing some problems in the store; a meat problem, I believe.

My snack bar manager then walked up to me and informed me that one of her girls was just handed a piece of Union literature and that she was, in fact, on the clock. . . . I approached the organizer and told him that they were not allowed to hand out literature to an employee that was on the clock; told them that they would have to leave the premises.

They told me that they did not have ESP; that they didn't know that the employees [sic] were on the clock; and I said she was, in fact, on the clock and repeated again, "You will have to leave the store."

I was then told by one of them that they were not going to leave. I said, "I will have you escorted from the premises."

Sachs had the head cashier call the police who, as Dixon testified, asked them to leave the store.

There are no credibility resolutions necessary to resolve in these accounts. I did note that Sachs emphasized the appositive "in fact" both times he said it.

February 22, 1988; Smithfield; Paragraph 6. Dixon made two trips to this store this date. About 7 a.m. he stood around the office area at the front end of the store; in that area are the manager's booth, the timeclock, and a row of cash registers. Dixon spoke to no employees at this time; after a while, he left. At 9 a.m. he returned to the store, bought a cup of coffee, and walked with it to the front area of the store. According to Dixon:

I observed an employee get out of his car and come in to work and he was carrying his smock, and I gave him an authorization card [and] identified myself. And as I was standing there shaking hands with the employee [Store Manager Donald] Gregory came out of the office and . . . at that time he said I was loitering. If I didn't leave the store, he would call the police and have me arrested.

Dixon continued to stand around the area, and Gregory told him, "Dixon, get your bail money ready; you're going to jail." The police arrived within a few minutes; they asked Dixon to leave, which he did.

Gregory testified that he was not there on Dixon's first trip to the store that day, but the visit was reported to him by employees. While Dixon was there the second time, according to Gregory:

I noticed one of my employees coming in the door; he walked over toward the time clock, and right before he got to the time clock . . . Mr. Dixon approached him, and started to talk to him.

I interjected at the time, as it was after nine o'clock, and the employee was scheduled to report at nine o'clock, and I told him to go ahead and punch in; he needed to go ahead and go to work.

And Mr. Dixon, at that time, started telling me what his rights were under the National Labor Relations Board [sic], and this type thing. And I told him that the employee needed to go to work.

. . . .

We exchanged some words; his voice got louder and louder and at that time, I asked him to leave the store. He continued to tell me what his rights were; I told him to please leave the store, that I was the store manager, and if he did not leave, I'd call the police.

As Dixon testified, Dixon did not leave, and the police were called.

Again, there is no significant credibility resolution to make about this incident. I am confident, however, that both men were loud.

(2) Surveillance and creation of the impression of surveillance

Surveillance and impression thereof; September 1, 1986, and thereafter; Oyster Point. Respondent's Oyster Point store was purchased from another Norfolk food chain in September 1986, or about 3 months before the settlement agreement was approved. At the time, Gerald James was the store manager. James remained Oyster Point store manager until he was succeeded in May 1987 by Gerald Mingee. One of the subordinates of James and Mingee was Daniel Hoadley, frozen food and dairy department manager, whom I find and conclude was a supervisor within Section 2(11) of the Act.³

Hoadley was called as a witness by the General Counsel. He freely admitted prouion sympathies, friendship with Union Representative Terry Dixon, and bad feelings about the circumstances under which he resigned his employment with Respondent in September 1987.

Hoadley testified that in July or August 1986, when the Union was attempting to organize Respondent's predecessor, James conducted a supervisors' meeting. According to Hoadley:

And George James said that the reason that we were called in there was [that] there was a log book that wanted [sic] to be kept on the union activity. And that this log book would be kept up in the front podium. And any time that a Union representative was seen coming into the store, talking with an employee that that employee was going to be confronted⁴ and this was what he wanted logged in this book. It was to keep up with the activity going on within the store.

Hoadley testified that James told the supervisors to write down the names of the employees spoken to by union representatives. Hoadley testified that a log book was created and kept at the manager's podium, "locked up in a drawer" to which only the store manager, the assistant store manager, and the front end supervisor⁵ had access. Hoadley testified that he told those under his supervision, about four employees, what James had said in the meeting. Hoadley further testified:

They were just curious as to whether or not they would lose their jobs [if] they were seen talking with a representative. . . . I told [them] that was very probable. And that it wasn't up to me, but it was pretty clear that something, some kind of action would be taken.

³ Although Respondent denies the allegation of Hoadley's supervisory status, it adduced no evidence to rebut Hoadley's testimony that, at all times material, he had the authority to hire, fire, and discipline employees. Moreover, Respondent does not argue in its brief that Hoadley's testimony was inadequate to prove the point.

⁴ In subsequent testimony, Hoadley made clear that James was referring to expected confrontations between union representatives and employees, not intended confrontations between management and employees.

⁵ Front end supervisors were superior to baggers, cashiers, and, sometimes, office clerical personnel, but it was not stipulated or proved that all front end supervisors were "supervisors" within Sec. 2(11) of the Act.

Hoadley further testified that after Respondent took over the Oyster Point store, James conducted another meeting of department heads. At this meeting James stated that Respondent's zone⁶ manager, Dennis Patterson, had stated that:

They wanted to make sure that the book was being kept on, kept up on and kept up with. And that they stressed very strongly that when there was activity within the store to have this logged down into the book.

In May 1987 James was succeeded by Gerald Mingee as manager of the Oyster Point store. Hoadley testified that about that time Mingee conducted a meeting of department heads in which he told them:

And he was aware of the problem of the organizers coming around to the store and trying to approach the employees. And he was aware of this log book. And he wanted us to make sure that we were keeping up with it. And keeping up with the organizers when they came into the store. And that he wanted to continue to have these things logged into this book. . . . Just whoever [Dixon] talked to, who he approached, what he may have done in the store.

James was not called to testify; Mingee testified, but he did not dispute this testimony by Hoadley.

The logbook was offered in evidence by the General Counsel and received over Respondent's objection. Respondent renews its objection in its brief and moves to strike the document from the record. Respondent's argument, in its entirety, is:

To the extent that this log was maintained by Farm Fresh following the merger, it was done on the advice of counsel in connection with pending or anticipated litigation. As such it was privileged, and its admission in evidence was error. *Patrick Cudahy, Incorporated*, 288 NLRB 968 (1988). [Br. p. 45, fn. 35.]

In citing *Cudahy*, Respondent appears to rely on the attorney-client privilege; however, in referring to anticipated litigation, Respondent seems to rely on the work product exclusionary rule. I find that neither applies. It was not the attorney's work product; it was that of the manager's. Assuming, somehow, that it was the work product of the attorney, the privilege still would not apply. Respondent did have abundant reason to expect litigation with the Union. As recited above, Respondent has been charged many times with unfair labor practices. Additionally, on at least three occasions in the fall and spring of 1986/1987, the Union conducted what were, at the hearing, called "blitzes" of Respondent's stores. These blitzes consisted of from four to eight union representatives going into the stores, strewing union literature on the floors, grocery shelves, meat and dairy cases, nonpublic-access storage and workrooms, and any other areas the union representatives could physically gain access to, and soliciting employees who were trying to work. The Oyster Point store was one of those that was "blitzed." However, while Respondent may have anticipated litigation over future trespasses, there is no evidence that the logbook in evidence was maintained after the merger solely for that purpose.

⁶The transcript, p. 292, L. 5, is corrected to change "own" to "zone."

Moreover, assuming that the privilege ever applied, Respondent is required to secure the document. As stated at 8 Wigmore, *Evidence*, Sec. 2298:

All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle . . . that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being over heard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents. [Emphasis in original.]

Therefore, any attorney-client privilege was destroyed when the person (whoever it was)⁷ took it from lock and key and turned it over to the Union, which, in turn, turned it over to the General Counsel (who is not accused in participating in the theft). I adhere to my ruling, and Respondent's motion is denied.

Hoadley identified the first entry, dated "1-14-87" as having been signed Ron Yates, front end supervisor. The entry notes a visit by Union Representative Terry Dixon and his contacts with three employees who are

An entry dated "1-15-87" by Linda King, another front end manager, recites contact by Dixon with two named employees and King's questioning of a named night stocker about his contact with Dixon.

An entry immediately following that one, apparently also made on January 15, is by Hoadley; it recites a short discussion with Dixon. Hoadley testified that King had seen Dixon and ordered him to make the entry.

An undated entry, which appears between entries between January 15 and March 12, recites a visit by Dixon and his contact with one named employee. The author is not indicated.

An unsigned entry dated "5-21 87" notes that Dixon was talking to a named employee "on the clock."

An entry dated "6-13" by Morris Siebert, another front end manager, records Dixon's contact with a named employee while she was "outside on her way to work."

The last entry is dated "6-17-87." Written by Siebert, it notes a visit by Dixon and his contact with a named employee who was "off the clock." This was the last entry in the log. There were several other entries that only noted the times Dixon, sometimes accompanied by other union representatives, came and left.

*Surveillance; February 3; West Mercury Blvd.*⁸ Union Representative Hepner testified that he and Dixon went to the store about 7 p.m. and stayed in the snackbar "a total of two hours off and on." Night Manager Todd Briley came into the snackbar about 5 minutes after they arrived. He positioned himself in a booth about 20 feet from the one in which Hepner and Dixon sat; Briley turned at an angle so that he was directly facing the union representatives. At first, no employees were in the snackbar on breaks. Hepner and Dixon got up to walk around the store to see if there was

⁷Hepner testified that the Union received the book from persons unknown through the mails.

⁸Respondent has two stores on West Mercury Blvd. in Hampton, Virginia. Unless otherwise stated, all references are to the larger of the two, store number 269.

any other place at which the employees could be taking breaks. Briley followed them. When they would stop, Briley would stop. Then Briley would follow them, as close as 5 or 10 feet, when they would start walking again.

Hepner and Dixon, after 5 or 10 minutes of this, returned to the snackbar. Briley followed them and again sat at an angle in a booth so that he was directly facing the union representatives. The union representatives had three exchanges with employees in Briley's presence. The first was an employee whom Hepner stopped as he walked by the table at which Hepner and Dixon were seated. Hepner said, "excuse me," introduced himself, and asked him to accept some literature that had a union authorization card attached. The employee took it, but then he then announced that he was throwing it away; he did discard it in a trash receptacle immediately behind Briley. The second employee was a woman who, according to Hepner, "came in kind of on the other side of the booth where we were." Hepner walked over and introduced himself and asked the woman to accept some union literature. The employee took it, read it, and then announced that she was tearing it up; she did so and also deposited the scraps in the trash can behind Briley. The third employee invited Hepner to come to her table; she told Hepner that she wanted to talk to them but could not then do so, nodding her head toward Briley as she did so.

There is little difference in the testimony of Briley, except that he testified that he stayed somewhat further from Dixon and Hepner than they claim. Briley testified Dixon had been in the store many times before and talked to employees, and distributed literature to employees, while they were working, and this was the reason he followed them.

Briley further acknowledged that he followed Dixon each time he went into the store and watched him while he was in the snackbar. Briley acknowledged that, after the union representatives left, and when he was in an enclosed office, out of sight of any employees, he made notes of union visits, and he transmitted to his superiors. These notes included the names of the employees to whom the union representatives spoke; he did not qualify his acknowledgement to state that he made such notes only when the employees involved were on duty. (The General Counsel does not contend that this note keeping is a violation of the Act.)

Surveillance; February 26; Kempsville Road. Donald Dickerson is the Union's organizing director; Mike Trotter is an organizer. Hepner testified that he, Dickerson, and Trotter entered the store about 11 a.m., and they went directly to the snackbar. Each bought coffee and sat down. Within 5 minutes four men, whom Hepner could not identify by name, entered the snackbar. Each of the four was wearing a tie and a green name tag that, according to Hepner's observation, was usually worn by department heads. The four men stood, arms crossed, within 5 to 10 feet of the seated union representatives for the entire time that the union representatives were in the snackbar. There were employees in the snackbar, but the union representatives made no attempt to talk to them because of the presence of the four men. After 15 minutes of this, the union representatives got up and left. The four unidentified men followed them to the front of the store, then out the door. They stood before the door and watched as the union representatives got in their automobile and drove away. No words were exchanged between the four unidentified men and the three union representatives.

Lawrence Green was store manager at the time. He denied knowledge of any such incident. Green testified that he had witnessed only two incidents with union representatives; a blitz (defined above) in the spring of 1986, and a confrontation with Dixon in the fall of that year. Green further testified that sometimes assistant department heads wear green name tags such as those described by Hepner and that all male employees are required to wear ties.

