

F. W. Woolworth Co. and United Food and Commercial Workers Union, Local 4R, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 19-CA-21256

April 27, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On August 31, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed a brief in reply to the General Counsel's brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by photographing and videotaping employees. The judge found that the Respondent's off-duty employees were engaged in protected union activities when they stationed themselves in the general area of the Respondent's store entrances in order to distribute handbills to potential customers and appeal to them to shop elsewhere during the labor dispute with the Respondent. The judge specifically found that handbillers did not block store entrances. The judge further found that at most some handbillers stood in front of store entrances, but that customers were able to walk around the handbillers. The judge additionally found un-

ported the Respondent's assertion that large contingents of handbillers gathered in front of the entrances. Indeed, the Respondent's district manager Kovar testified that the handbillers moved to the side when he requested they do so. No misconduct by the handbillers is asserted by the Respondent other than their location.

As the judge recognized, the Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate. *Waco, Inc.*, 273 NLRB 746, 747 (1984), and cases cited therein. Here, the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that "something 'might' happen does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), *enfd.* 401 F.2d 128, 136 (7th Cir. 1968). Accord: *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976) ("the Board may properly require a company to provide solid justification for its resort to anticipatory photographing").

In addition, we disagree with our dissenting colleague's reliance on the Third Circuit's *United States Steel* decision, which denied enforcement of a Board Order. *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982), denying *enfd.* to 255 NLRB 1338 (1981). In *United States Steel*, the Board held that the fact that the employees publicized their activities is entitled to "little weight," and the Board has continued to cite its decision with approval. *John Ascuaga's Nugget*, 298 NLRB 524 fn. 3, 554 (1990), *enfd.* in relevant part 968 F.2d 991 (9th Cir. 1992). Finally, the cases our dissenting colleague cites in footnote 2 of his dissent are not "analogous" because they are based on the principle that an employer's "mere observation" of open, public union activity on or near its property does not constitute unlawful surveillance. When an employer's surveillance activity constitutes more than "mere observation," the Board has found a violation of the Act. E.g., *Gupta Permold Corp.*, 289 NLRB 1234 fn. 2 (1988); *Baddour*, 281 NLRB 546, 548 (1986), *enfd.* 848 F.2d 193 (6th Cir. 1988). Photographing and videotaping clearly constitute more than "mere observation" because such pictorial recordkeeping tends to create fear among employees of future reprisals. *Waco*, *supra*.

Accordingly, for all these reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by photographing and videotaping employees engaged in union activities without proper justification.

¹In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discriminatorily reducing the working hours of unit employees during the period of the Union's consumer boycott in support of its bargaining demands, we find that the record supports the judge's finding that the hours worked by newly hired employees, three temporarily transferred assistant managers, and on-call employee O'Brien, materially approximated the reduction in scheduled working hours of unit employees. In so concluding, we have carefully reviewed the Respondent's exception comparing the reduction in hours with those worked by the new hires, the assistant managers and O'Brien, and the Respondent's specific contention that the hours attributable to training of the new employees should not have been included in the judge's calculus. The testimony of the Respondent's personnel specialist, Ann Thomas, establishes, however, that at least a portion of employee training time is spent actually working. We note in addition the Respondent's contention that the schedule reduction commenced in full the week of October 27, 1992. The boycott did not start until October 29, 1992, however, and the record establishes that the first weekly schedule fully reducing unit employees' hours commenced the week of November 5, 1992.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, F. W. Woolworth Co., Butte, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting in part.

I agree with my colleagues except in the following respect. Unlike my colleagues and the judge, I would not find that the Respondent's photographing of employees, in the circumstances of this case, violated Section 8(a)(1) of the Act.

As fully recounted by the judge, the Union here, to protest the Respondent's efforts to seek concessions at the bargaining table, commenced a consumer boycott of the Respondent's store. The boycott involved off-duty employees handbilling customers at the store entrances and making oral appeals to customers. The Union notified the local media of the boycott and this resulted in at least one television spot that included interviews with handbilling employees. Several employees wrote a letter, published by the local newspaper, appealing for public support of the boycott.

During this period of time, management officials videotaped and photographed the handbilling employees. Management sought to support its claim that the handbilling employees were blocking customer ingress and egress. Two assistant managers shot about 5 minutes of video and about 24 photographs.

