

**Consolidated Printers, Inc. and Graphic Communications Union, Local No. 583, Graphic Communications International Union, AFL-CIO.**  
Case 32-CA-11202

January 8, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On January 30, 1991, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief and an answering brief to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Consolidated Printers, Inc., Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) of the Act by laying off employees after the election.

<sup>2</sup> In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) when it laid off employees during the week of the election, we do not interpret the decision as requiring the General Counsel to establish the precise date the Respondent made its decision to lay off the employees. Rather, based on the facts presented, the judge reasonably concluded that the decision was made prior to the time the Respondent was obligated to bargain with the Union. We find that the record supports that inference.

*Gary M. Connaughton, Esq.*, for the General Counsel.  
*Samuel L. Holmes, Esq. (Holmes, Rochester, & Lea)*, of San Francisco, California, for the Respondent.  
*William Sokol, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on October 29 and 30, 1990, in Oakland, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 32 of the National Labor Relations Board (Board) on July 19, 1990, based on a charge filed on June 15, 1990, and docketed as Case 32-CA-11202 by the Graphic Communications Union, Local No. 583, Graphic Communications International Union, AFL-CIO (the Charging Party or the Union) against Consolidated Printers, Inc. (Respondent or the Employer). Posthearing briefs from the General Counsel and Respondent were submitted on December 18, 1990.

The complaint alleges that Respondent's agent Garrison made various statements to employees in early 1990 violating Section 8(a)(1) of the National Labor Relations Act (Act). The complaint further alleges that Respondent in May 1990 "began a series of employment layoffs and recalls" of employees. The complaint alleges that Respondent took this action because of employees' union and other protected activities in violation of Section 8(a)(3) and (1) of the Act. The complaint further alleges that these actions were taken without Respondent giving the Union notice of or an opportunity to negotiate and bargain respecting either the actions or their effects in violation of Section 8(a)(5) and (1) of the Act.

Respondent in its answer denies that it engaged in the conduct alleged to independently violate Section 8(a)(1) of the Act. Further Respondent avers that it initiated the relevant employee layoffs and recalls in response to economic conditions and for reasons independent of employees' union or other protected activities and therefore did not violate Section 8(a)(3) and (1) of the Act. Respondent further contends it had no obligation to notify and bargain with the Union respecting these actions and therefore did not violate Section 8(a)(5) and (1) of the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following<sup>1</sup>

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is a California corporation, with an office and place of business in Berkeley, California, where it is engaged in the business of nonretail production printing and binding. Respondent during the 12 months preceding the issuance of the complaint herein, a representative period, in the course and conduct of its business operations, purchased and received at its Berkeley facility goods and materials valued in excess of \$50,000 directly from sources outside California.

<sup>1</sup> As a result of the pleadings and the stipulations of counsel at trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

There is no dispute and I find that Respondent at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

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

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *Background*

Respondent produces books and other printed material in Berkeley, California. It has two departments, a print shop and a bindery. Respondent admitted the supervisor and agent status of Robert Prouse, owner, Alex McGuire, plant manager, and Jim Garrison, bindery department supervisor. Bindery department employees had not recently been represented by a labor organization. In early 1990 the Union commenced an organizing campaign among Respondent's bindery employees.

The Union filed a representation petition docketed as Case 32-RC-3244 on March 26, 1990.<sup>2</sup> An election in the representation case was held on May 23, 1990, in which a majority of votes were cast for the Union. The Union was subsequently certified by the Regional Director as the exclusive representative of employees in the unit set forth below. The complaint alleges and the answer admits that the Union, by virtue of Section 9(a) of the Act, has been at all times since May 23, 1990, the exclusive representative of employees in the following unit (the unit):

All bindery department employees, including maintenance mechanics, truckdrivers, bailers, shipping clerks, janitors, and all other production employees not covered by a collective bargaining agreement, employed by Respondent at its Berkeley, California facility; excluding all employees covered by a collective bargaining agreement, office clerical employees, guards and supervisors as defined in the Act.

### B. *Allegations of Independent Violations of Section 8(a)(1) of the Act*

The General Counsel's complaint at paragraph 6, as amended at the hearing to add and delete certain allegations, attributes to Respondent's bindery department supervisor Jim Garrison statements to employees during the months of February, March, and May 1990 which are alleged to violate Section 8(a)(1) of the Act.

#### 1. The evidence

Michael Fitzgerald, a former employee of Respondent hired in the bindery department in August 1988, testified that he had several conversations with Bindery Department Supervisor Jim Garrison respecting the Union in the shipping department area in February or March 1990. Fitzgerald testified:

Usually [Garrison] asked if I had heard about anybody passing out union cards, that the union was—someone

was trying to get the union in, and if I had signed a card or heard rumors about people signing cards.

I said no, that I haven't signed a card, but I hadn't heard rumors—I had heard rumors about it.

Fitzgerald also testified that on May 15, 1990, Garrison approached him and employees McLark, Glomski, and Ashby as they were sitting at a lunchroom table. Fitzgerald described the event as follows:

Jim [Garrison] . . . said that if the union got in, people were going to be hurting and they were going to need jobs, and that the union did not guarantee anything, they couldn't guarantee jobs and they couldn't guarantee anything. They made promises but couldn't guarantee anything.