Hepner was completely credible in his account of the incident, and I find the facts to be as he described.

Surveillance; February 26; Merrimac Trail. Eva Andriuk, another union organizer, testified that she and Dixon entered the store and went to the snackbar. She purchased a soft drink. After she and Dixon had been there 3 to 5 minutes, Assistant Store Manager Edward Sheedy entered the snackbar and sat opposite them, about 25 to 30 feet away. Andriuk testified that Sheedy had nothing with him and that, "he was just sitting there looking at the workers and at myself and [Dixon]." After an hour of this Andriuk got up and left the snackbar; Sheedy followed closely behind until she went out the front door. On cross-examination, Andriuk acknowledged that when she went to Respondent's stores she brought literature to distribute to employees, but she testified that she would distribute the literature only after she was seated with the employees.

Dixon testified about this incident; his testimony is essentially consistent with that of Andriuk, except he also placed Produce Manager Charlie Gilbert with Sheedy. Also, Dixon's testimony is not clear that Gilbert and/or Sheedy came in after he and Andriuk arrived in the snackbar. Dixon testified that he and Andriuk approached employees and handed out literature during this visit. On cross-examination Dixon acknowledged that at one point he and Andriuk got up, walked around the store, returned to the snackbar, and sat down for another 30-minute period during which he bought nothing. Dixon acknowledged that one reason he walked around the store was to let employees know that he was there.

About this incident Sheedy testified:

They sat at one booth, and Mr. Dickson and the female had gotten up from their booth and put pieces of paper on—in front of anybody at any table in the cafeteria at the time; and it—one of those people was a customer.

Dixon and Andriuk generally denied that they engaged in such conduct; however, I found Sheedy credible on the point.

Sheedy did not deny the remainder of the testimony by Dixon and Andriuk about the February 26 incident.

Surveillance; March 2; Merrimac Trail. Dixon testified that he went alone to the snackbar and purchased a cup of coffee. Sheedy came into the snackbar and sat at a booth about 20 feet away. Dixon was asked and testified:

Q. Was he doing anything?

A. Not that I noticed, no.

Q. How long did you stay that day?

A. About two-and-one-half hours.

Q. Did Mr. Sheedy watch you the entire two-and-one-half hours?

A. I had walked the store about three times. Cause while I was there after a long period of time no one had taken breaks. I thought that to be very unusual for

being such a large store. I walked the store to let the people [see] that I was going to be in there, to identify myself.

Dixon testified that Sheedy followed him in these walks. After his last walk around the store, he returned to the snackbar. Sheedy followed him and sat down. After a while Dixon left the store; Sheedy followed him and watched him leave.

Sheedy did not deny this testimony.

Surveillance; March 18; Merrimac Trail. Andriuk testified that she and Dixon again went to the snackbar at the store between 11 a.m. and noon. They ordered and sat down. About 3 to 5 minutes after they arrived, Sheedy and Gilbert arrived in the snackbar. They sat in a booth about 10 feet away and stayed there the entire time she and Dixon were in the snackbar. (Andriuk did not indicate how much time that was.) She and Dixon spoke to the 8 or 10 employees who were there on break, and, as they did so, Sheedy and Gilbert watched. She denied that Sheedy and Gilbert were eating, or that they were working on papers at the time. When the union representatives left, Sheedy and Gilbert followed them to the front door.

On cross-examination Andriuk acknowledged that, as indicated in her pretrial statement, Sheedy and Gilbert ordered lunches about 12:15 p.m.

Sheedy did not dispute this testimony. In fact, he acknowledged that every time Dixon entered the store, he followed him around or sat where he could watch what Dixon did in the snackbar. Sheedy also acknowledged that he regularly followed Dixon as Dixon left the store and watched as Dixon went to his automobile.

Dixon did not testify about the March 18 incident.

*Surveillance and attempted confiscation of union literature; April 2; Merrimac Trail.*⁹ Dixon testified that he and Andriuk went to the snackbar at the store and stayed for about an hour talking to employees. After they arrived, Charles Gilbert, produce manager, came in and sat down at a booth 15 or 20 feet away. Gilbert was accompanied by Paul Purdham and a third man whom Dixon could not identify. Dixon and Andriuk left the snackbar, and Gilbert followed. The union representatives went to the produce section where Andriuk purchased some fruit. They went to the checkout section and Andriuk got in line.

Dixon testified that he left the line to go to the public restroom, which is located at the front of the store. Dixon described the restroom as about 15 by 20 feet, having a toilet and a urinal with a sink next to the urinal. Dixon went to the urinal and laid his folder on the sink. The folder then contained signed authorization cards and other union literature. Gilbert, Purdham, and the third man entered the restroom. Dixon testified:

Mr. Gilbert saw I was using their urinal and reached for my folder; and I put my hand on his and asked him what he was doing. He said he wanted the Union authorization cards. . . . And, I put my hand on him—on his hand to stop him from getting the folder and turned around and asked him what he was doing and he said [that] he wanted the Union authorization cards. And, I proceeded to walk around him . . . and he nudged me. . . . And then [Purdham] stepped over and he nudged

me. That's when I yelled for [Andriuk]. . . . I opened the door and [Andriuk] stepped right into the bathroom, and that was it. Eva said, "We better go; you look pretty shaken up." And that was it.

Gilbert and Purdham were called by Respondent. Both testified that only they, and not any third man, followed Dixon into the restroom, and I find that was the case.

Purdham and Gilbert testified that they had just gotten off duty; Gilbert had bought some beer, and the two stood together on one of the register lines. According to Purdham:

We were going through the line purchasing some merchandise, and we noticed Mr. Dixon was hanging around the front end of the store.

And I didn't really think nothing about it. We were going through the line and we noticed him, about four or five registers down, talking to a cashier. We didn't think nothing of it; and, as we were going through the line, we noticed him coming in and out of the restroom, the men's rest room several times.

So Mr. Gilbert turned to me and asked me if I would come along with him to see what was going on. I said, "Okay," and as we walked into the bath room there was a bagger coming out.

Gilbert testified on direct examination:

I saw Terry Dixon talking to a cashier as she was ringing an order through; and Dixon came back to the rest room, which is located right on the front, and he followed an employee into the rest room.

Now, [Purdham and] I were ready to go home, so I said, "Paul, let's you and I go in, see what's going on." So on the way inside—in the rest room, the employee was coming out.

On cross-examination, Gilbert was asked why he went into the restroom and he testified only: "Because I had seen him talking to a cashier while she was ringing groceries, and I wanted to ask him about that." Gilbert acknowledged that he had not heard what Dixon had said to the cashier, that customers and cashiers do converse, and that the cashier had not complained to him. Gilbert further acknowledged confronting Dixon while Dixon was urinating; when asked why he had not waited until Dixon had come out of the restroom, Gilbert replied: "I don't know. We just wanted to go in and see what was happening."

Gilbert denied that he had, immediately previous to this incident, been in the snackbar when Dixon and Andriuk were there, as Dixon claimed. Purdham was not asked what he had been doing before he and Gilbert noticed Dixon following baggers in and out of the restroom. Gilbert and Purdham denied that either of them touched Dixon, or his folder containing the authorization cards, and they denied that Gilbert stated that he wanted the materials in the folder. They testified that Gilbert just leaned backwards against the sink and stated to Dixon, who was facing the opposite direction as he was at the urinal, that he wanted to ask Dixon if he were not prohibited from talking to employees who were "on the clock." Dixon replied by yelling that they would know when he was talking to employees who were working.

⁹Alleged in par. 9 of the complaint.

Gilbert and Purdham conflict somewhat about why they followed Dixon. However, they were consistent and credible about what happened in the restroom. Moreover, Dixon's testimony that Gilbert said, in *haec verba*, that he wanted the union authorization cards is too much to believe, and I do not. As well as being "too pat," and not ringing true, there is no reason to believe that Gilbert would have thought that confiscation of the cards would have brought Gilbert, or Respondent, anything but trouble.¹⁰ Finally, if Dixon had actually thought he was being assaulted, and if he had called Andriuk to come and assist him (in the men's restroom), and if Andriuk had actually come into the restroom, Andriuk would have been asked to testify about the matter. Although she testified about other matters, she was not asked about this incident.

In summary, I credit the testimony of Gilbert and Purdham about what happened in the rest room on April 2.

*Surveillance and impression of surveillance by posting of notice; spring of 1987; West Mercury Blvd.*¹¹ Employee Linda Boitnott testified that during the spring of 1987, for a period of at least 3 weeks, a notice was posted in the employee breakroom near the timeclock that is used by employees and some supervisors. Other notices that were posted on that board concerned such matters as equal employment opportunities. Boitnott testified that a few days after the notices were first posted, a stack of the notices was also placed on a table near the posting; before the events of this case, other postings, such as notices about insurance coverage, had been accompanied by stacks of copies for employees to take.

The notice, on Farm Fresh stationery, is dated April 10, 1986. (Boitnott testified that, when it was posted, it was apparent that it was old.) It is addressed to store managers, and it is from Jim Cox who is vice president of human resources.¹² The topic line is: "RE: No Solicitation/Distribution Policies." The memorandum is four pages long, and it refers to attached no-solicitation and no-distribution rules. The General Counsel does not contend that either of the attached rules are facially invalid. The General Counsel does contend that the posting and enforcing of the memorandum constitutes a violation of Section 8(a)(1) insofar as it applies to Respondent's snackbars.

The introductory paragraph of the five-page memorandum is:

The attached statement of our basic solicitation and distribution policies should be posted in appropriate store locations where it will be seen by employees promptly. In addition, we have prepared the following guidelines regarding appropriate responses to problems involving solicitation and distribution by outside organizers for your attention and discussion with appropriate members of management and supervision.

The second paragraph recites that nonemployees had come into private and public areas of the stores for purposes of solicitation and distribution, and that guidelines for each area

of the stores were being stated. The guidelines for the snack-bar areas are those placed in issue by the General Counsel; they are:

This area is likely to be the focus of activity by outside union organizers. Typically they will attempt to solicit employees in this area and may distribute literature while posing as snack bar/cafeteria patrons. It is important to understand what our rights are regarding the use of the snack bar/cafeteria by outside organizers.

The snack bar/cafeteria is for patrons or customers. Outside union organizers have the same rights to use the snack bar/cafeteria as any other patrons. This means that they may sit, order food and drinks and converse privately and in a non-disruptive manner for a reasonable period of time on any subject with employees, provided that the employees are off duty. Outside union organizers are not permitted to solicit employees while they are on duty or to disrupt or harass our customers. They may, of course, engage in casual conversation with customers unrelated to union solicitation.

Here are some more specific guidelines for dealing with problems involving outside organizers which may occur in the snack bar/cafeteria:

1. The snack bar/cafeteria should be alert to the presence of outside union organizers and should immediately notify the store manager or the assistant manager of their presence. Both the snack bar/cafeteria manager and the store manager should remain alert to evolving problems once the presence of the union organizers is detected.

2. The outside organizers have a right to sit in booths or at tables as patrons. They do not have the right to occupy booths and tables for extended periods or in such a way as to prevent other patrons from using the restaurant. Normally, assuming their activities are otherwise unobjectionable, they may remain for the period of time reasonably needed to consume whatever food items and drinks they may order. However, just as others would not be permitted to loiter, the outside organizers may be asked to leave if it becomes clear that the snack bar/cafeteria facilities are being used by them merely as a meeting place for union business or for a series of meetings with employees, rather than to have snacks, drinks or meals as patrons normally do. The point when they may be asked to leave will occur when the outside organizer has had a reasonable period of time to complete a meal or snack as the case may be. For example:

- a. Two or three cups of coffee or soft drinks in a one-half hour period is probably reasonable, but lingering much beyond that to the point where the facilities are obviously being used merely as a meeting place need not be permitted even if the union organizers order additional drinks or coffee, just as you would not permit others to loiter or abuse the facilities.

- b. Similarly, a reasonable time should be allowed to order and eat a meal, including an additional 15 or 20 minutes to have coffee or tea at the end of the meal, after which they may be asked to leave.

¹⁰ There are reported cases on confiscation of literature, but these involve cases in which supervisors confiscate literature from employees. There are no cases of confiscation of literature from nonemployee union organizers, and I find it unlikely to the point of disbelief that the phenomenon occurred here.

¹¹ Par. 20(c) of the complaint. This allegation concerns the smaller of Respondent's two West Mercury Blvd. stores.

¹² Tr. 129.

3. The outside organizer may not use a booth or table as a point of distribution of union literature to employees who pass by the booth or who momentarily sit at the booth for the purpose of receiving the literature. However, the handing of a brochure or union card to an employee who is sharing a booth during his/her brake meal [sic] or other non-working time and engaging in conversation with the organizer is permissible.