In my view, the photographing of employees is not per se unlawful. Rather, I would look at all the circumstances to determine whether employees were coerced.¹ In *United States Steel Corp. v. NLRB*, 698 F.2d 98 (3d Cir. 1982), the court held that an employer's photographing an employee demonstration was not unlawful. The employees were protesting the employer's failure to provide locker room facilities for female employees. As here, the employees and the union in *United States Steel* successfully sought to publicize their efforts. Local media showed pictures of the employees' demonstration. The court did not hold that picture taking by a third party necessarily justifies picture taking by an employer and I agree. But if employees seek and obtain publicity, this is a significant factor to be considered in determining whether an em-

¹ See, e.g., *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676, 679 (1990). (An employer's photographing of a picket line was unlawful where there was no showing of anticipated picket line misconduct and no showing that the action had any lawful or noncoercive purpose.) Cf. *Concord Metal*, 295 NLRB 912, 921 (1989). (An employer's photographing of a picket line at a common situs was lawful where the employer sought to preserve evidence regarding possible charges of secondary boycott or blocking of ingress and egress.)

ployer's photographing of employees would tend to interfere with, restrain, or coerce employees.²

I would dismiss this allegation of the complaint.³

² In analogous situations, the Board does not find employer surveillance unlawful when an employer observes employees who openly solicit for a union in "full public view." See, e.g., *Chemtronics, Inc.*, 236 NLRB 178 (1978); see also *Hoshton Garment Co.*, 279 NLRB 565, 566 (1986), and *Harry M. Stevens, Inc.*, 277 NLRB 276 (1985).

³ I also disagree with the judge's conclusion that the Respondent failed to provide proper justification for its action. In this regard, I note that the judge accepted the Respondent's contention that handbillers stood in the center of entrances and that customers had to walk around handbillers to enter and exit. Surely, an employer need not prove that ingress and egress was willfully blocked before attempting to acquire definitive evidence on the matter. Otherwise, it could only seek proof (e.g., photographs) after already obtaining other proof. In my view, an employer, before photographing events, must have a reasonable belief that certain conduct might be occurring. Here, evidence that customers had to walk around handbillers would satisfy a reasonable belief requirement and justify making a record of events. See *Concord Metal*, supra at 921 (one incident of a delayed delivery justified and employer's taking pictures of a picket line).

Scott F. Burson, Esq., for the General Counsel.

James J. Pirretti, Christopher J. Hoey, and Michelle M. DiGello, Esqs., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. United Food and Commercial Workers Union, Local 4R, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (Union), initiated this proceeding by filing an unfair labor practice charge against F. W. Woolworth Co.¹ (Company or Respondent) on December 12, 1990.² The Union amended the charge on February 1, 1991.

On February 4, 1991, the General Counsel of the National Labor Relations Board (NLRB or the Board), acting through the Regional Director for NLRB Region 19, issued a formal complaint based on the Union's charge. The complaint incorporated a notice of hearing before an administrative law judge. The General Counsel amended his complaint on May 31, 1991, and at the hearing. As amended, the complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Respondent timely answered the complaint denying that it engaged in the unfair labor practices alleged.

I heard this matter from June 18 through 21, 1991, at Butte, Montana. After carefully considering the record,³ the demeanor of the witnesses, and the posthearing briefs of the General Counsel and Respondent, I find Respondent engaged

¹ The caption has been amended to reflect Respondent's correct name.

² All dates refer to the 1990 calendar year unless otherwise shown.

³ I grant the General Counsel's unopposed motion to correct the transcript. That motion is designated officially as G.C. Exh. 20.

in certain unfair labor practices alleged, but not others, based on the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The General Counsel alleges, in essence, that Respondent's supervisors and agents implicitly threatened employees with more onerous working conditions, uttered statements designed to interfere with lawful employee handbilling, and created the impression protected employee activity was under surveillance by photographing, videotaping, and otherwise observing employee handbilling activity at the entrance to Respondent's Butte store. Such conduct, the General Counsel believes, independently violated Section 8(a)(1).

The General Counsel further alleges Respondent violated Section 8(a)(3) because its supervisors or agents canceled or denied vacation leave and personal days of certain unit employees; discriminatorily enforced its sick leave policy; altered employee schedules and reduced employee work hours; used new employees, management trainees, and others to perform work normally performed by unit employees; and imposed work schedules not permitted under the expired collective-bargaining agreement.

The complaint also alleges Respondent violated Section 8(a)(5) by altering its employee work scheduling practices without affording the Union an opportunity to bargain concerning this subject.⁴

Respondent's answer flatly denies the conduct attributed to it in the complaint. In addition, Respondent contests the complaint allegations concerning the supervisory or agency status of certain individuals but none are relevant to the issues presented for decision here.