To which I don't believe anybody else said anything except Randy Ashby, after [Garrison] said that people need jobs, Randy said that he would go sell homes, seeing as he was getting his real estate license or had it at that time.

Fitzgerald testified that he was present at a conversation between Garrison and employee Salvador Avalos on May 17, 1990. Fitzgerald testified:

I heard Jim Garrison tell Salvador that if the union got in, all the Mexicans would be making [\$]5.50 like they were at—he mentioned another specific bindery that I can't recall the name of.

Fitzgerald also testified that after the balloting on May 23, 1990, which ended at 3 p.m., he walked up to fellow employees Carol Miranda and Yolanda Pronio who were talking with Garrison outside Garrison's office and asked about the results of the election. Miranda told Fitzgerald that the Union had won the election. Garrison then said, in Fitzgerald's recollection, "well, I hope these people have jobs lined up."

Salvador Avalos, a former bindery employee of Respondent, testified he was supervised by Garrison who directed him in English. Avalos testified that he and other Hispanic employees had numerous lunchroom conversations with Garrison about the Union before the May 23, 1990 election. Avalos was unable to distinguish each conversation in his testimony, but rather characterized them as follows:

Jim said that if the union came in, if the union won, we were going to earn less than five [dollars] or [\$]5.50, and perhaps a lot of people would be laid off.<sup>3</sup>

Avalos testified that on one occasion Fitzgerald was present when Garrison talked to them. Avalos recalled:

He was telling us that if the union won, they would pay us less, and perhaps a lot of people would be laid off.

McLark, Glomski, Ashby, Miranda, and Pronio did not testify.

James Garrison testified that he held "little group" employee meetings in which the union was discussed. He recalled talking to Avalos and other employees but denied tell-

<sup>2</sup> Administrative notice is taken of the filing date of the petition.

<sup>3</sup> At the time, Avalos' wage rate was \$6.69 per hour.

ing them that they would be laid off if the Union became their representative or that their pay would be reduced. He testified he told employees that, if the Union got in, “they’d be hurting because they’d have to pay union dues.” He also recalled showing or discussing with employees, including Avalos and Fitzgerald, contracts between the Union and other area employers which included a starting wage rate of \$5.50 per hour. Garrison recalled talking to employees Miranda and Pronio following the election but denied that Fitzgerald asked about the results of the election or that he ever responded that he hoped employees had jobs lined up.

## 2. Preliminary arguments

The General Counsel argues that the statements attributed to Garrison, if credited, constitute independent violations of Section 8(a)(1) of the Act. Respondent argues on brief that there is no evidence that Garrison’s alleged remarks were ever repeated to others or “reported to higher management so that there could be an opportunity to affirm or repudiate them.” Respondent also contends that there is no evidence that “Garrison reflected the views of management or was authorized to make the statements attributed to him.”

Respondent’s arguments do not support a defense to the violations alleged. Garrison, an admitted supervisor and agent of Respondent, was in charge of the bindery department which is the focus of the violations alleged. The record reveals his direct role in hiring and firing employees in that department and his additional role in supporting Respondent in the union election campaign. His conduct need not be shown to have been authorized or approved by Respondent’s higher management to be held violative of the Act. On this record Respondent is responsible for Garrison’s statements to employees.

Respondent argues that the statements attributed to Garrison are protected under Section 8(c) of the Act. The Board has long held, however, that Section 8(c) gives no protection to threats or interrogations concerning union activity. An employer may make predictions of adverse consequences to employees related to union organization, if the basis for the consequences are explained as resulting from objective circumstances and not the employer’s unfettered discretion. Thus, if Garrison told employees that the Union had negotiated a lower starting rate with other employers and that it might do so with Respondent resulting in a drop in employee wages, no violation of the Act would have occurred. Where an employer’s agent tells employees, without more, that, if the union is selected by employees, wages will be reduced, there is no aspect of prediction rather the statement is a violative threat outside the ambit of Section 8(c). *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Respondent cites the Board’s decision in *Webb Furniture Enterprises*, 275 NLRB 1305 (1985), for the proposition that a supervisor’s statements: “if they got that thing in here all the employees would see it ‘rough’” and people who had union shirts would “dread it,” were not violations of the Act. Respondent’s cited case does not support the propositions asserted. First the Board in an earlier *Webb* decision reported at 272 NLRB 312 (1984), had remanded the “dread it” allegation to the judge to determine if the statement had in fact been made. The judge in Respondent’s cited case found the statement had not been made and on that basis recommended dismissal of the allegation (275 NLRB 1305,

318), which recommendation the Board adopted in the absence of exceptions. The “rough” statement was found vague and ambiguous by the judge whose dismissal of the allegation was adopted only in the absence of exceptions by the Board, *ibid.* 1305. Such an adoption is not binding authority. Further the situations discussed are factually dissimilar from the circumstances at issue herein.

## 3. Credibility resolutions and conclusions regarding the 8(a)(1) allegations

I have considered the arguments of the parties on brief as well as the inherent probabilities respecting the events in contention. I find nothing advanced by the parties or present on this record sufficient to overcome my conclusions and credibility resolutions based on the demeanor of the witnesses during their testimony. The General Counsel bears the burden of proof on all aspects of his case. Here the testimony of witnesses Fitzgerald and Avalos concerning the contested conversations, compared and contrasted with Garrison’s version of events, more than meets that burden.