4. Snack bar/cafe/tertia managers should make a record of any such incidents, including the following:

- a. Identity or description of the outside organizer (not employees)
- b. Time of arrival
- c. Location of activity
- d. Distribution of literature or other activities which may be beyond the scope of proper conduct as outlined above.
- e. Whether they were asked to leave and, if so, what was said by all parties
- f. Time of departure.

These descriptions should be sent to me or to my staff promptly. If any problem situations have occurred, we should be notified by telephone immediately.

Clayton Hewitt, the store manager during the time in question, was called by Respondent. On direct examination Hewitt testified that he had not seen the memorandum before the hearing opened. He was further asked and testified:

Q. Did you ever see that document posted at Store 213 while you were manager there?

A. I don't recall seeing it, no.

Q. Did you ever see copies of that document in that store while you were manager there?

A. No.

To the extent Hewitt's professed inability to recall seeing the document posted was intended to operate as a denial, it is discredited. Boitnott had a more credible demeanor than Hewitt. In addition, when, on cross-examination, Hewitt was asked if he kept track of what was on the bulletin board, he replied: "I would—may or may not have seen documents on the bulletin board. I really didn't watch them or read them that much." I believe that any of Respondent's store managers, especially in the context of an organizational campaign, did watch the bulletin boards in their respective stores, and they watched them closely. However, if Hewitt was as derelict as he claimed, his testimony that he did not remember seeing the memorandum is even more meaningless.

I further credit Boitnott's testimony that a stack of the memoranda was maintained in the breakroom, and discredit Hewitt's testimony to the contrary.

Surveillance; November 30; Suffolk. Dixon testified that he sat in the snackbar for about 30 to 45 minutes, and during that time no employees came in. He further testified that Store Manager Michael Sachs came into the snackbar twice; Sachs sat at a booth for a few minutes looking at Dixon and then got up and left. Nothing was said between the men.

This testimony was not denied.

(3) Interrogation

February 16; Warwick Blvd. Former employee Shelia Bement testified that she became active in the organizational campaign in December 1986, or January 1987. This activity consisted of talking to other employees, during nonworking time, about signing union authorization cards. Two or three times a week she would meet with union representatives in the store's snackbar. This activity continued through the spring of 1987.

Bement testified on direct examination that on February 16 she was called from her place of work in the video rental department to the office of Store Manager Gerald Mingee. Mingee introduced Bement to Robert Melody (who is alleged to be an agent of Respondent's within Sec. 2(13) of the Act). Mingee told Bement that Melody was from the "home office" and stated that Melody was going to give Bement a lie detector test. Then Mingee left the office.

Bement testified that before Melody gave her a polygraph test, he asked her some questions. According to Bement:

He asked me questions of had I ever stolen anything from the store; if I knew of anybody that had done that, and if I knew of any thing that was called "the buddy program." I told him, "no."

Then he asked me if I knew of anything—he repeated the questions again and then he asked me if I knew of anything else going on in the store, and I asked him what he meant, and he said, have I heard anything about the Union, and I told him, "Yes, so has everybody else in the store."

He asked me if I had met with anybody and if I had signed a union card, and I told him, "yes."

Bement testified that after the last question, Melody hooked her up to the polygraph. Then he asked Bement several questions about alleged thefts at the store. (Bement denied any such knowledge to Melody, and there is no evidence that Respondent ever suspected her of theft.)

Bement testified that the polygraph examination lasted about 20 or 30 minutes. After the examination was over, Melody asked her one more question:

He asked me if there was anything about the store or my job that I could tell him that might help me out.

Bement testified that she told Melody, "no."

Bement testified that after the polygraph examination, but before she left the office, she signed the following paper:

The examination now being over, I certify that I took same voluntarily, was well treated, and remained of my own free will, having been advised that I could leave at any time. I was not asked any personal or private questions unrelated to the investigation.

Bement testified that she signed the document without reading it because, "I was in a hurry and I wanted to get out of there. I was nervous."

On cross-examination Bement acknowledged that she talked freely with other employees about her union sympathies, but denied that she has mentioned them to any su-

pervisor. She denied that Mingee told her that the investigation was about alleged thefts; she testified, "I was told it had something to do with the store."

Melody was not called to testify.

Mingee testified on direct examination that he asked that polygraph examinations be given at the store because, "I was having problems with gross profits."¹³ He further testified that before the examinations he discussed with Melody the areas of the store in which he was having problems. Mingee was questioned about what was said between him and Melody after the examinations. Mingee testified that Melody told him that, after one employee had been examined, "the employee had told him [Melody] that he—that she wished that the Union people would leave her alone when she was coming to work." Mingee was asked to state what employee had supposedly said this to Melody Mingee first disclaimed memory; then he named Bement, but only after blatant leading.

I credit Bement. There was nothing in her demeanor that would tend to make her credibility suspect. She was not employed by Respondent at time of trial and had no apparent reason to testify falsely. Finally, her account is not factually denied because Respondent did not call Melody to testify (and Respondent offered no reason for not doing so). Respondent relies on the signed statement that Bement was not asked personal or other questions unrelated to the investigation. Aside from the fact that Bement was subjected to a pressure situation in that office, just what was "personal" and what was "unrelated to the investigation" was never defined for Bement; she was told only that the investigation "had something to do with the store."

c. Alleged violative discharges and directly related alleged 8(a)(1) violations

Warren Carter was employed by Respondent at its 21st Street store in Norfolk from December 18, 1985, until he was discharged on Friday, February 27, or Saturday, February 28, depending on whose version is credited.¹⁴ During his entire period of employment, he worked as a bagger. Angelo Fasciocco was the store manager at the time of the events in question here, and Laura Hilber was head cashier; subordinate to Hilber were Karen Wood, front-end supervisor and, sometimes, night manager,¹⁵ and Rhonda Franklin and Laurie Knill, front-end supervisors.¹⁶

Carter testified that, during his tenure, he was complimented in his work by Hilber, and he was disciplined only once—in January he got a written warning for being 20 minutes late to work.

¹³ The transcript, p. 1769, L. 12, is accordingly corrected.

¹⁴ Credibility resolutions for this section are recited in the analysis.

¹⁵ Respondent denied that Wood was a supervisor within the meaning of the Act. Fasciocco testified that Wood became night manager on February 7; before that she was front end supervisor, directly supervising baggers and cashiers. Wood testified that, as night manager, she was in charge of the entire store (which had as many as 30 employees working on any given evening) after about 5 p.m., at which time Fasciocco and Hilber usually left the store for the day. As night manager, she had authority to direct, discipline, and schedule employees, and to grant employees time off. None of this testimony was rebutted by Respondent; no argument on the issue is made in Respondent's brief; and I find and conclude that, at all times material, Wood was a supervisor within Sec. 2(11) of the Act, as alleged.

¹⁶ Franklin is not alleged to be a supervisor within Sec. 2(11) of the Act; Knill is so alleged, but there is no probative evidence to support the allegation, and the General Counsel does not argue the point in the brief.

Walter Kent Jr. was hired as a bagger at the 21st Street store in December 1986, and was discharged on March 17, 1987. During this period he was a high school student and generally worked nights and weekends. During his tenure Kent received one written warning notice; this was for failing to wear a tie on the job. Kent testified that, several times before his discharge, Hilber told him that he was doing a good job. Hilber and Franklin testified that neither Carter nor Kent was a good worker.

The complaint alleges that Carter and Kent were discharged because of their union memberships, activities, or desires. The complaint also alleges certain independent violations of Section 8(a)(1) of the Act as having occurred on February 25, 1987; *to wit*, threatening employees with discharge, conducting surveillance of their protected union activities, and creating the impression of such surveillance, and denying employees scheduled work breaks. These allegations depend almost entirely on the testimony of Carter and Kent, and the General Counsel contends that these alleged violations are directly relevant to the discharges of those employees; therefore, they are considered in this section of this decision.

(1) Events of February 25, 1987

Carter testified that on Wednesday, February 25, he was scheduled to work from 3 to 9 p.m. He testified that Fasciocco usually left for the day shortly after 3 p.m.; but on February 25 Fasciocco came back to the store (at an unspecified hour) and started walking around with a pen and note pad in hand. He testified that he observed Fasciocco watching union representatives who were in the store at that time.

Carter testified that about 7 p.m. he asked Wood if he could take a break.¹⁷ Wood said, "no." About 8 p.m., he asked again and:

she told me that "no," she told me "no," I couldn't take a break because Fasciocco didn't want anybody in the snack bar while the Union representatives were in the store.

Carter also testified that Wood then asked him to work late that night and he agreed and that he did work that night until closing at midnight.

Carter testified that about 40 minutes after he asked the second time, he asked Wood a third time for a break, and Wood allowed him to go. He went to the snackbar where he was approached by the union representatives whom he did not name. Carter spent 10 minutes talking to the union representatives in a booth. One of the union representatives gave him a union authorization card, and Carter took it to the restroom and signed it. Further according to Carter:

And on my way out of the rest room I was met by [a union representative], and I handed him the card, and I turned around to go to work and I saw Mr. Fasciocco standing about 10 to 20 feet away and he had a pen and pad in his hand. So I just walked on by him and continued to work.

¹⁷ Part-time employees, such as Carter, got unpaid breaks.

Carter was asked on direct examination if Fasciocco was writing anything at the time, and Carter replied, "Yes. I saw him marking something down but I wasn't too sure what it was."

Carter testified that after his break he relieved Kent who went to the snackbar and joined the union representatives.

Carter further testified that about 5 or 10 minutes after he got back to his work station at the front of the store, Fasciocco came to the area and stood 5 to 10 feet away from Carter. Carter testified:

and [Fasciocco] called Karen Wood from off the podium and while I was bagging, I was going along bagging the groceries, and I overheard him tell [Wood] that she's to keep an eye on the snack bar and keep a list of names of everyone who [goes] back there and they would be terminated.

Carter testified that he could hear Fasciocco "very clearly."

Kent testified that, on February 25, he worked from 5:30 p.m. to midnight. About 15 minutes after Kent arrived, Fasciocco left the store, which according to Kent was Fasciocco's usual time for leaving the store for the day.

About 7:30 p.m., Kent asked for permission to take a half-hour break, and Wood granted it. He met Carter who told him that there were union representatives in the snackbar and that Kent should go there and sign a union authorization card. Kent went to the snackbar where there were four union representatives, including Hepner. Fasciocco was in the snackbar; he had purchased a cola when Kent walked in.

Kent sat at a table next to the union representatives' table and conversed with them. Hepner gave Kent a union authorization card that Kent took to the restroom to sign. Kent returned to the snackbar and gave the card to Hepner; Kent testified that, when he did so, Fasciocco was about 3 feet away; Fasciocco was facing in Kent's direction and "steady moving" by the table at which Kent and Hepner were seated. After delivering the card to Hepner, Kent left the snackbar.

Kent testified that about 13 minutes of his 30-minute break had elapsed as he left the snackbar. He started walking toward the front door, on his way to a nearby fast food store, when he was paged by Wood. He went to the front where Wood told him to clock back in and that she would let him finish his break later. Kent did so, but there was only "a little bagging" to be done, and he spent the next few minutes standing around talking to Wood.

Kent further testified that during that evening he saw Fasciocco:

He was just walking down [sic] the store, pacing up and down. He was in the snack bar, out of the snack bar. Do [sic] receiving, in receiving, out receiving.

Receiving is adjacent to the snackbar. Kent testified that, while Fasciocco was walking around, he had a pad and pencil in his hand. Kent testified that for an unspecified period of time after he returned to work, he saw Fasciocco as Fasciocco was walking around the store, and "he was either writing or he was just looking towards the snack bar."

Hepner testified that on February 25 he and Union Representatives Dixon, Andriuk, and Mike Trotter went to the 21st Street store around 6 or 6:30 p.m. and they stayed for

about 2 hours. Hepner testified that he spent that time in the snackbar, and the Union secured authorization cards from eight employees that night, including Kent and Carter.

Hepner testified that when Kent returned to the snackbar table he slid his signed authorization card across to him. At the time, Fasciocco was walking by, and:

He was within arm's length. You know, it [sic] was right beside it [the table]. He just come by, kind of pause and did that, you know, and went on.

"That" was a motion Hepner made as he testified; Hepner craned his neck over the side of the witness box and looked down.

Hepner further testified that during the evening, Fasciocco came in and went out of the snackbar several times, and he was carrying "a little pad and a pen."