In his brief, the General Counsel moved to "amend the Complaint to conform to the proof." The proposed amendment is designed, *inter alia*, to provide a basis for finding that Respondent violated Section 8(a)(5) by repudiating its collective-bargaining agreement with the Union. This claim rests on a remark to an employee by Respondent's store personnel manager, in response to the employee's postcontract work schedule complaint, that "you have no contract."

Respondent argues in its brief that the statement, if made, is true. Further, Respondent argues that the statement is not coercive, does not interfere with the bargaining process, and does not repudiate the contract.

I grant the General Counsel's motion with respect to specific complaint allegations. I deny the General Counsel's motion insofar as it seeks to add the aforementioned repudiation theory.

Although, as found below, the "no contract" remark was admittedly made, I have concluded that it is not tantamount to unlawful repudiation where, as here, the supervisor involved so obviously lacked authority to alter the broad range of terms covered by the collective-bargaining agreement to such a degree required for finding repudiation.

⁴ At the hearing, the General Counsel's motion to amend the complaint for the purpose of deleting pars. 7(a), 8(a) through (c), 9(a) and (b), and that portion of 10(a) referring to the "length of probationary period" was granted.

B. *Facts*

1. Background

Respondent, a New York corporation, retails variety goods at numerous locations across the United States, including Butte, Montana, where this dispute arose.⁵ The Butte store, also known as store 1934, is located in the Butte Plaza Shopping Mall where Respondent and numerous other unrelated employers lease space from the mall owner. Since 1971, the Union has represented certain of Respondent's employees, primarily all selling floor employees.

In November 1989, K-Mart, a competitor, opened a Butte retail facility adjacent to store 1934. Not surprisingly, the new Butte K-Mart had an almost immediate, adverse impact on store 1934; purportedly its sales declined by up to 30 percent compared to sales for a comparable time periods.

As a rule, the unit regular employees enjoyed stable employment.⁶ All who testified reported working regular schedules of 36 to 39 hours per week (exclusive of optional Sunday hours) with regular days off and break periods which rarely varied from one week to the next except for minor instances caused by employee vacations and illness. The last consistent scheduling variance occurred in about February 1990 when Respondent adjusted to the new reality of K-Mart's competition by laying off all part-time employees and reducing the regular employees' workweek by 1 hour.

2. The 1990 bargaining

The parties' 1986-1989 collective-bargaining agreement at Butte was extended for a 1-year period in 1989. The extended agreement was scheduled to expire on September 30. Bargaining for a new agreement commenced August 14 against a backdrop of anxiety represented by the new competition. Respondent approached the bargaining table with a concession agenda; the Union focused on resisting concessions and altering certain scheduling practices.

Representing the Company at the first bargaining session were Assistant Corporate Secretary-Assistant General Counsel Christopher Hoey, Regional Personnel Director Donald Dill, Store Manager Ronald Major, and Store Personnel Director Sue Joy. The Union's negotiators were International Representative Robert Patterson, Union President Pamela Casagrande-Miller, and an employee committee.

⁵ Respondent's direct inflow to its operations in the State of Montana during the 12 months preceding the issuance of the complaint exceeded a *de minimis* amount and its gross sales exceeded the dollar volume established by the Board for exercising its statutory jurisdiction over retail enterprises. Respondent admits that it is engaged in commerce and in a business affecting commerce within the meaning of Sec. 2(6) and (7) of the Act. Therefore, I find the policies of the Act are effectuated by exercising the Board's jurisdiction to resolve this labor dispute.

⁶ Under the terms (art. 5) of the parties 1986-1989 collective-bargaining agreement which were in effect at times relevant here, employees are categorized as: (1) regular—worked at least 24 hours in 6 of the past 12 consecutive weeks; (2) part-time—works more than 8 hours per week on a regularly scheduled basis; (3) casual—normally works 8 hours or less per week on an on-call basis; and (4) seasonal—commences and completes employment between November 15 and December 31 or is hired for the garden center between April 1 and July 1. The casual and seasonal employees are not included in the bargaining unit.