I found Fitzgerald to be a forthright witness with a persuasive demeanor. I hold the same view as to Avalos. Garrison, however, struck me as an individual seeking to deny conduct which he believed to be embarrassing both to himself personally and his employer. I was not persuaded by his testimony. Accordingly, I specifically credit Fitzgerald and Avalos over Garrison with respect to the conversations at issue herein. Having made this factual finding, I further find that Garrison’s interrogations of Fitzgerald about his union activities and the union activities of others, violate Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984). I further find that Garrison’s statements to employees that union adherents would be “hurting” and “need jobs” constitute threats which violate Section 8(a)(1) of the Act. I also find that Garrison’s statements to employees that they would receive a lower wage, if the Union represented them, are threats which violate Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Accordingly, I sustain the allegations of complaint paragraph 6 as amended.

### C. Allegations of Violations of Section 8(a)(3) of the Act

#### 1. Reconsideration of refusal to amend complaint at trial’s end

Following the conclusion of the presentation of evidence at the hearing in this case, counsel for the General Counsel moved to amend the complaint to, in effect, allege that a portion of Respondent’s presented defense, i.e., that it had delayed implementation of layoffs until the Board election balloting was concluded, was a violation of Section 8(a)(3) of the Act. Respondent opposed the motion. I denied it. The General Counsel renews his motion on brief.

The General Counsel argues that his motion to amend was “hardly untimely since General Counsel first learned of this ‘postponement’ defense at the hearing.” He further argues that the motion is “merely an attempt to conform the pleadings to the evidence which Respondent purposely put on the record,” that the matter was fully litigated and that no statute of limitations issues exist.

One of the cases cited by the General Counsel, *New York Post Corp.*, 283 NLRB 430 (1987), deals with a last-minute

amendment to a complaint. The Board in *New York Post* reversed an administrative law judge who had allowed a last-day amendment to the complaint over the objection of respondent. The Board noted that Section 102.17 of the Board's Rules and Regulations permit amendments "upon such terms as may be deemed just." The Board particularly noted that the General Counsel had without explanation waited until the last minute to add the allegation, 283 NLRB at 431.

In the instant case counsel for the General Counsel contends that he learned of Respondent's defense only at the trial. Counsel for the General Counsel does not explain however the delay between the time he learned of the nature and theory of Respondent's defense and the time he first made his motion after the entire trial record had been made and the hearing was to be closed. That delay is of consequence because during that interim period counsel for Respondent cross-examined the General Counsel's witnesses and presented his defense in its entirety without any knowledge that the General Counsel was intending to move to amend the complaint to allege that portions of Respondent's defense were independently violative of the Act. Respondent at the very least was entitled to know of the General Counsel's intentions at the soonest possible opportunity. I find that this did not occur.

It may not be glibly assumed that Respondent counsel's handling of Respondent's case would have been unchanged had he been aware of the potential new allegations. Nor may it fairly be assumed that the provision of an opportunity to defend against the allegation by simply granting the amendment at the conclusion of the record and giving Respondent additional time to prepare and thereafter to submit evidence to meet the new allegations would suffice. A trial record, like life itself, proceeds in one direction only. One may regret but cannot change what is past. An evidentiary record may be augmented but augmentation is an addition to and not a substitution for what has gone before.

In making my findings in this regard, I also reject the corollary arguments of the General Counsel that the matter was fully litigated, that the amendment was "in essence a motion to conform the pleadings to the evidence," and that the amendment "involves only a legal conclusion based on facts already in evidence." The substantive law respecting the propriety of delays in announcing and/or initiating changes in unit employees' working conditions due to a pending election is subtle and considers many variables. A respondent employer counsel could well have various and significant decisions to make in presenting the defense involved herein, if that defense were under independent attack as a violation of Section 8(a)(3) of the Act.

Given the costs to respondents of post-evidentiary amendments to complaints of the type at issue here, the Board both in decisional law and in the portion of Section 102.17 of the Board's Rules and Regulations, cited *supra*, admonishes its administrative law judges to grant amendments to complaints only upon such terms as may be deemed just. Therefore last minute amendments must be justified by the General Counsel. For such an amendment to be just there can be no doubt that delay on the part of the government in proposing its amendments to the complaint was used to gain an advantage over Respondent. Where no or an insufficient explanation is made to explain a prosecutorial delay in proposing an

amendment to the complaint or in informing Respondent that such an amendment will be proposed, the motion to amend the complaint should be denied. Here counsel for the General Counsel has not justified the delay occurring between the time he knew or should have known of the nature of Respondent's defense and the time he put Respondent's counsel on notice of his intention to move to amend the complaint to allege that a portion of Respondent's defense violated the Act. I find that unexplained delay herein precludes granting the amendment sought by the General Counsel. I therefore reaffirm my ruling at the hearing.

## 2. Evidence respecting Respondent's staffing pattern in 1990

Respondent's bindery department serves the commercial book publishing trade. Various specialized equipment is utilized in the bindery to fulfill particular production needs. The various machines used require differing degrees of skill to operate. Some utilize a specially trained or skilled operators and crews of varying sizes dependent on the particular requirements of the type and size of the order being run. The unit includes highly skilled machine operators, less skilled operators, and other production employees and support staff.