The General Counsel called Daniel Robinson who was employed as a produce clerk on February 25, but was not employed by Respondent at the time of the hearing. Robinson testified that on February 25 he worked from noon to 8 p.m. During the evening, "about 5" union representatives came to the store, walked around the store and then sat in the snackbar.

Robinson testified that he saw Fasciocco in the store after 7:30 p.m. Robinson testified that this was unusual because Fasciocco usually left the store between 5 and 6 p.m. Robinson was asked if there was anything unusual about Fasciocco's conduct while he was there at that hour, and Robinson testified:

And he was in the produce department a lot. In the produce and in the deli a lot. Which is unusual. And then he was talking to me a lot, which is unusual, too. Because he did not have too much to say to me. . . . He asked were people harassing me and those were the basis [sic] question. And then he was asking about my work which was unusual, because he usually doesn't ask about my work Like I said, he was asking me questions, plus he was looking around. . . . Well, he was looking toward the snack bar.

Robinson testified that standing in the produce department one can see the interior of the snackbar and can see the deli area. Robinson testified that he did not know what time Fasciocco left the store because Robinson left the store at 8 p.m.

Finally, on direct examination Robinson was asked if Fasciocco had anything with him, and Robinson replied that he did not recall.

On cross-examination Robinson testified that during that evening one of the union representatives gave him "one of those little cards" while he was working, and that he saw union representatives giving cards to six or eight other employees, all but one or two of whom were working.

Fasciocco testified that he worked late on February 25. He testified that Wood called on a house telephone and told him that there were four union representatives in the store. He walked around the store for a bit, and he saw a union representative giving literature to an employee who was working. He went to the snackbar and bought a cola.

Fasciocco denied walking around that evening with a pad and pencil; denied "observing" the union representatives;

denied telling Wood that she should keep a list of all employees who went to the snackbar; denied telling Wood not to let employees go to the snackbar; and denied telling Wood that those employees who did go to the snackbar would be terminated.

On direct examination Fasciocco was asked:

Q. What conversation did you have [with Wood]?

A. Just that business would be as usual. It was a busy night, and just do what you normally do.

Q. Did you say anything else [sic] to her about employee break[s]?

A. Just the normal comments that I have always made, which is baggers bagging, cashiers cashing, which is what I always say the last three years when I have been in the store.

Fasciocco denied seeing either Carter or Kent with the union representative on February 25, and he denied knowing that either had signed union authorization cards at the time of their discharges.

On cross-examination Fasciocco was asked if the union representatives were still in the store when he left that evening Fasciocco replied:

I believed that they had left. But I wasn't sure. They had told me that there were three or four people in there at the time. Like I said, I only remember two of them, and when they left, I stayed for a few minutes longer about 15, 20 minutes; talked with Ms. Wood and just went about—told her about business that night, that that was going to be a busy night in the store and just make sure the cashiers and baggers stay up front and do their job.

Fasciocco testified that, while he usually left the store at close to 6 p.m., on February 25, he left at "around 6:30, 7 o'clock." On cross-examination he was asked by the General Counsel and testified:

Q. What were you doing that kept you in the store that extra time?

A. At that time, I was walking around the store at the time making sure regular business [sic] and to make sure that nobody would do anything that would cause any kind of violation.

Q. Make sure the Union organizers didn't cause any violation?

A. Mainly ourselves rather than Union organizers.

Q. Okay. That supervisors didn't do anything that caused a violation?

A. That's correct, sir. Yes, sir.

Q. So, in order to make sure that no supervisors did that, you needed to observe what the organizers were doing in the snack bar; correct?

A. Never did I observe them. I walked through the snack bar on one occasion and got a Coke and walked around the store consistently like manager responsibilities are.

None of the supervisors whom Fasciocco was supposedly watching over (to make sure that they did not violate employee rights) was called to corroborate Fasciocco.

(2) Discharge of Carter

Carter testified that he was scheduled to work Friday, February 27, but, before he could report, he was involved in an automobile accident. After he called a tow truck, he called the store and got Hilber who told him:

well, you're already an hour late and if you don't get here in an hour, you'll be terminated.

Carter arrived at work about 7 p.m., 3 hours late. He was met by Assistant Store Manager Allen Adcock. Carter told Adcock that he had been involved in an accident. Adcock told Carter that Hilber had said that Carter "just wasn't coming in." Adcock told Carter to come in the next morning and talk to Store Manager Fasciocco.

The next morning Carter did go to see Fasciocco at the store's office. Fasciocco, after hearing pleas and protestations from Carter left the office. Fasciocco returned after a few minutes; he told Carter that Hilber and the other supervisors had said that he had been tardy, insubordinate, and had wandered off the job. Carter protested that he had been a good worker, had only been written up once, and that he could not help being late because of the accident. Fasciocco replied that he would have to let Hilber's decision stand.

Carter's personnel file contains an "Employee Status Report" that lists as the reason for termination: "Come in late, excessively." The report is signed by Fasciocco who dated the termination as "2-15-87."

Respondent contends that Carter was discharged because another employee, with whom Carter had traded shifts, did not appear for work for the morning shift of Saturday, February 28. Respondent contends that the facts are that Carter was scheduled to work a shift that began during the morning of February 28; that on February 27 Carter asked for, and received, permission to switch shifts with another employee for February 28; that the other employee failed to appear for the Saturday morning shift; and that, under a strict liability rule involving such approved shift-switches, Carter was discharged.

The rule pursuant to which Carter was discharged, under Respondent's theory of defense, was never promulgated in written form. Front End Supervisor Rhonda Franklin and Head Cashier Laura Hilber testified that in October 1986, shortly after Hilber came to the store as head cashier, Hilber conducted a meeting of cashiers and baggers. At that meeting Hilber announced a rule that employees would be terminated for one "no-show." (This rule will be called the "one 'no-show' rule.") Hilber and Franklin further testified that at the meeting Hilber told the gathered employees that they were responsible if they swapped shifts and their replacements did not show up; if the person with whom they swapped shifts did not show up, they, the employees originally scheduled, were responsible and would be discharged. (This second rule will be called the "absolute liability for shift replacements" rule.) Franklin and Hilber testified that they could not remember if Carter or Kent were present when this meeting was conducted.

Franklin testified she had been given authority to approve employees' swapping shifts by Hilber. Franklin testified that, "on a Friday," Carter asked her if he could swap with another employee, whose name Franklin could not remember, for Carter's scheduled Saturday morning shift because Carter

wanted to go to North Carolina on Saturday. Franklin testified:

I told him at that time that he could swap the shift, but if the person he swapped with did not show up, then he was to be there to work the shift.

Franklin testified that no one appeared for Carter's Saturday shift, which was scheduled from 10 a.m. to 6 p.m. Franklin testified that after the shift was over she called Hilber and:

I told her that I had okayed for Warren Carter to swap the shift and he did not show up; that that person that he swapped with did not show up and that he [Carter] didn't show up.

She further testified that her Saturday call to Hilber about Carter and his shift replacement could have been as late as 7 or 8 p.m. She testified that she did not ask Hilber to discharge Carter; she was not asked what Hilber replied when she reported to Hilber that neither Carter nor his shift replacement had appeared for the Saturday morning shift.

On cross-examination Franklin testified that, under the strict liability policy regarding shift-swappers, the employee who agreed to show for a shift, but did not, was not punished. Franklin was asked why, and she testified:

Because of—they weren't—actually it wasn't their scheduled shift. They were doing a favor for another employee.

Franklin further testified that she could not remember which employee it was that Carter had asked for, and received, permission to swap with, but she was sure that the shift replacement would have been working there at the time.

Hilber testified that on Saturday, February 28, after "the shift had come and gone," she received a telephone call from Carter. Carter told her that he was having car trouble out of town and "would not be able to make it in." Hilber testified that she told Carter that "he had already missed his shift and that he had been terminated as a result." Hilber was examined further about her conversation with Carter and testified:

[Carter] told me that he was supposed to be there in the afternoon and I said, "no; you were scheduled for in the morning." . . . He said that he had switched, and I told him I was unaware of that. . . . I told him that even though he had switched shifts he was still responsible to make sure that whoever he traded with was there and whoever he had traded with did not show up. There was no one to cover that shift. So he was terminated, yes.

Hilber testified that Franklin told her about the shift-swapping, and the failure of Carter's coswapper to appear, the day after Carter had failed to appear and was fired by her (which would have been Sunday, March 1, or possibly Monday, March 2). Hilber testified that Franklin had no authority to allow employees to swap schedules after Hilber had made out the schedule, and that she told Franklin so in the conversation following Carter's discharge.

Hilber was asked on cross-examination what had become of the employee with whom Carter has switched shifts;

Hilber testified that she investigated the matter at the time, but she could not remember the name of Carter's shift replacement, and that she believed, "that person had already quit early in the week that Carter allegedly had switched shifts with."

Hilber was asked if, in the call in which Carter stated that he had a replacement for his missed shift, Carter had said that he knew nothing of the absolute liability for replacements rule, would it have made a difference. Hilber replied that it would not have.

Hilber denied any knowledge that Carter supported the Union or had signed a union authorization card at the time of his discharge.

Adcock was called by Respondent. He was asked on direct examination and testified:

Q. Did you ever have occasion to tell Mr. Carter not to report to work?

A. I believe I did.

Q. Do you recall when that was?

A. February 28.

Q. Of what year?

A. '87, which was a Saturday night.

JUDGE EVANS: We can't hear you, sir.

THE WITNESS: February 28, a Saturday night of 1987.

By [Respondent's counsel]:

Q. And why did you tell him not to report to work?

A. Because the—I was working that night in charge of the store, and the head cashier, which was Laurie Hilber which is in charge of the cashiers and baggers, told me to, that he probably would be coming in at five to work, and told me to tell him not to punch [in], that he needed to see herself or the store manager, Mr. Fasciocco.

On cross-examination Adcock added that Hilber told him that Carter would probably be terminated, but she did not say why.

Fasciocco disclaimed any direct knowledge of Carter's discharge. He testified that Hilber had told him that she had discharged Carter because he had failed to show up for work; Fasciocco stated that Hilber mentioned that Carter had traded shifts; Fasciocco believed that Hilber had stated that Carter had failed to show up for the shift for which he had traded, not that his replacement had failed to appear. Fasciocco testified that after Carter appealed for reinstatement, he consulted with Hilber; he saw no reason to reverse Hilber's decision to discharge Carter, and he let the decision stand.

Fasciocco was asked on cross-examination about the strict liability rule:

Q. Now is there a rule about trading shifts at the company that requires that if you trade shifts you're liable still to perform the shift that you didn't—if you traded?

A. There isn't a company policy per se. But everybody is aware of the fact that—and they are told at the time when they trade shifts that they are responsible for the other shift, yes, that they're traded with, and Warren Carter was aware of it, and he knew it.

Q. And so in addition to just not showing up, he was also fired pursuant to this policy that if you trade shifts,

then the person who you trade with doesn't show up, you're still liable?

A. I can only tell you that he was fired for not showing up for work sir.

Later in the hearing, Fasciocco was asked on cross-examination and testified:

Q. Let's see, the reason that Warren Carter got fired was because he did not show up for work?

A. Yes, sir.

Q. And was that because his car had been broken or something?

A. That is what he stated, yes, sir.

Q. And is the fact that an employee's car is broken, is that legitimate reason to miss work?

A. I think there are other reasons involved in this situation here.

Q. What other reasons?

A. No phone call. No comments, no nothing.

Q. Warren Carter did not call to say he wasn't coming?

A. As far as I knew.

Q. If he had called to say he was coming, then he wouldn't have been discharged?

Q. That situation would have been taken [sic], yes. We would have thought about it.

Q. And not have discharged him?

A. Maybe not.

Carter denied that he ever asked to trade shifts with any other employee, and he denied that he told Hilber that he had done so when he called to report that he had been in an accident.

The General Counsel contends that the policy of strict liability for shift replacements did not exist. The General Counsel contends that Respondent has raised the issue as something of a "red-herring" because Carter was told he was discharged for his late appearance on Friday, February 27, and that Respondent knew that a discharge for such reason, under the "one no-show" rule or otherwise, would not withstand scrutiny.

Respondent's rule regarding a single failure to appear for work is an element in both the cases of Carter and Kent.

Respondent introduced into evidence a handwritten notice that states:

*No Shows Will
be Terminated*

Laura

Hilber and Franklin testified that Hilber posted this notice, in places sure to be seen by baggers and cashiers, after the October 1986 meeting in which Hilber announced the policy. Carter denied ever having seen the notice. Other documentation of the "one no-show" rule is contained on all warning notices that Respondent issues to employees. The warning notice received by Carter in January (for being late) states:

Three write-ups will result in termination. One no-show will result in termination.