During the first session, the union negotiators addressed three or four issues related to Sue Joy's scheduling practices.⁷ Hoey, the Company's principal spokesperson, sought specific details about the employee complaints, including the employee names and dates of the events giving rise to the Union's proposals. The union negotiators refused to supply identifying information claiming that employees feared retribution by Joy. Company witnesses reported that an acrimonious exchange followed which Joy obviously interpreted as an unwarranted personal assault on her benevolence toward employees.⁸

Joy admits that during the evening following the first bargaining session she told employee Linda Brosovic (one of the Union's bargaining committee members) that "[i]f they think that I'm a bitch now, wait."⁹ Employee Eva Holderman said that when she met Joy at work the following morning, she asked Joy about the previous day's bargaining session and Joy angrily retorted, "Well, it was pick on Sue Joy day, and [i]f you think I was a bitch before, just wait." Holderman said Joy appeared upset so she "just shut up." Joy denies that she ever made such a remark "to" Holderman but acknowledged that she might have told Holderman that she had made such a remark.

The parties failed to make progress toward resolving their differences at the second bargaining session on September 7. Some evidence shows that the Union made strike threats in an effort to secure modification of certain company proposals and that the Company responded with its own threats to hire permanent replacements if a strike occurred.

On September 10, the union unit members voted to authorize a strike and union officials initiated internal procedures seeking its International's authorization to engage in a strike or a boycott to support its bargaining demands. The International authorized a boycott outright but vested a regional official with authority to determine whether or not to call a strike.

On the other side, Regional Personnel Director Dill prepared a strike contingency plan. District Manager Art Kovar, a Butte resident who formerly managed store 1934, was designated to oversee the strike plan implementation at the site.

Dill's plan anticipated that the store would continue to operate if a strike occurred. It provided for staffing the store with nine current employees considered likely to cross a union picket line, at least four assistant managers temporarily transferred from other stores, one or two regional office spe-

⁷For example, some employees sought the liberty to alter their scheduled workdays provided they arranged for a qualified substitute. Some claimed that Joy, whose duties included employee scheduling, consistently refused such substitutions for fear of causing a scheduling nightmare.

⁸Hoey described the exchange as "one of the most vicious and personal vendettas directed at an individual I've encountered in my life." However, no one attempted to provide any detail as to what precisely was said.

⁹To the extent that Joy's meaning is ambiguous, she later explained:

I have always been good to employees. I try to be as just and fair as I can be. If they think I've been a bitch in the past, they can just wait, because I'm not going to do anything any more for them special. I'm not going to go out of my way to do anything like that. In other words, I meant I'm not going to put their day off with their birth day to make them have two days together. I'm not going to do any of that kind of stuff.

cialists, and replacement employees hired during recruiting efforts set to begin on September 24. The plan also addressed 24-hour security, potential common carrier disruptions, and strike-period sales promotions.

At the third session on October 19, Respondent's negotiators presented their last and final offer, or at least as close as they cared to come to that. Hoey emphasized that he intended to implement the terms if they were not accepted and Patterson threatened to strike if he did so. Ultimately, however, the Union agreed to provide a 72-hour notice before engaging in a strike and the Company agreed to give a similar notice before unilaterally implementing any of its bargaining proposals.

On October 21, the unit union members rejected Respondent's last offer. The following day, Casagrande-Miller notified Hoey's New York office of the rejection and advised that employees would continue to work as usual. Hoey telephoned Casagrande-Miller the following day to confirm the message and was informed again that the employees intended to continue working.

3. The consumer boycott

Undoubtedly concerned that Respondent would carry out its threats to permanently replace striking employees, the Union decided to engage in a consumer boycott of store 1934 rather than call a strike. The boycott began on October 29.

The most significant element of the boycott involved handbilling and direct appeals to customers about to enter the store by off-duty employees posted at the store entrances. Initially, the off-duty employees also carried picket signs but use of the signs was discontinued after about a day and a half at the insistence of an International official who was concerned about creating an impression that a strike was progress.

In addition, the Union notified the local media of its action in order to secure publicity for the boycott. At least one local television station visited the scene and conducted televised interviews with union agents and handbilling employees which were aired. Several employees signed a letter to the local newspaper editor appealing for public support of the boycott. That letter was published together with the names of certain signers.

The store has three entrances reserved for public use. One entrance—about 13 feet wide—leads into the store from the enclosed mall area. The two other entrances—each 7-foot double door openings—lead into the store from the adjacent parking lot. Off-duty employees and, on occasion, union agents stationed themselves at each entrance so they could distribute handbills to approaching shoppers and verbally appeal for them to shop elsewhere during the labor dispute.

Almost from the beginning, management officials—most particularly District Manager Kovar—accused the handbilling employees of interfering with the customers' ingress and egress at the store entrances. Attorney Hoey, who was not frequently at the store during the boycott, directed that videos and photographs be taken to support these claims. Hoey's directive was ultimately carried out by two assistant managers who completed about 5 minutes of video and shot less than 24 photos.