Respondent introduced uncontroverted evidence of a decline of economic activity in the bindery over the calendar year 1990 to the time of the hearing in October. The volume and size of orders received and filled generally fell over time. No evidence was offered to suggest that Respondent refused or diverted bindery department business or sought it less assiduously over the period at issue. There was no suggestion that such work was contracted out or undertaken with other staff or at other facilities. Simply put, business in the bindery was down.

Bindery unit staff, defined as employees actually at work for some part of a given week, numbered from 33 to 34 in early 1990 to mid-March, from 29 to 30 from mid-March to early April, from 25 to 27 from early April to the week of May 23 and, finally, from 16 to 18 thereafter to October 1990. Four employees were terminated and one transferred out of the bindery unit in mid-March. Four employees went on disability: one each in March and April, two in May. One employee resigned in July and a disabled employee returned to work in August. Respondent discontinued its second shift in or about the first week of May. At about that same time Respondent was informed by the company that purchased its scrap paper that it no longer would derive economic benefit from continued sorting and separation of the scrap paper. Respondent accordingly discontinued these tasks eliminating what had heretofore been a regular task occupying four unit employees.

In the early part of 1990, although there were some exceptional weeks where virtually no short days or layoffs occurred, Respondent with regularity sent employees home early (short days) or put individual employees on layoff for a few days at a time. Thus 9 of the 14 weeks in the period beginning in January 1990 and ending the week of April 4 involved partial week layoffs and/or short days affecting the majority of the unit. During this same period no employees were laid off permanently or even for periods extending to full weeks. The following weeks of April 11, 18, and 25 involved virtually no layoffs or short days of any kind although, as noted *supra*, four unit employees had been dis-

charged, one transferred and three had gone on disability by this time. The weeks of May 2 and 9 included widespread short days, the week of May 16 was limited to about one short day per two employees.

Alex McGuire, Respondent's plant manager, testified that Respondent made a policy decision in early May to avoid unit employee layoffs before the election. Accordingly, testified McGuire, as "billable" work declined, employees were assigned ad hoc maintenance and clean up tasks such as replacing broken windows at the facility until, in the final days before the election, some employees were reduced to repetitive sweeping of the shop floor to occupy their time.

The Board election in Case 32-RC-3244 was held at Respondent's premises from 2 to 3 p.m. on Wednesday, May 23, 1990. The end of Respondent's normal business day in the bindery is 3:30 p.m. Contrary to usual procedure, which was to give earlier notification to employees of upcoming layoffs, numerous employees were told as they left the facility or later that evening by telephone that they were to be laid off effective immediately. A significant number of employees were laid off that week, many of whom had not been recalled as of the hearing date.

Respondent's pattern of employment after the election differed from the earlier part of the year. The employees laid off following the election were not recalled. The employees not laid off experienced fewer short days. The previous pattern of more frequent but less than full week layoffs was substantially reduced. Thus after May, layoffs were not spread over the unit but rather some employees were placed on uninterrupted layoff and those who remained employed generally enjoyed continuous or at least less interrupted employment.

James Garrison testified that he had earlier consciously tried to spread work among unit members, but that the practice was not satisfactory and was discontinued. Garrison testified he had conversations with employees Carol Miranda and Yolanda Pronio about Respondent's allocation of available work and layoffs. At the time of the cessation of the night shift, Miranda asked Garrison to lay off the night shift permanently so that the employees could draw unemployment compensation. Garrison testified that both Miranda and Pronio complained that frequent layoffs of a few days at a time spread among all employees served to diminish paychecks for everyone without making any employees eligible for state unemployment compensation. Garrison testified that "a couple of employees even got second jobs because the first job didn't pay enough. They weren't getting enough hours." Miranda and Pronio did not testify.

### 3. Arguments of the parties

The General Counsel argues that Respondent threatened employees with layoffs if they selected the Union, told employees after the election that they had better "have jobs lined up," thereafter laid off various employees and changed its practice of placing unit employees on frequent short term layoffs as opposed to placing a few employees on long term layoffs—all in retaliation for the employees' selection of the Union as their representative. The General Counsel argues that the bindery supervisor's threats to lay off employees, the precipitate timing of the commencement of numerous and long-term layoffs immediately after the election balloting, the variation from previous practice in announcing the layoffs

and the change in Respondent's postelection practices respecting the sharing of layoffs generally, all support the General Counsel's retaliation theory.

Respondent argues that the record is essentially uncontradicted that economic factors determined Respondent's bindery business volume and unit personnel requirements. Respondent argues further that bindery staffing patterns and related unit layoffs and recalls were objectively determined by production needs and that employees' union activities were irrelevant to and not a part of Respondent's personnel actions with a single exception. Respondent concedes that it did not lay off unit employees in the face of a declining volume of business in the weeks immediately prior to the election. Rather Respondent argues it carried some unit employees on the payroll and occupied them in make-work tasks so that unit layoffs immediately preceding the election would not generate election blocking unfair labor practice charges filed by the Union or generate hostility to Respondent on the part of voting employees as the election approached.