Hilber and Franklin were examined about the "one no-show" policy at length. Hilber was asked and testified:

Q. Now after—let me ask you this are there any exceptions to the no-show policy?

A. No.

Q. Every time an employee does not show up for his shift, under your supervision, he is discharged; correct?

A. No.

Q. Why not?

A. The no-show policy refers to a person not calling in, not giving me some sort of notice or reason as to why they're not showing up.

JUDGE EVANS: . . . When a person does not show up and hasn't called in, is that person fired?

THE WITNESS: Yes, unless it's something that was beyond their control such as they were in an accident and they were in a hospital and they—you know, there's always circumstances that would be beyond somebody's control.

JUDGE EVANS: Did Carter tell you that he had been in an accident?

THE WITNESS: He told me he had car trouble.

JUDGE EVANS: All right. If a person called you and said he had a flat . . . would he be discharged for not showing up for his shift?

THE WITNESS: If they had called me prior to their shift or some time close to their shift beginning, no . . . I would not discharge them.

When Franklin was being cross-examined about the policy for strict liability of employees if their shift replacements failed to appear, she was also asked about the "one no-show" rule. Franklin acknowledged that the employee who had agreed to swap and failed to appear, and was not punished was, in that circumstance, a "no-show."

Karen Wood was also examined about the "one no-show" rule. She testified firmly that Carter was there when Hilber announced the rule, but she, like Hilber and Franklin, could not remember if Kent was there. Wood testified that there was a rule of absolute liability if a shift replacement did not show up; but she did not testify that the rule was announced in the same meeting that Hilber announced the "one no-show" rule. Wood testified that the "one no-show" rule was a storewide rule.

The weekly time schedule and Carter's time records were placed in evidence by the General Counsel. The weekly work schedule reflects that Carter was scheduled to work:

Wednesday, February 25—3 to 9 p.m.
Thursday, February 26—off
Friday, February 27—4 to 11 p.m.
Saturday, February 28—10 a.m. to 6 p.m.

The record of employee hours worked reflects that on the following dates Carter worked the hours set opposite:

Wednesday, February 25—3 to 9:07 p.m.
Thursday, February 26—none
Friday, February 27—none
Saturday, February 28—none

On cross-examination Hilber was asked and testified:

Q. Now, it's your testimony, is it not, that you fired [Carter] for not coming to work on Saturday the 28th; correct?

A. Correct.

Q. What happened on Friday the 27th of February with Warren Carter?

A. I don't know.

Q. He didn't call you on that Friday, did he, and tell you his car broke, did he?

A. I don't recall what the reason is that he didn't work.

Hilber acknowledged that she would remember if Carter had called 2 days in a row and claimed automobile problems were keeping him from coming to work.

The General Counsel also introduced evidence that some employees had been considered no-shows at the store; none of these were under Hilber's supervision; however, Fasciocco, like Wood and Franklin, testified that the "no-show" rule was storewide.

(3) Discharge of Kent

Just before midnight, Sunday, March 29, a day on which Kent was not scheduled to work, Kent called the store because he wanted to know what his next day at work was. He was put through to the countdown room, a room where cashiers tally their tills at shift changes. The telephone was answered by Laurie Knill. Knill worked as a front-end supervisor, but some of her duties took her to the countdown room where the work schedules were posted.

Knill did not testify, but Kent testified that Knill told him that his next day at work was Tuesday, March 31. Kent appeared for work that day, not having appeared for work on Monday, March 30. In his March 31 arrival, he was greeted by Hilber who informed him that he did not have a job with Respondent anymore because he had not appeared for work on Monday, March 30. According to Kent:

I asked her, "Why? I thought I was suppose[d] to work on Tuesday." And she said, "You just no longer have a job here." And I didn't say anything else to her. . . . I turned in my smock, and I walked out the door.

During the following week, Kent's father, Walter Kent Sr., visited and called Fasciocco and Hilber, appealing to them that his son be reinstated. Kent Sr. told Fasciocco that he thought his son was discharged because he had signed a union authorization card; Fasciocco denied it.

Fasciocco and Hilber testified that they reviewed the matter but decided that Kent should not be reinstated because Kent had actually been scheduled to work on Monday, and he had failed to appear; therefore, Kent had violated Respondent's rule that one no-show was grounds for discharge.

To the General Counsel's argument that Kent had received from Knill the information that he was not supposed to be at work on Monday, Respondent answers that employees were responsible for determining, accurately, what their schedules were, and telephone calls to get schedules were discouraged. Respondent argues that, assuming Kent's testimony to be true, Knill was not a supervisor, so this was just

a case of one employee misinforming another employee about his schedule.

A copy of the schedule for the week of March 29/April 4 was received in evidence as the General Counsel's Exhibit 23. It shows that Carter was, in fact, scheduled to work from 5 to 11 p.m. on March 30.¹⁸

The General Counsel introduced credible evidence that employees did call in and get their schedules from supervisors and other employees. The General Counsel adduced other evidence that three other employees in the preceding year had missed a day of work and had not been fired; however, none worked under Hilber.

2. Analysis and conclusions

a. *Alleged postsettlement 8(a)(1) violations*

(1) Denials of access and threats of arrest to nonemployee organizers

The General Counsel argues that each time Respondent excluded, or threatened to exclude, the union representatives from its snackbars, Respondent violated Section 8(a)(1) of the Act. In so arguing, the General Counsel relies heavily on *Montgomery Ward Co.*, 288 NLRB 126, 127 (1988). That case, in relevant part, holds:

6. The Respondent violated Section 8(a)(1) by ejecting Lois Johnson, a nonemployee organizer, from its buffeteria. The Respondent operates its buffeteria for use by the general public as well as by employees for meals and breaks. At the time she was ejected, Johnson was meeting with off-duty employees while eating at the Respondent's buffeteria. Thus, she was clearly using the buffeteria in a manner consistent with its purpose. The Board and the courts have traditionally held that solicitation in restaurants cannot be prohibited when, as in this case, the conduct of the nonemployee organizer is consistent with the conduct of other patrons of the restaurant. *Dunes Hotel & Country Club*, 284 NLRB 871 (1987); *Harold's Club*, 267 NLRB 1167 (1983), enfd. 758 F.2d 1322 (9th Cir. 1985); *Ameron Automotive*, 265 NLRB 511 (1982); *Montgomery Ward & Co.*, 263 NLRB 233 (1982), enfd. as modified 728 F.2d 389 (6th Cir. 1984); *Montgomery Ward & Co.*, 256 NLRB 800 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982); *Marshall Field & Co.*, 98 NLRB 88 (1952), enfd. as modified 200 F.2d 375 (7th Cir. 1952). To hold otherwise would license a property owner to prohibit a union organizer from utilizing its restaurant solely because the organizer was discussing organizational activities with off-duty employees (who are there in the capacity of restaurant patrons). Such a prohibition, which discriminates on the exclusive basis of the union's organizational activity, flies in the face of the Supreme Court's admonition against discrimination on this basis when determining the propriety of access restrictions. *NLRB v. Babcock Wilcox*, 351 U.S. 105, 112 (1956). Even assuming the Respondent could have lawfully prevented Johnson from soliciting in the selling

¹⁸The copy received was in pencil; Hilber testified that a photocopy of this would actually have been posted, obviously, so that unauthorized alterations could not have been made.

area, it could not prevent her from using its public restaurant in an orderly way, not disruptive of its business, even though she had earlier made appointments with employees on the sales floor. [Footnote omitted.]

Therefore, the issue becomes: were the union representatives conducting themselves “in an orderly way, not disruptive of [Respondent’s] business?” Guidance is found in a review of the cases cited by the Board.

In the *Montgomery Ward*, 263 NLRB 233 (1982) case, Union Representatives Wright and Tillet had gone to the employer’s snackbar, purchased beverages, seated themselves, and spoke to employees who approached them. One employee at an *adjacent* table asked a question, and Wright slid his chair to the employee’s table to answer it. They were ordered out by a supervisor. The Board found a violation of Section 8(a)(1) of the Act. The Board reasoned above at 233:

On these facts, we conclude that the union representatives were not attempting to use the public snackbar in a manner inconsistent with its purpose. We do not consider Wright’s move to the table adjacent to his, in response to a question by an employee seated there, to constitute the sort of circulating “from table to table” which an employer may lawfully prohibit.¹ His conduct was in no sense “table hopping” or solicitation of employees table by table, and was not inappropriate in a public restaurant.

¹ See *Montgomery Ward & Company, Inc.*, 256 NLRB 800 (1981); *Marshall Field & Company*, 98 NLRB 88 (1952).

In *Harold’s Club*, the Board based its finding of a violation on the fact that the ejected union representative “did not move from table to table or interfere with on-duty employees in the vicinity.” In *Montgomery Ward*, 256 NLRB 800, 801, the Board noted that the unlawfully ejected union representatives were conducting prearranged appointments and “did not move from table to table, try to distribute literature, speak to employees who were not off duty, or in any other way create a disturbance.” And in the seminal case of *Marshall Field*, 98 NLRB 88, 94, the Board noted:

solicitation *seriatim* would basically alter those circumstances which differentiate the restaurant from the selling floors. Moreover, it would be incompatible with normal use of these facilities at the expense of Respondent’s business.

(The remaining cases cited in the relied-on *Montgomery Ward*, 288 NLRB 126 (1989), case, namely, *Dunes Hotel* and *Ameron Automotive*, above, deal only with the facial validity of nonemployee solicitation/distribution rules, and not specific conduct of organizers.)

The quoted passages make it clear that employers who operate restaurants that are patronized by both the public and its employees need not suffer the spectacle of union organizers, or anyone else, chasing employees around the restaurant, or “hopping” from table to table, to engage in uninvited solicitations or distributions.

In this case, the organizers made no claim of previously arranged appointments; and they freely admitted circulating from table to table and handing out unrequested literature

such as authorization cards. This technique of organization must be borne in mind as the specific acts of alleged interference by Respondent are analyzed.

January 29; Wards Corner; Paragraph 6. Dixon, in effect, admitted “table hopping in that he admitted leaving his seat and going over to a table where two employees were, handing them authorization cards, and asking them if he could talk to them about the Union. However, there is no evidence that Poyner witnessed this. Poyner testified that he saw an unnamed, on-duty employee standing at Dixon’s table when he approached Dixon and asked if Dixon had a right to do what he was doing.

Poyner did not explain why he considered the employee to have been on duty, and I do not credit his bare assertion that the employee, whom he did not (or could not) name, was on duty against Dixon’s identification of the apparent employee in question (Tynes) and his assertion that, while Tynes was a snackbar employee, she was on her break at the time. Therefore, even though the union representatives freely engaged in “table hopping,” and Dixon had done it (apparently immediately) before Poyner entered the snackbar, Poyner did not witness it, and did not rely on it when he ejected Dixon.

In summary, Dixon was not “table hopping” or engaging in other unprotected conduct at the time he was ejected by Poyner. Like Lois Johnson in the *Montgomery Ward* case, Dixon was conducting himself consistent with the normal use of the restaurant. Moreover, assuming the veracity of Poyner’s testimony that Dixon had previously solicited an employee on the sales floor, Respondent could lawfully have prevented only that type of activity. Poyner was not, however, licensed to interrupt Dixon after the union representative had gone to the snackbar and had begun conducting himself generally within a pattern of conduct typical of retail customers.

Accordingly, I find and conclude that, by Poyner’s ordering Dixon to leave upon threat of arrest on January 29, Respondent violated Section 8(a)(1) of the Act.

January 29; 21st Street; Paragraph 6. Dixon was “table-hopping” at the time he was approached by officer Walker; that is, he had gotten up from his table, gone to the back of the snackbar, and was attempting to solicit employees there when Walker and Adcock came up behind him. This “table hopping,” as discussed above, was unprotected activity, and Respondent had a right to eject Dixon (if not Hepner) at that point.

Moreover, I find that, although Walker did make a threat of arrest, Adcock and Walker immediately backed down when shown, apparently for the first time, the settlement agreement that spelled out the right of the union representatives to solicit nonworking employees in the snackbar. Adcock told them to “carry on” when he went to check (by telephone) with Fasciocco; and Walker simply sat down and chatted with employees. In other words, Hepner stood Adcock and Walker down; he told them emphatically that he and Dixon had a right to do what they were doing, and he told them (emphatically, I believe) that no one was going to jail that night. Then Hepner and Dixon sat down and did not leave the snackbar until they decided to do so on their own. Therefore, to any employee who observed the exchange, it would have appeared that Adcock backed down (even without the express apology claimed by Adcock).