Only two photos were offered as evidence. Store Manager Major flatly asserted that the photos reflect handbilling em-

employees blocking the mall entrance. In fact, they depict a customer exiting the store practically ignored by two employees engaged in handbilling.¹⁰ Apparently, the other photos and the videos produced similar results; none were offered in evidence and Attorney Hoey wrote in a November 17 memo to Dill that “[t]he videos are disappointing . . . I wanted shots of them blocking the door—not peacefully handbilling.”

Shortly after the boycott began, District Manager Kovar and some of the employees engaged in handbilling became embroiled in a series of tiffs over their location outside the store entrances.

Employee Mary Dolinger recalled that Kovar angrily told her that she was disrupting the store business by standing directly in front of the mall entrance and ask who told her to stand there. Dolinger reported that the mall manager insisted that she keep to that position because of complaints of interference by mall tenants immediately adjacent to the Woolworth store.

Linda Brosovic also claims that Kovar told her in the presence of Darlene Panion, Gloria Trevenna, and Toni Cor that “it was illegal to stand in front of the store and do the handbilling.” At the time, Brosovic said that she was standing to the side of the mall entrance. Although Kovar appeared upset, Brosovic nevertheless disagreed with his assertion.

Panion said that Kovar instructed Brosovic, Dolinger, and herself to remain 10 feet out from the Woolworth mall entrance on November 5 so they would not block the entrance. The following day the mall manager told Panion and Dolinger that they had to remain within 5 feet of the mall entrance while handbilling. They reported Kovar’s instruction from the previous day but the mall manager remained adamant and told them that Kovar should contact the mall attorney if he had any problem with her instructions.

A little later that same day, Kovar again told Dolinger and Panion that they had to remain 10 feet out from the mall entrance. Dolinger told Kovar to speak with the mall attorney and remained steadfast at her location.

Kovar left and returned a short while later (apparently after speaking with the mall manager) saying that he was going to talk to his lawyers and that “[h]e was going to see about this.” Nothing further came of the matter.¹¹

Kovar told Sharon Henderson and two other employees who were handbilling at a parking lot entrance that he was merely being nice to them by allowing them to remain within 5 feet of the entrance. Henderson clearly was more upset because Kovar put his hand on her shoulder as he spoke, a gesture she thought was totally unnecessary.

Kovar acknowledged that he spoke to the boycotters about their location. From the following, his principal objection related solely to location:

¹⁰The two sequential photos show a customer leaving the store and entering the mall unobstructed to the left of an off-duty employee and a man (a nonemployee who regularly spoke with the boycotters during his walking exercises in the mall) situated roughly in the center of the store entrance. To their right, another off-duty employee holds a picket sign.

¹¹No claim is made that employees trespassed on Respondent’s mall leasehold while handbilling. However, Respondent apparently disciplined certain employees overheard making boycott appeals to customers while on duty.

They were standing in the center of the doorway where our customers should pass and our customers were having to go around the boycotters to get into the store and our customers were being interrupted and stopped along the way as they were trying to enter the store.

By his account, the boycotters moved to the side when he requested them to do so. Kovar recalled that he told the boycotters that it was unlawful to block the entrance but denied that he told any of them that it was unlawful to handbill.

Some employees estimated that up to 50 percent of the customers to whom they made appeals turned away; others gave lower estimates. Management officials claimed that sales declined by about 50 percent almost immediately, a claim repeated several times in Respondent’s brief. No comparative sales records were proffered to establish the precise effect the boycott may have had on the store’s sales.

On October 31, Attorney Hoey wrote to the Union’s president claiming that an impasse had been reached in negotiations and giving the Union the agreed-upon 72-hour notice that the Company intended to implement portions of its final offer effective November 5.¹² He also advised that the Company intended to hire a “pool of permanent replacements” in case the employees chose to strike. According to Hoey’s letter, the “replacement hiring” would commence before November 5.