Respecting the General Counsel's contention that Respondent changed the pattern and duration of unit layoffs in retaliation against employees, Respondent denies the extent of the change alleged. Further Respondent contends that, to the extent a change in the pattern of layoffs occurred, Respondent's decision to abandon the practice of spreading the available work among all unit employees by having frequent short period layoffs for many employees was both made and implemented at the time of the close of the second shift. Respondent contends this change came about as a result of requests from employees that work not be so intermittent that employees could neither work enough hours to earn a fair income nor claim unemployment compensation based on longer term layoffs.

### 4. Analysis and conclusions respecting the 8(a)(3) allegations

The layoffs following hard after the balloting on May 23 were different from previous layoffs both in the timing of their announcement to employees and in their duration. The layoffs were announced unusually late in the day on May 23 or were announced to employees after hours by telephone. Rather than the pattern of widespread short week layoffs existing in early 1990, the May 23 layoffs and those that followed soon after were far longer in duration. The layoffs initiated the week of May 23 continued for many laid-off employees to the time of the hearing. The number of hours worked per working employee increased. As noted, the complement of working unit employees was reduced from some 25 employees in the weeks before the postelection layoffs to 16 or 17 by the week of May 30 and remained at this level thereafter.

I have considered the economic arguments made by both Respondent and the General Counsel based on the records introduced into evidence respecting Respondent's business volume, production requirements and personnel statistics for the year 1990 to the time of the hearing. In agreement with Respondent, I am persuaded that Respondent's business volume and bindery department staffing requirements had declined over the relevant period so that a reduction in total unit weekly working hours was necessary in May 1990. In reaching this decision I have considered and rejected the General

Counsel's various arguments that the records were inadequate to support such a conclusion.

Having concluded there was a business necessity to reduce bindery hours, I further find Respondent's decision to initiate postelection layoffs was not taken as an act of retaliation against the unit for selecting the Union. Rather, consistent with Respondent's argument, I find the timing of the layoffs themselves as well as their delayed announcement following the election was a result of Respondent's preelection decision to avoid laying off employees or notifying them that they would later be laid off until the balloting was concluded. The evidence shows and I find that Respondent made its decision to keep employees on the payroll as part of its electoral strategy. That determination to delay necessary layoffs did not extend to the period after the election. I have found that the declining work available militated for layoffs earlier in May. It is clear and I also find that the economic conditions requiring layoffs continued up to and after the election. Given all the above, and on the record as a whole, I find Respondent would have been forced to substantially reduce unit payroll when it did irrespective of the outcome of the balloting.

I have found that Respondent's substantial reduction in payroll was required in May by economic circumstances independent of employees' union activities. This finding does not conclude the necessary analysis of the 8(a)(3) allegations of the complaint however. The General Counsel also challenges the form and pattern of the postballoting layoffs and argues that the previous standard of sharing work and layoffs was discontinued in order to punish unit employees for selecting the Union. This is an argument which stands largely independent of the earlier argument that the layoffs were initiated to punish employees. The issue here is not the number of hours worked but rather their distribution among unit employees. Given that I have found Respondent's reduction in hours worked after the election justified, was Respondent's distribution of those reduced hours among unit employees changed so as to punish unit employees for their union activities?

This latter argument turns on different facts. For the General Counsel to prevail, he must demonstrate that there was motivating animus on Respondent's part in changing layoff practice. The General Counsel argues that, rather than continuing to share the burden of reduced hours among the entire unit, Respondent concentrated the postelection reduction in hours in a group of employees in essence laying them off permanently and employing the remaining employees on an essentially full-time basis so that they did not experience the earlier pattern of recurring short work weeks or short days. It seems clear that, to at least some degree, the General Counsel's argued redistribution of work hours did occur. It is not obvious however how this redistribution may be held to be a punishment to particular employees who engaged in union activities. Thus, there is no evidence whatever that the employees laid off after the election were more active in support of the Union than the employees who, rather than being laid off, enjoyed longer and more regular working hours.

Further, as noted above, Respondent's bindery supervisor Garrison testified that at the time the second shift was discontinued he was made aware of employee dissatisfaction with Respondent's then applicable practice of sharing out layoffs among Respondent's unit employees and that he thereafter attempted to provide more hours to some employ-

ees and to make longer rather than shorter layoffs. Garrison also testified that he was aware that employees were having financial difficulty surviving on their reduced paychecks the reduced hours produced. He testified that some employees had had to obtain a second job to make ends meet. Thus, to the extent a change in work hour distribution occurred, Respondent argues the change was undertaken benignly at employees' request and at a time well before the union balloting.

The General Counsel argues the evidence respecting the asserted basis and timing of Respondent's decision to redistribute unit work hours is unbelievable. First, the General Counsel notes that Respondent contends it consulted only a few employees before implementing this significant policy change, a proposition the General Counsel argues is implausible. Second, the General Counsel attacks Garrison's credibility generally. Further, the General Counsel attacks Garrison's testimony about conversations with employees Carol Miranda and Yolanda Pronio as uncorroborated and seeks an adverse inference that, had these two employees been called to testify, they would not have corroborated Garrison.

In support of his argument Counsel for the General Counsel on brief cites the Board's decision in *International Automated Machines*, 285 NLRB 1122 (1987). That case however stands for the proposition noted at 1123 that:

[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. (2 Wigmore, *Evidence* § 286 (2d ed. 1940). . . . See *Greg Construction Co.*, 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974)).