In these circumstances, it appears that an immediate reputation was issued, and there could have been no coercive impact on the witnessing employees. Accordingly, I find and conclude that Respondent did not violate Section 8(a)(1) of the Act by the conduct of Adcock and Walker on January 29.

February 19; Southside Plaza; Paragraph 6. The credibility resolutions enumerated above preclude the finding of any violation of Section 8(a)(1) of the Act. Ricky Davis had the right to stop Frank Davis from distributing literature to working employees such as Donati, and he pursued a peaceful method of doing so.

March 2 and 3; Midlothian Store; Paragraph 6. Even if nonemployee Davis were credited, it shows that he simply ignored Store Manager Green on both days. Moreover, Davis did not claim that there were employee witnesses to the March 2 incident, he did not deny handing a union authorization card to employee Ginon White in the store aisle, and he was led to claim that Green spoke loudly enough for employees to hear on March 3. There is no coercive element shown by the credited testimony, and I find and conclude that the General Counsel has failed to prove violations of Section 8(a)(1) of the Act on March 2 or 3.

May 12; Wickham Avenue Store, Paragraph 5. The credibility resolutions on this issue preclude a finding of any violation of Section 8(a)(1) of the Act.

September 30; Main Street; Paragraph 5. Dixon testified that he and Metille were sitting in the snackbar when a female employee walked by carrying her coat and apron across her arm. Dixon did not dispute that she was, in fact, on the clock; he testified that he and Metille just did not know it.

An employee in the interior of a store, coat and apron in hand, is either on the way to work, or on the way out; but, in either event, she is on working time, either having just punched in or on the way to punch out. Therefore, Dixon and Metille had no reasonable basis to assume that the employee was not on working time.

Moreover, the union representatives were simply flagging down persons passing by and handing them unrequested literature. No one could argue that such conduct is within the general sphere of conduct expected of restaurant customers. Additionally, a specific problem with this tactic is that union representatives who employ it have no better than a one-in-three chance that each such solicitation will be protected. The persons snared may be (1) employees who are not on working time, but they may also be (2) employees who are, in fact, on working time (as was the case herein), or (3) they may be customers.¹⁹ This was the risk Metille assumed when he told the woman “excuse me” and, without request, distributed to her a union authorization card. Although Metille and Dixon were apparently willing to assume the risks inherent in flagging down unknown passers-by, there is no valid argument that Respondent was required to let them do so.

In summary, even assuming that they had no reason to believe that the employee in question was working, Metille and Dixon were venturing outside the sphere of protected non-employee activity when they employed the tactic of flagging

down persons passing their table for purposes of solicitations and unrequested distributions. This conduct is essentially indistinguishable from the “table-hopping” tactic that was held, in the above cases, to be unprotected. Therefore, Respondent could lawfully interdict such activity, as Sachs did.

Accordingly, I find and conclude that, by Sachs’ causing the union representatives to be removed from the snackbar on September 30, Respondent did not violate Section 8(a)(1) of the Act.

February 22, 1988; Smithfield Store; Paragraph 6. Dixon was not in the snackbar; he was in a selling/business area of the store, the front end, near the timeclock, when he greeted and shook hands with, and handed an authorization card to, an employee who was attempting to punch in. This non-employee conduct is obviously distinguishable from the snackbar/restaurant cases relied on by the General Counsel. A premise of such cases is that nonworking employees in restaurant areas are there as customers and the union representatives are in the restaurants as customers; their voluntary exchange cannot be interrupted by management on the premise that the employer’s property is being used for purposes inconsistent with those for which it was intended. Neither Dixon nor the employee was in the timeclock area of the store as a customer, and Dixon’s conduct was not of the nature expected of customers in that area of the store; customers do not usually stand around the cashiering/office area of a grocery store and greet, and handshake, others who happen by, be they employees or the general public.

Therefore, Gregory had the right, on behalf of Respondent, to stop such conduct. Dixon refused to respect this right, and he was told to leave. Dixon’s conduct was not protected, and I therefore find and conclude that, by Gregory’s conduct of February 22, 1988, Respondent did not violate Section 8(a)(1) of the Act.

(2) Surveillance and creation of the impression of surveillance

Maintenance of a surveillance log at Oyster Point; September 1, 1986, and thereafter. James did not testify, and the testimony of Hoadley is unrebutted. According to Hoadley’s testimony, before the merger, James told all supervisors that any time the union representatives came into the store the names of the employees to whom they spoke were to be recorded. James told the supervisors that the purpose of the log was “to keep up with the activity going on within the store.” After Respondent assumed ownership of the store (September 1986), James reaffirmed his instructions to the supervisors and stated that Respondent’s zone manager, Patterson, had emphasized that Respondent wanted “when there was activity within the store to have this logged down into the book. . . . Just whoever [Dixon] talked to, who he approached, what he may have done in the store.” The log was kept under lock and key, and there is no evidence that any employee saw it or saw any supervisor make any notation in it.

The General Counsel argues that employees need not know of conduct constituting surveillance for the employer’s conduct to be held violative, and there are cases that hold just that. However, each such case is premised on the conclusion that a given surveillance was one in which the employer had no right to engage. In this case, each act of surveillance

¹⁹ Distinguishing customers from employees was apparently not as simple as one might think. Dixon testified on cross-examination that one of the purposes of his frequent aisle-walks was “to see if there were any new employees that we hadn’t noticed before—identify them when they came to the snackbar.”

memorialized in the Oyster Point log was of open and obvious activities on Respondent's property involving non-employee union representatives. This was not unlawful surveillance. As stated by the Board in *Chemtronics, Inc.*, 236 NLRB 178 (1978), quoting, in turn, *Milco, Inc.*, 159 NLRB 812, 814 (1966):

[U]nion representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them.

This indisputable logic was specifically applied to an essentially similar retail sales and snackbar setting in *Adams Super Markets Corp.*, 274 NLRB 1334 (1985). In that case the Board held that management had a right to follow non-employee organizers (who were accompanied by bargaining unit employees) around the subject grocery store, sit in an adjacent snackbar booth and watch them, and then follow and watch them as they left the store (again, accompanied by bargaining unit employees).²⁰

The General Counsel advances no argument of why Respondent's agents should have been barred from making discrete notes of what they could lawfully observe.²¹ I therefore reject the contention that the maintenance of the Oyster Point log constituted a violation of Section 8(a)(1) of the Act, and I shall recommend dismissal of this allegation of the complaint.

Surveillance; February 3; West Mercury Blvd. Hepner and Dixon were followed around the store and then watched closely by Briley as they sat in the snackbar. The General Counsel does not contend that Briley's following the union representatives around the store was unlawful, but does contend that Briley had no right to watch Hepner and Dixon so closely in the snackbar. *Adams Supermarkets*, above, precludes a finding of a violation in Respondent's conduct in this instance. Moreover, Hepner and Dixon were flagging down employees, introducing themselves, and asking the employees to accept literature that the employees had not requested. This, according to the principles of the above-cited cases was unprotected conduct, and the Union cannot complain that Briley watched it, even closely, in progress. Accordingly, I shall recommend dismissal of the allegation that by Briley's conduct of this date Respondent violated Section 8(a)(1) of the Act.

Surveillance; February 26; Kempsville Road. The union representatives spoke to no employees that day, and there is no argument by Respondent that they engaged in any unprotected conduct. They, like any other customers, had a right to sit in the snackbar without being surrounded by arms-crossed, glaring (it is safe to assume) men.

The close presence of the four standing, arms-crossed, agents of Respondent would necessarily have had a coercive impact on any employee who might have wanted to communicate with the union representatives. Four of such agents, standing close by, arms-crossed, would convey to employees more than an impression than that supervisors were simply,

²⁰ The General Counsel recognizes *Adams Super Markets* in the brief, but attempts to distinguish it on the basis of cases that include visible note taking and acts of *sustained* surveillance of activity that was taking place *outside* an employer's store.

²¹ Briley acknowledged making such notes, and there is no allegation that this was unlawful.

lawfully, watching what was going on in public (as was the case of the supervisor who sat in the booth next to the organizers in *Adams Super Markets* and in the cases of many other instances herein). The employees would have concluded only that the managers were there to keep the organizers from talking to employees, and that the employees should stay away.

Therefore, had management responsibility been shown, I would conclude that, under the guise of lawful surveillance, Respondent interfered with its employees' right to communicate with nonemployee organizers by posting, or suffering or permitting to be posted, its agents closely around the organizers who were lawfully conducting themselves as customers in Respondent's Kempsville Road snackbar on February 26; and by such conduct, Respondent engaged in an act of surveillance that violated Section 8(a)(1) of the Act.

However, no such agency, or management responsibility, has been proved. The General Counsel contends that the four men were proven to be department heads because they wore ties²² and had name tags. However, all male employees were required to wear ties, and Green's testimony that even assistant department heads wore the name tags was un rebutted.

Even assuming that the four unidentified men were department heads, there was no stipulation, and no reason to conclude, that all department heads were supervisors within Section 2(11) of the Act. Also, while a case of agency could possibly have been made had the General Counsel shown that the store manager or some other supervisor witnessed the event, such proof is missing here. Of course, there is the suspicion that no four persons could engage in such conduct without management knowledge, much less sponsorship or approval, but the suspicion is not evidence.

Due to the failure of proof in this regard, I am constrained to conclude that the General Counsel has not proved a violation of Section 8(a)(1) of the Act by the conduct of the four unidentified men.

Surveillance; February 26; Merrimac Trail. Andriuk admitted coming to the store provisioned with literature to distribute. Although she denied that she distributed literature to any employees until after she sat down with them, she did not claim to have appointments with any employees.

I believe, and find, that Andriuk came to the cafeteria to "approach" (Dixon's word) employees, and that she and Dixon intended to do so by table-hopping or flagging, because they had no appointments with any employees and this was the usual method of operation of the Union in this campaign. Although there is no evidence that they used the literature for table-hopping or flagging on this occasion, there is credible testimony, by Sheedy, that the union representatives passed out the literature to persons at all tables, including one at which a customer was seated.

This conduct was no more protected than table-hopping or flagging, and the union representatives cannot here complain that Sheedy kept them under surveillance after they did it.²³ Accordingly, I shall recommend that this surveillance allegation be dismissed.

Surveillance; March 2; Merrimac Trail. The first thing to be noticed about Dixon's testimony is that he nowhere states that Sheedy watched him, or even looked his way, while

²² Kent, a bagger, got a written warning notice for not wearing a tie, and the General Counsel does not contend that the notice was violative.

²³ See also *Adams Super Markets Corp.*, above.

Dixon was in the snackbar. Assuming that Sheedy did so, it is to be noted that there Dixon had patrolled the store, buying nothing, and introducing himself to employees and informing them that he would be around. This is not a course of conduct consistent with that of retail customers. Sheedy would have had no more reason to believe that Dixon was going to conduct himself any more properly in the snackbar than Sheedy had witnessed on the selling floor. Moreover, Sheedy would not have been unreasonable to conclude that Dixon was there for more than protected solicitations by Dixon's admitted nursing of a single cup of coffee for 2-1/2 hours.

In these circumstances, I find and conclude that, by Sheedy's conduct of March 2, Respondent did not violate Section 8(a)(1) of the Act.²⁴

Surveillance; March 18; Merrimac Trail. When Andriuk and Dixon went to the snackbar at lunchtime, they assumed the risk that supervisors would be there, as they had a right to eat lunch. Andriuk acknowledged that, about 12:15 p.m., Sheedy and Gilbert did, in fact, order meals. Sheedy and Gilbert undoubtedly watched what was going on before them before they started eating, as they ate, and after they ate. The General Counsel apparently contends that, while the supervisors may have a right to eat lunch like anybody else, they should not have paused before eating, or lingered afterwards. However, if the Union is going to claim the right to nurse a cup of coffee for 2 hours or so, as it does herein, it is ill-positioned to complain if supervisors pause a bit before, during, or after they eat their lunches in the same places.

I find no violation of Section 8(a)(1) of the Act, and shall recommend dismissal of this allegation.²⁵

Surveillance and attempted confiscation of union literature; April 2; Merrimac Trail. My credibility resolutions above preclude a finding of a violation of Section 8(a)(1) of the Act in any attempted confiscation of literature.

Moreover, no violation of the Act occurred when Sheedy and Gilbert, for whatever reason, followed Dixon into the restroom. It is undisputed that no employees were in the restroom when Sheedy and Gilbert entered; nor is there any evidence that Sheedy and Gilbert even believed that there were any employees in the restroom. Therefore, it is clear that they were not there for purposes of surveillance; and there is no reason to believe that any employee witnessed anything that would have a coercive impact on employees.

Accordingly, I shall recommend dismissal of this allegation of the complaint.

Surveillance and creation of the impression of surveillance by posting of a notice; spring of 1987; West Mercury Blvd. The General Counsel contends that the memorandum of April 10, 1986, which was posted in the spring of 1987 at the smaller of Respondent's two Mercury Blvd. stores, contains an unlawful instruction to employees to spy and report on other employees. The memorandum, quoted above, contains no such instruction. It is addressed to managers only, and it asks the employees to do nothing; nor does it ask or instruct supervisors to do anything unlawful.

The General Counsel contends that the posting of the memorandum would convey to employees the impression that "all" of their union activities are being kept under sur-

veillance. This is not so; only the actions of nonemployee organizers trigger operation of the memorandum, and then only when the actions are on the premises. Activities of organizers elsewhere, and activities of employees, by themselves, anywhere, are not touched by the memorandum.

In essence, therefore, the General Counsel is contending that, while an employer may instruct its supervisors to engage in lawful surveillance (as was done here), it may not tell its employees that it has done so. There is no logic or authority for such a proposition, and, accordingly, I shall recommend that this allegation of the complaint be dismissed.

Surveillance; November 30; Suffolk. Dixon testified that he sat in the snackbar for 30 to 45 minutes. No one came in except Store Manager Sachs, who came in twice. Sachs sat down and looked at Dixon both times. Nothing was said.

Dixon did not testify that he purchased anything before sitting down. Therefore, the General Counsel has failed to show that Dixon was there as a customer and, on the above-cited cases, he could have been ordered from the store. Sachs did not order Dixon from the store; Sachs did nothing.

So, what we have here is a picture of Dixon sitting at a table, without having purchased any coffee to nurse for hours-on-end as he so often did, and Sachs looking at Dixon and Dixon looking at Sachs, with no employees around, and no one saying anything. In this picture there are no union activities to surveil, and there are no employees around to be impressed with the notion that Respondent is conducting surveillance.

There is no violation established in these circumstances, and I shall recommend dismissal of the allegation.²⁶

(3) Interrogation

I credited Bement's testimony that polygraph operator Melody asked her, before hooking her up to the polygraph machine, if she had heard anything about what was "going on" in the store, and, specifically, if she had heard anything about the Union, and if she had met with anyone from the Union, and if she had signed an authorization card.

Although Bement had met with the Union at the store's snackbar, and was not reticent about her sympathies for the Union, this is hardly the case of an open and obvious supporter being engaged in noncoercive discussions. The specter of a polygraph examination is sobering to the point of causing fear. Although the interview took the form of an interrogation, it could hardly have been less than coercive in impact than an explicit threat to job security. In sum, if an employer wanted to scare an employee, a polygraph examination would be an effective way of doing it.

Therefore, I find and conclude that the interrogation of Bement was violative of Section 8(a)(1) of the Act.²⁷

b. Discharges of Carter and Kent and directly related alleged 8(a)(1) violations

(1) Events of February 25, 1987

Fasciocco's testimony that he remained late at the store on the night of February 25 to make sure that management personnel would not "do anything that would cause any kind of violation" is one of the most preposterous lies that this

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ *Southwire Co.*, 282 NLRB 916 (1987).

administrative law judge has ever been required to sit and listen to. Fasciocco was there to do exactly what he did: watch the union representatives and anybody who approached them in the snackbar. I further find that, as he did so, he carried with him a pen or pencil, and a writing pad, as Carter, Kent, and Hepner testified. I further believe the testimony of Kent and Carter that Fasciocco made notes while in their vision.

I further believe true the testimony of Hepner and Kent that Fasciocco walked deliberately by their table and stared at the union authorization card that Kent signed that night.

I further believe to be true the testimony of former employee Robinson that Fasciocco spent a good part of his time in the produce department, staring into the snackbar, while the union representatives were attempting to solicit cards from employees. I also believe Robinson's testimony that Fasciocco was still there when Robinson got off at 8 p.m., and that Fasciocco testified falsely when he stated that he left that night at "around 6:30, 7 o'clock."

I believe Fasciocco's testimony that he told Wood to "just make sure the cashiers and baggers stay up front and do their jobs."²⁸ However, I do not believe that Fasciocco believed that the union representatives were gone when he said it. Robinson left at 8 p.m., and Fasciocco was still there, conducting surveillance (or, if you believe him, making sure that no supervisor committed any violations).

I do not believe Carter's testimony that Fasciocco, in haec verba, told Wood to keep cashiers and baggers out of the snackbar while the union representatives were present. However, Fasciocco's instruction to Wood, which was overheard by Carter, to "just make sure the cashiers and baggers stay up front and do their jobs," given at the time that the union representatives were still in the store, would have had the same effect. Neither Wood nor Carter could have missed the message: keep everybody at the front until they are gone.

Carter testified that he also heard Fasciocco tell Wood to keep a list of all employees who went to the snackbar "and they would be 'terminated.'" I did not believe this testimony when I heard it, and I do not believe it now. The premise of Carter's testimony in this regard is almost oxy-moronic: Fasciocco would have been telling Wood not to let any one go back to the snackbar while the union representatives were there, but, if any employee did take a break in the snackbar (contrary to the instructions which Wood would give them), Wood should keep a list so that Respondent would not forget who to terminate. Although violative threats are not always expressed in logical form, they usually make more sense than that.

Moreover, there is no evidence that Fasciocco, or any other of Respondent's supervisors, were disposed to discharge any employee simply because they took a break in a snackbar at the same time a union representative was there, much less talking with a union representative in a snackbar, sitting with one, or signing a union authorization card. But, assuming that such a malicious disposition existed, I doubt that Fasciocco would have announced it ("very clearly," as Carter testified, or otherwise) in front of Carter or any other

²⁸ I do not believe Fasciocco's testimony that, nightly, for 3 years, he told front-end supervisors, like Wood, to keep "baggers bagging, cashiers cashing." Any conscientious supervisor, as Wood appeared to be, would have been insulted if Fasciocco had said it once.

employee. Fasciocco did not impress me with his veracity; but he seemed smarter than to do that.

Finally, if such a malicious disposition did exist, evidence thereof would have surfaced somewhere, sometime during this multiyear organizational campaign, and it would have appeared in the form of testimony by someone other than one who just happened to be discharged immediately after hearing it. That is, it just seems too incredible to me that, of Respondent's 6000 to 7500 employees, the only one to hear such an undiluted threat to discharge was one who was, in fact, discharged within 48 to 72 hours.²⁹ Although theoretically Carter's testimony that he heard Fasciocco tell Wood that any employee who went back to the snackbar while the union representatives were there would be terminated.

I therefore find and conclude that Fasciocco followed employees and union representatives around the store with note pad in hand, writing, in a fashion that would lead employees to believe that their protected union activities were under surveillance, and that by this conduct, Respondent violated Section 8(a)(1) of the Act.³⁰ I also believe that Fasciocco conducted surveillance of employee activity when he walked by the snackbar table occupied by Kent and Hepner and took a good look at what Kent had signed, the union authorization card, and I find and conclude that this action constituted an independent violation of Section 8(a)(1) of the Act.

The complaint, paragraph 21, also alleges that, in violation of Section 8(a)(1) of the Act,³¹ Fasciocco and Wood denied employees their breaks on February 25. Although Fasciocco told Wood to keep the baggers and cashiers at the front of the store while the union representatives were in the store, there is no evidence that Wood followed the instruction, except in regard to Kent, and there only to a certain extent.

Assuming the truth of Carter's testimony, it shows only that his break was delayed, not denied, for a time while the union representatives were in the snackbar. Even according to Carter's testimony, he was permitted to go to the snackbar on February 25, and he got the permission while the union representatives were still there.

However, I do not believe Carter's testimony that Wood would not let him take a break until 9 o'clock that evening. Carter was certain that he relieved Kent; Kent testified that he went on break at 7:30 p.m. The testimonies cannot be reconciled.

Additionally, the week's work schedule shows that Carter was scheduled to work from 3 until 9 p.m. Carter testified that he arrived at 3 p.m. and worked until about 9 p.m. when

²⁹ Two other alleged threats to discharge do appear in the presettlement case. Employee Prentiss, with copious leading, testified to a veritable litany of violations uttered by Respondent's Arrowhead Center store manager, Harmon, in March 1986. Harmon testified and credibly denied all such allegations. The other threat is alleged to have been made by Department Manager Kathy Austin at a Richmond store, also in March 1986. Austin testified that she told employee Cindy Castro that she could be fired for discussing the Union in the store. Austin and Castro were close personal friends, and Austin clearly made the statement as her own estimation of things. Although this may not preclude a finding of a violation, it substantially erodes any argument that Austin spoke knowingly, and authoritatively, of Respondent's policy on the issue.

(Hoadley's threat to employees at the Oyster Point store, as quoted above, was made before Respondent bought the store.)

³⁰ See *W. T. Grant Co.*, 195 NLRB 1000 (1972), in which visible note taking rendered unlawful surveillance of public activity on an employer's property.

³¹ No 8(a)(3) allegation is made in this regard.

Wood asked him to work until closing at midnight; Carter testified that he agreed and that he did work until closing at midnight. However, Carter's timecard shows that, while he arrived at work at 3 p.m., and he punched out at 9:07 p.m., he did not punch back in that day. Of course, he would have punched back in if he had punched out at 9:07 p.m. only for a break. That is, the time records show that Carter took no break at all on February 25. (The same records do show when other employees took breaks that day.)

It is absolutely incredible that Carter would have worked until midnight and not claimed 3 hour's pay by not punching out before he left for the day, and I do not credit his testimony that he forgot. If he had worked from 3 p.m. to midnight, and did "forget" to punch out, he would have, at least, demanded his rightful pay subsequently when he got his final check. According to this record, he did no such thing.

I believe that the time records accurately reflect the hours that Carter worked that evening. I believe that, while the union representatives were in the store, Carter heard Fasciocco tell Wood to keep baggers and cashiers at the front. Carter, either because he heard this, or because he did not want to lose 30 minutes of pay, did not even ask for his unpaid break. He punched out at 9:07 p.m. and went to the snackbar where he signed the union authorization card; then he left the store. This is why his time record shows no punchin after 9:07 p.m., and no punchout near midnight.

Therefore, while it could be inferred that Carter did not attempt to go on his break because he heard Fasciocco's instruction to Wood, it is equally inferable that he did not take his break to avoid losing one-half hour's pay. In this circumstance, there is no proven violation of the Act.

Kent did, however, lose part of his break that night when Wood called him back to the front to do little more than stand around and talk. However, there is no evidence that Kent knew why he was then called back to the front. There is also no evidence that any other employee was denied any part of a break because of Fasciocco's instruction to Wood to keep cashiers and baggers at the front, and there is no evidence that any other employee knew at the time that Kent's break could have been shortened-by the instruction from Fasciocco to Wood. Finally, because Kent was entitled only to an unpaid break, loss of only part of this unpaid break was, at most, only a de minimis violation, and will not support an order herein.

(2) The discharges

I am thoroughly convinced that Respondent's stated reason for the discharge of Carter is a complete sham.

I agree with the General Counsel that Hilber, Franklin, and Fasciocco concocted the "absolute liability for shift-replacements" rule and that they did so because Carter violated none other. The reasons I believe that the "rule" was created post hoc are many:

a. Although there is no duty on Respondent to be generally "fair," the unfairness of any rule of absolute liability for the appearance of shift replacements is so blatant that it naturally renders its (disputed) existence suspect.

b. Although Respondent has reduced other rules (such as the "one no-show" rule) to writing, it did not

do so in regard to this one. There is no testimonial corroboration either, except from the supervisors directly involved; certainly there is no evidence, or even contention, that any employee, other the Carter, was ever discharged under the absolute liability rule.³²

c. Carter's shift replacement was a no-show, but he, according to this record was not disciplined. Hilber acknowledged that that employee would have been a "no-show" why he would not have been disciplined under the "one no-show rule" was not explained. (Hilber testified that the shift replacement may have already quit; if that had been so, the question immediately arises: why would Franklin have given permission to Carter to swap with an employee who, at least by the time of the shift, was no loner employed?)

d. Neither Hilber nor Franklin could name the shift replacement; the obvious reason is that he did not exist, except in the scenario manufactured by Hilber and Franklin.

e. Respondent's records support Carter, not Hilber, Franklin, Adcock,³³ or Fasciocco. Carter testified that he was scheduled to work on Friday, February 27; that is what the records show. Carter testified that he arrived late and that Adcock would not let him punch in; the records show that he did not punch in on that date. If Carter's testimony that he called in on Friday and gave a valid excuse³⁴ were not true, then he would have to have been a "no-show" under Respondent's "one no-show" rule. And if his testimony about the Friday telephone call with Hilber had been untrue, Carter would have been fired for missing his shift on Friday; he would not have been given a chance to risk the Saturday nonappearance of his (phantom) shift replacement. Hilber was given full opportunity to explain how Respondent's records could indicate that Carter was a "no-show" on February 27, but nothing was then done about it (like firing him under the "one no-show" rule). However, Hilber could not explain, and Respondent attempts no explanation in its extensive brief.