In *International Automated Machines* as well as each of the cases cited in the quotation immediately above, the class of witnesses reasonably assumed to be favorably disposed to a party was limited to fellow agents of the involved employers or unions, i.e., individuals aligned in interest with the party who did not call them. Neither the Board's decisional holdings nor common sense suggest that an employee may properly be assumed to favor either an employer or a union in the typical Board unfair labor practice proceeding or in the instant case in particular. I therefore decline to draw any adverse inference respecting this testimony.<sup>4</sup>

I disagree with the General Counsel that the evidence respecting Respondent's asserted timing of and basis for its change in distribution of unit work hours is unpersuasive. Even though I have discredited Garrison's denials respecting the statements attributed to him by other witnesses in the portion of this decision dealing with allegations of 8(a)(1) violations, supra, I credit his testimony here. I make this finding not only on demeanor grounds but also because I am convinced that employees would have brought to Garrison their views that regularly shortened hours and concomitant reduced paychecks were not satisfactory. I also find plausible the further proposition that this financial truism would have

<sup>4</sup> Similarly, I have not drawn adverse inferences, supra, respecting the failure of any party to call employees McLark, Glomski and Ashby, Miranda or Pronio, all of whom who were identified by Fitzgerald as parties to conversations with Garrison in which Garrison violated Sec. 8(a)(1) of the Act.

become obvious to Garrison on his own. Thus I find it both reasonable and foreseeable that Garrison, as he testified, would have learned of employee dissatisfaction with the reduced hours and reduced income and would have acted to change the distribution without feeling the need to consult with other employees. I further find it reasonable that Garrison and Respondent would have not attempted to spread out the reduced hours necessary after May 23, but would have rather have laid off some employees and kept others on the payroll without continuing to impose regular short days or short layoffs.<sup>5</sup>

In conclusion I have found that the reduction in total unit hours initiated on and after May 23, 1990, by Respondent did not occur because of unit employees' union or other protected activities as alleged in the complaint and that Respondent would have undertaken the reduction irrespective of the outcome of the election and even if the employees had not engaged in union or other protected activities. I have further found Respondent adjusted the distribution, pattern, duration and extent of individual employee's reduction in hours required on and after May 23, 1990, based on management decisions made before the May 23 election. Finally I have found Respondent made these determinations free of any consideration of employees' union or other protected concerted activity.<sup>6</sup> Having so concluded, I further find that the General Counsel has not established a violation of Section 8(a)(3) and (1) of the Act as alleged in paragraphs 10 and 11 of the complaint. Accordingly, I shall recommend that the 8(a)(3) allegations of the complaint be dismissed.

#### D. Allegations of Violations of Section 8(a)(5) and (1) of the Act

The General Counsel alleges that the layoffs described in paragraph 10 of the complaint as amended were undertaken by Respondent without providing the Union with notice of nor an opportunity to bargain respecting either the layoffs themselves or the effects of the layoffs. The General Counsel contends that the Union as the exclusive representative of the unit for purposes of collective bargaining at all times after the election was entitled to such notice and opportunity to bargain and that Respondent's failure to provide it violates Section 8(a)(5) and (1) of the Act.

Respondent does not challenge the Union's postelection representative status, the fact that layoffs are a mandatory subject of bargaining or the fact that it did not provide the

<sup>5</sup>Respondent argues that the change in assigning work and days off after the election was not as significant as contended by the General Counsel. I agree. Respondent had previously terminated several employees in 1990 as noted supra. While the post-May 23 layoffs which continued without interruption to the time of the hearing were not recorded as terminations, the practical effect of these employees' continued absence was the same in terms of distribution of hours worked among the other employees as if they had been terminated.

<sup>6</sup>Placing my analysis in terms of the approach set forth in *Wright Line*, 251 NLRB 1083 (1980), see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), assuming the General Counsel's arguments based on the threats of Garrison, the initiation of the layoffs simultaneously with the conclusion of the balloting, and the change in the distribution of the reduction in hours among unit employees have sustained his prima facie case, and specifically assigning the burden of proof to Respondent, I find that Respondent would have taken the action it did in the absence of any union or protected concerted activity by Respondent's employees.

Union with notice of the layoffs or an opportunity to bargain respecting the layoffs or their effects. Rather Respondent argues that it had no obligation under Section 8(a)(5) of the Act to do so since it had simply continued its past practice of laying off employees who were objectively determined not to be necessary to undertake the work contemplated by the bindery orders received.

There is no doubt that an employer's obligation under Section 8(a)(5) of the Act to refrain from making unilateral changes in working conditions commences at the time of an apparent ballot victory for a labor organization rather than at the time of its official certification. *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982); *Lawrence Textile Shrinking Co.*, 235 NLRB 1178 (1978). The layoff of unit employees is clearly a mandatory subject of bargaining. *U.S. Gypsum Co.*, 94 NLRB 112, 114 (1951), enfd. as modified on other grounds 206 F.2d 410 (5th Cir. 1953).