Assuming that the "absolute liability for shift replacements" rule did exist, Carter was not fired for violating that rule, or any other, on Saturday, February 28. Adcock testified that Hilber told him: "[Carter] probably would be coming in at five to work, and [she] told me to tell him not to punch [in]." Hilber testified that, because neither Carter nor his replacement had appeared for Carter's Saturday shift, she told Carter that he was fired; she further testified that she did so after the shift had "come and gone." However, Respondent's records show that the shift Carter was originally scheduled to work was from 10 a.m. until 6 p.m. If Carter's Saturday shift, from 10 a.m. to 6 p.m., had "come and gone" when Hilber fired him, Hilber would not have told Adcock that Carter "probably would be coming in at five to work."

³² Fasciocco's quoted testimony shows that he did not exactly know what the absolute liability for replacements rule was, but he was absolutely sure that "Warren Carter was aware of it, and he knew it."

³³ Adcock was clearly a part of a scheme of false testimony; he had hardly taken the oath when he twice volunteered that the day that Carter had failed to appear was a Saturday.

³⁴ As discussed below, Carter testified that he told Hilber that he had been involved in an accident, and Hilber and Fasciocco acknowledged that such was a valid excuse for late appearances.

The only way to reconcile the testimonies and Respondent's records is that, while Adcock lied about when his conversation with Hilber occurred, he told the truth about what she said; the conversation between Hilber and Adcock occurred on Friday, the date Carter was to appear at 4 p.m., according to Respondent's own records. Therefore, Carter told the truth; on Friday, February 27, Hilber told him that he would be fired if he were not there within an hour; he was not there within an hour, and Adcock would not let him punch in. That was a discharge on that date, and the entire theory of a Saturday discharge is premised on false testimony.³⁵

Nor can Respondent argue that Carter was fired pursuant to the "one no-show" rule. Carter was not a "no-show." He was late when he called Hilber sometime before 5 p.m.; and he was late, quite late, by 7 p.m. when he attempted to punch in; but he was still not a "no-show"; the shift had 4 hours to go. But even if he were considered such, the General Counsel has proved that the "one no-show" rule would not have applied to Carter.

After first flatly testifying that there were no exceptions to the "one no-show" rule, Hilber acknowledged that exceptions were made for employees who gave "some sort of notice." The notice would be acceptable if it entailed "something beyond their control such as they were in an accident" and if it were given "prior to their shift or some time close to their shift beginning." Fasciocco, himself, testified that if Carter had called in, as Carter claimed, that would have been taken into account and, "maybe," Carter would not have been fired.

Given these admissions, it becomes clear regarding why the supervisors felt constrained to manufacture a totally different theory about why Carter was fired. Carter was, essentially, fired on the spot when he told Hilber, on February 27, that he would be late because of an automobile accident. Respondent invoked the "excessive tardy" defense thereafter until, at least, March 15, when Fasciocco filled out the employee status report listing that reason for discharge. Because Carter had had only one other tardy report in his file, Respondent's supervisors obviously realized at some point that the excessive tardiness defense would not withstand scrutiny. Therefore the "absolute liability for replacements" rule was created to attempt justification.

Although the General Counsel has demonstrated that the defense on Carter was a sham, she has not done this in the case of Kent. Wood acknowledged that an employee who misreads his schedule might get a "break" from Hilber and Kent was given none. However, Kent did not claim to Hilber that he had misread his schedule, or that another employee, like Knill, had misinformed him of the day he was next to report to work. In fact, even according to his own account, Kent said nothing when Hilber accused him of failure to appear for his scheduled shift. The General Counsel introduced cases that could have been considered "no-shows" under the rule as stated by Hilber and Fasciocco. However, in only one case does the record show that the employee did not offer

an acknowledged excuse.³⁶ Here, again, Kent offered no excuse for missing his scheduled shift.

However, assuming that the General Counsel proved lack of merit to the defenses on both discharges, this does not end the inquiry. The General Counsel must first prove a prima facie case before the defense, or lack thereof, becomes an issue.³⁷ Here, the General Counsel has done this neither in the case of Carter nor Kent.

Fasciocco's surveillance of February 25 is enough to prove knowledge, or at least a suspicion, of union sympathies, if not membership, on the part of both Carter and Kent. But the General Counsel must also show animus, or proof that Respondent was motivated to discharge the alleged discriminatees because of their known or suspected union activities or sympathies.

The union activity shown here was the same degree and kind that many, many others of Respondent's employees had demonstrated; they also met union representatives in Respondent's snackbars and, presumably, signed cards. In fact as many as six others signed cards the same evening, according to Hepner's testimony. Those others, and others who were known to have been active in soliciting cards themselves, suffered no alleged discrimination.

The General Counsel points to nothing that would cause Respondent to single out Kent and Carter for the ultimate in labor relations punishment—discharge. There is no reason to conclude that Respondent thought Kent or Carter had been or would be, any more active than others who had signed cards for the Union. Therefore, while the General Counsel has shown some known union activity on the parts of Kent and Carter, the degree of that activity is, at best, minimal, and there is no reason to conclude that Respondent regarded that particular (minimal) activity with animus.

Moreover, while the General Counsel has shown that a certain level of hostility toward unionization in general was harbored by Respondent, there is no evidence that would tend to show that Respondent had any predisposition to discharge employees for union activity or membership. As noted above, footnote 29, the only alleged threat to discharge by one of Respondent's supervisors was one spoken between close friends and clearly was made as, and would have been received as, a personal opinion. The other violations proved, at least since the settlement agreement, were directed at outside union organizers, with the singular exception of the interrogation of Bement. That is, there is no evidence "strong enough to support a conclusion that Respondent was willing to violate the law by discriminating against employees, in order to keep the Union out."³⁸

Therefore, while one can suspect that Kent was discharged for reasons other than those stated by Respondent, and one can be absolutely certain that the reasons stated for Carter's

³⁵This would explain why Hilber could not explain why Respondent's records showed that Carter was scheduled to work on February 27. He did not work on February 27, nothing was done about it, and he was still expected to be there on February 28 or have a replacement for that date.

³⁶The one exception was offered through the testimony of grocery department employee Robinson who testified that he just told his department head that he had needed some time off. There is no evidence that Hilber, Fasciocco, or any other of Respondent's higher management knew of this; moreover, the General Counsel's reliance on this one instance is an argument that the exception makes the rule.

³⁷See *Wright Line*, 251 NLRB 1083, enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 395 (1983).

³⁸*Raysel-Idé, Inc.*, 284 NLRB 879 (1987), citing *Fabracan Corp.*, 259 NLRB 161, 171-172 (1981).

discharge are false, a violation of the National Labor Relations Act simply has not been proven in either case.³⁹

Accordingly, I shall recommend dismissal of the allegations that Kent and Carter were discharged in violation of Section 8(a)(3) and (1) of the Act.

C. Reinstatement of the Settlement Agreement

Respondent contends that it committed no unfair labor practices after signing the settlement agreement of December 24, 1986, that it was an error for the Regional Director to have set aside the agreement, and that the Board should not consider any of Respondent's presettlement conduct as a basis for the finding of any violations of the Act.

I have found some instances of violative conduct; however, the Board has never held that proof of any postsettlement violations will require the nullification of settlements. On the contrary, as stated in *Porto Mills*, 149 NLRB 1454, 1470 (1964):

The Board has repeatedly held that "findings of unfair labor practices can properly be made on the earlier conduct only where there is evidence of substantial unlawful conduct following the settlement agreement, for evidence of isolated and minor incidents will not justify the Board in going behind the settlement agreement." *Baltimore Luggage Company*, 126 NLRB 1204, 1208. See also *Rice-Stix of Arkansas, Inc.*, 79 NLRB 1333, 1334, 1337; *Jackson Manufacturing Company*, 129 NLRB 460. Accord: *Lincoln Bearing Co., et al. v. NLRB*, 309 F.2d 692, 695 (C.A. 6).

Of course, just what may qualify as "minor and isolated" necessarily depends on the context of each case.⁴⁰

I have recommended dismissal of the two alleged violations of Section 8(a)(3) of the Act, the discharges of Kent and Carter, and I have further recommended dismissal of all but the following allegations of Section 8(a)(1) of the Act:

1. The January 29 ejection from the Wards Corner store of Union Representative Dixon by Respondent's produce manager, Poyner.
2. The February 16 interrogation of employee Bement by independent (lie detector) contractor Melody, at the presumed instance of Warwick Blvd. Store Manager Mingee.

³⁹ I believe the real reason that Carter and Kent were discharged was because, independent of their union activities or membership, Hilber hated Carter and did not like Kent very much; she considered them both lazy, and viewed Carter's tardiness and Kent's absence to be vehicles to get rid of them; and that is what she did. Had she told the truth on the matter, her employer would have been saved a great deal of legal fees, and neither Fasciocco nor Adcock would have been called on to support her with false testimony.

⁴⁰ As stated by the Board in *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980):

In deciding whether or not to give effect to or rescind settlement agreements, the Board has long held the issue "cannot be determined by a mechanical application of *a priori* rules, but must be determined by the exercise of a sound judgment based on all the circumstances of each case." *The Ohio Calcium Company*.⁴

⁴ 34 NLRB 917, 935 (1941); *Rathburn Molding Corporation*, 76 NLRB 1019, 1030 (1948). See also *Superior Tool & Die Co.*, 132 NLRB 1373, 1397 (1961).

3. The February 25 surveillance and impression of surveillance by Respondent's 21st Street store manager, Fasciocco.

Thus, the ultimate issue before the Board becomes: would it effectuate the purposes of the Act to set aside the December 26, 1986 settlement agreement because of this conduct by Respondent?⁴¹

Respondent has approximately 52 retail grocery stores in the Richmond-Norfolk area, employing between 6000 and 7500 nonsupervisory employees at a time. Respondent has several layers of management above the store manager level, and there is no evidence that any higher level management had anything to do with the violations found.

As well as there being 50 other store managers such as Fasciocco and Mingee, there are hundreds of department heads such as Poyner. None of those others have been found to have committed postsettlement violations, and relatively few others have even been accused of unlawful conduct during the approximately 20 months that the campaign has been conducted (with vigor) since the settlement was approved by the Regional Director.

Although the interrogation of Bement was a serious violation of the Act, the conduct has not recurred in the approximately 1-1/2-year period from the incident to the close of the hearing. Although the union representatives have made hundreds of visits, lasting from minutes to hours, nursing coffee to the point of loitering or caffeine overdose, strolling (and sometimes strewing) the aisles, and sometimes soliciting working employees,⁴² this record shows only one unlawful ejection and one unlawful instance of surveillance in the 20 months of the postsettlement campaign.

Therefore, even if all three postsettlement violations were to be considered serious, they are necessarily isolated; and while the settlement agreement has not achieved perfect compliance, it has been effective in safeguarding the statutory rights of the employees. I accordingly conclude that it would best effectuate the policies of the Act to reinstate the settlement agreement of December 24, 1986, and I shall recommend that the Board do so in its Order.

CONCLUSIONS OF LAW

1. The Respondent, Farm Fresh, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Food and Commercial Workers Union, Local 400, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by interrogating an employee, by threatening arrest of a union representative who was lawfully conducting himself on Respondent's premises, and by conducting surveillance and creating the impression of unlawful surveillance of union representatives and off duty employees.

⁴¹ *Ohio Calcium Co.*, above at 917.

⁴² In addition to the instances made the subject of allegations discussed infra, note that even the General Counsel's witness, Robinson, testified that, on February 25, the union representatives were passing out "those little cards" to working employees.

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

5. The General Counsel has failed to prove any other of the postsettlement violations alleged in the complaint.

6. The settlement agreement of December 24, 1986, in Cases 5-CA-17940 and 5-CA-18407, is still in effect.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom.

[Recommended Order omitted from publication.]