The timing of a decision to lay off a particular group of employees at a particular time is critical to determining if the employer was obligated to notify and bargain about the decision or its effects. In *Valley Iron Co.*, 224 NLRB 866 (1976), the Board adopted the decision of an administrative law judge who found the employer violated Section 8(a)(5) and (1) of the Act when it laid off employees for a few days commencing immediately after the close of balloting in an election won by a union. The judge specifically found in that case that the decision to lay off the employees "was made at a time when the Union had the demonstrated support of a preponderant majority of the employees in the bargaining unit." Id. at 877. The Board in *Embossing Printers*, 268 NLRB 710 (1984), dismissed a unilateral change 8(a)(5) allegation that an employer had unilaterally canceled employees' Christmas bonus after a union had been certified as representative of employees. The Board decision turned on its finding that the employer's decision to cancel the Christmas bonus was made before it became obligated to bargain with the union, i.e., before the Board-conducted election.

Turning to the instant case, I have found in my consideration of the 8(a)(3) allegations, supra, that Respondent had determined well before the election to work unit employees through the election irrespective of actual work requirements and then to effect substantial and long term as opposed to short term or shortened week layoffs to bring staffing levels in the bindery into conformity with production needs. The record does not isolate the particular date and time of Respondent's specific determination of who would be laid off. On this record, given the close timing of the end of the balloting and the announcements of the layoffs to the employees as well as the burden of proof the General Counsel bears on each aspect of his prima facie case, it cannot be said that these decisions were made at a time when Respondent was obligated to bargain with the Union. Accordingly, I find that the layoffs initiated the week of the election were decided on by Respondent before it was obligated to bargain with the Union even though the employees were told of the layoffs and even though the layoffs did not actually begin until after the election. There being no obligation by Respondent to bargain respecting these layoffs, its failure to notify the Union respecting them does not violate Section 8(a)(5) and (1) of the Act. Accordingly, I shall dismiss the complaint allegations dealing with these changes.

Layoffs also occurred after the week of the election through the date of the hearing. The decision to initiate each such layoff may fairly be inferred to have occurred after the election. Respondent contends that these layoffs were but a continuation of its previous practice and therefore it was not obligated by Section 8(a)(5) of the Act to notify or bargain with the Union concerning either the layoffs or their effects. The Board in the General Counsel's cited case, *Adair Standish Corp.*, 292 NLRB 890 (1989), conclusively addresses this defense at fn. 1:

The Respondent argues that because of its past practice of instituting economic layoffs due to lack of work, it had no obligation to bargain with the Union over such layoffs. However, because of the intervention of the bargaining representative, the Respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs. See, e.g., *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986). Instead, the Respondent was obligated to bargain with the Union over the layoffs, which are mandatory subjects of bargaining. *Lapeer Foundry & Machine*, 289 NLRB [952] (1988). Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to bargain with the Union over the layoffs.

I find this recent Board decision controlling of the result herein and therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act when it undertook layoffs of unit employees which layoffs commenced after the week of May 23, 1990, without notifying the Union or providing it an opportunity to bargain over the layoffs or their effects. See also *Gulf States Mfrs.*, 261 NLRB 852 (1982). Accordingly, I sustain the complaint allegations with respect to them.<sup>7</sup>

#### E. Summary

Crediting the General Counsel's witnesses over Respondent's bindery supervisor, I found that he interrogated employees concerning their and other employees' union activities and threatened employees with reduction in wages, layoff and discharge if they selected the Union to represent them, all in violation of Section 8(a)(1) of the Act as alleged in the complaint as amended.

Crediting Respondent's economic defense, I found that its decisions to lay off employees following the election and its decision to change the pattern and distribution of hours of work and frequency and duration of layoffs among the unit employees were not made in retaliation for employees' union activities. Thus I found the General Counsel did not sustain his burden of proof with respect to these allegations. Accordingly, I shall dismiss the General Counsel's complaint allega-

<sup>7</sup> Thus all layoffs initiated after the week of May 23, 1990, were improper. Layoffs which commenced in the week of May 23 were not improper irrespective of how long they continued without interruption. Once an employee returned to work for any period, however, any subsequent layoff was a new layoff and was improper if no notification and opportunity to bargain was provided the Union. Difficulties in classification of particular layoffs under these findings may be resolved in the compliance stage of these proceedings, if necessary.

tions that such conduct violated Section 8(a)(3) and (1) of the Act.

I found that employee layoffs are a mandatory subject of bargaining and that Respondent had not notified the Union or offered to bargain respecting layoffs. I found that Respondent was not obligated to bargain with the Union respecting layoff decisions made before the election irrespective of the date of the implementation of the layoffs. I found Respondent was obligated to notify the Union and bargain respecting all unit employee layoffs decided on after the election. I found that Respondent decided on the layoffs occurring in the week of May 23 before the election and that all layoffs initiated after the week of May 23 were decided on by Respondent after the election. Finding no obligation to bargain respecting the layoffs effected the week of May 23, 1990, I find Respondent's failure to bargain respecting them did not violate Section 8(a)(5) and (1) of the Act. Therefore, I shall dismiss all allegations in the complaint respecting them. Having found an obligation to bargain over the layoffs undertaken after the week of May 23, 1990, and a failure by Respondent to fulfill that obligation, I further found Respondent's failure to bargain in good faith with respect to these layoffs violated Section 8(a)(5) and (1) of the Act. Accordingly, I sustained the General Counsel's allegations in the complaint with respect to them.

#### IV. REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes and policies of the Act including the posting of a remedial notice and the mailing of that notice to employees on layoff.

The remedy for Respondent's failure to notify the Union and give it an opportunity to bargain respecting the layoffs initiated after the week of May 23, 1990, shall be that directed in *Adair Standish Corp.*, supra, which included, inter alia, the following. Respondent shall be obligated to offer employees unilaterally laid off after the week of May 23, 1990, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges. Respondent shall also make all such employees whole for any and all loss of earnings and other benefits suffered as a result of the unilateral layoffs. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent shall further be directed to remove from its files any reference to the layoffs initiated after the week of May 23, 1990, and shall notify the employees involved, in writing, that this has been done.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been at all relevant times a labor organization within the meaning of Section 2(5) of the Act.
3. At all times since the balloting on May 23, 1990, the Union has been the exclusive representative for purposes of

collective bargaining of Respondent's employees in the following unit which is appropriate for collective bargaining within the meaning of Section 9 of the Act:

All bindery department employees, including maintenance mechanics, truckdrivers, bailers, shipping clerks, janitors, and all other production employees not covered by a collective bargaining agreement, employed by Respondent at its Berkeley, California facility; excluding all employees covered by a collective bargaining agreement, office clerical employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

- (a) Interrogating employees about their and other employees' union activities.
- (b) Threatening employees with discharge, if they selected the Union to represent them.
- (c) Threatening employees with wage reductions, if they selected the Union to represent them.
- (d) Threatening employees with layoffs, if they selected or because they had selected the Union to represent them.

5. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to notify the Union or provide it an opportunity to bargain with respect to layoffs of unit employees decided on by the Employer after the election on May 23, 1990, or the effects of those layoffs.

6. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not otherwise violated the Act as alleged in the complaint as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

ORDER

The Respondent, Consolidated Printers, Inc., Berkeley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Interrogating employees concerning their union activities and the union activities of other employees.
- (b) Threatening employees with discharge, if they select the Union to represent them.
- (c) Threatening employees with wage reductions, if they select the Union to represent them.
- (d) Threatening employees with layoff, if they select or because they have selected the Union to represent them.
- (e) Failing to bargain with the Union with respect to Respondent's employees in the unit described below by failing and refusing to notify and provide the Union with an opportunity to bargain over the decisions to lay off unit employees made after the election on May 23, 1990, and effects of those decisions.
- (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

<sup>8</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

- (a) On request, bargain in good faith with the Union as the exclusive representative of employees in the unit described below with respect to wages, hours and other terms and conditions of employment.
- (b) Offer employees unilaterally laid off after the week of May 23, 1990, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges.
- (c) Make all such laid-off employees whole for any and all loss of earnings and other benefits suffered as a result of the unilateral layoffs initiated by the Employer after the week of May 23, 1990. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).
- (d) Remove from its files any references to layoffs initiated after the week of May 23, 1990, and notify the employees involved, in writing, that this has been done.
- (e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and all other records and reports necessary to calculate the amount of money or other remedial aspects due under the terms of this Order and to insure that the Order has been fully complied with.
- (f) Post at its Berkeley, California facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. Copies of the notice shall also be mailed to all unit employees on layoff at the time this notice is posted.
- (g) Notify the Regional Director in writing within 20 days from the date of the Order what steps Respondent has taken to comply.

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT interrogate our employees about their union activities or the union activities of other employees.

WE WILL NOT threaten employees with wage reductions, layoff or discharge because they select or have selected the Union to represent them.

WE WILL NOT refuse to bargain in good faith with Graphic Communications Union, Local No. 583, Graphic Communications International Union, AFL-CIO as the exclusive representative of our employees in the unit set forth below for purposes of collective bargaining concerning wages, hours, and working conditions of unit employees.

WE WILL NOT lay off unit employees or make any changes in their wages, hours or other terms or conditions of employment, without first giving the Union adequate and timely notice and affording it an opportunity to engage in collective bargaining with respect thereto.

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, on request, bargain in good faith with the Union as the exclusive representative of all employees in the unit described below with respect to wages, hours, and other terms and conditions of employment.

WE WILL offer all employees who were unilaterally laid off after the week of May 23, 1990, immediate and full reinstatement to their former jobs or, if those jobs no longer

exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges previously enjoyed.

WE WILL make whole our employees who suffered layoffs which began after the week of May 23, 1990, for any and all loss of earning and other benefits suffered as a result of our unilateral implementation of those layoffs, with interest, as more fully set forth in the decision in this matter.

WE WILL remove from our files any and all references to the layoffs described above and notify the employees in writing, that this has been done.

The collective-bargaining unit represented by Graphic Communications Union, Local No. 583, Graphic Communications International Union, AFL-CIO is:

All bindery department employees, including maintenance mechanics, truckdrivers, bailers, shipping clerks, janitors, and all other production employees not covered by a collective bargaining agreement, employed by Consolidated Printers, Inc. at its Berkeley, California facility; excluding all employees covered by a collective bargaining agreement, office clerical employees, guards and supervisors as defined in the Act.

CONSOLIDATED PRINTERS, INC.