The Company concededly implemented portions of its strike contingency plan when the boycott began. Almost immediately, Regional Personnel Director Dill reconfigured the store’s personnel budget by reducing it about 10 percent. Dill claimed that this action was taken to maintain the store’s reasonable cost-to-sell ratio.¹³

Dill also dispatched Ann Thomas, a personnel specialist at his Northern California office, to the Butte store. Thomas implemented the reduced salary budget by taking over weekly employee scheduling from Sue Joy. As a norm, Thomas explained, regular employee hours were reduced to the minimum level sufficient for them to retain employee benefits which is 24 hours per week.¹⁴

¹²Specifically, Hoey’s letter notified the Union of the implementation of the Company’s proposals to: (1) reduce Sunday pay from double time to time and a half; (2) eliminate night differential pay; (3) eliminate the right of senior employees to claim Sunday work; and (4) hire part-time students.

¹³Cost to sell is a management tool designed to provide decision makers with a yardstick by which to measure store sales against wages paid employees. As explained by Dill, and as shown in R. Exh. 23, cost to sell reflects the percentage of total sales consumed by in-store salary costs for all employees except the store’s manager and associate manager.

¹⁴As Thomas explained below, and as otherwise shown, the budget axe fell almost exclusively on unit employees:

JUDGE SCHMIDT: If I might, I have one general thing I would like for you to clear up. This salary budget that Mr. Dill gave you applied to almost everyone who worked in the store. Can you tell me who it did not apply to?

A. To the non-sell, which would be office personnel, assistant manager, any people that were behind the scenes.

By Mr. Burson:

Q. You said “the people behind the scenes” in addition to the office and assistant manager.

Continued

The first postboycott weekly schedule was posted by at least November 3, covering the workweek commencing on Monday, November 5. The November 5 schedule reduced the regular employees' hours a normal range of 36 to 39 hours to 24 to 26 hours. These reductions were maintained in effect throughout most of the boycott period.

The weekly payroll hours for October through the first week in January 1991 reflect that 53 employees were on the payroll immediately prior to the start of the boycott. Eight are managers, supervisors, or office personnel specifically identified in the strike contingency plan as persons likely to work through a strike. Two more, Shirley Paynter and Joan Yocim, are classed as floor supervisor and security/floor supervisor, respectively. Five carry the 340 designation, meaning that they are nonunit restaurant employees. Seven are nonunit casual or call-in employees. None of the foregoing show any unusual cut in hours during the boycott.

Five employees listed on the preboycott payroll show no active employment prior to or during the boycott. One other retired on November 5. Of the remaining 25 employees, the record shows that 24 had their hours cut in the general range described above throughout the boycott. Only one, merchandiser Patti Collins, had no appreciable cut in hours throughout the boycott.

One on-call employee, Jean O'Brien, worked hours during the first week the reduced hours policy was in effect which paralleled her highest preboycott hours. In the following weeks, O'Brien's hours nearly doubled.¹⁵ The payroll record also shows Respondent hired three new employees on November 9, four more new employees on November 16, and three additional new employees on November 26. Joni Acebedo, hired on November 9, was terminated after working 13 hours in 2 weeks. Gregory Parks, hired on November 16, was terminated on November 20 after working 11.75 hours. Debra Bibber, also hired November 16, was terminated on November 25 after working 28 hours.

Altogether, O'Brien and the new employees worked a total of 417 man-hours during the boycott.¹⁶ When the likely man-hours of the temporarily transferred assistant managers, discussed below, are added, this number begins to approach the approximate number of man-hours cut from the unit employees' schedule during the boycott.

The drastic changes reflected in the November 5 schedule naturally caused a ripple effect which produced changes in the days employees were scheduled to work, and when they took their breaks and lunch periods.¹⁷

A. Maintenance, freight room, the non-union, well, I suppose it was—there is a group of people that are considered key employees that we have[:] general office, security, freight room, maintenance, assistant manager, personnel. I think that's the ones that were listed.

¹⁵ During the boycott, three of the remaining six on-call employees worked no hours at all. The remaining three worked a total of 32.5 man-hours during the boycott period.

¹⁶ In its brief, Respondent asserts that John Cady did not work any hours during the boycott. G.C. Exh. 19, the exhibit from which this data was drawn, reflects that Cady worked 24.5 hours during the week ending December 2, the last week of the boycott.

¹⁷ The General Counsel's complaint alleges the reduction in hours and other scheduling changes separately as unlawful. Nothing indicates that the changes in workdays and break periods resulted from anything other than the natural consequence of reducing employee

Because of the radical scheduling revisions during the boycott period, the daily schedule contained far more scheduling changes than before.¹⁸ As a result, it effectively controlled the employees work life to a far greater extent than it did prior to the boycott. Some evidence shows that the daily changes to the weekly schedule were so last minute that a few employees missed work shifts.

While at the store on November 3, Darlene Panion learned from Sue Joy that she was scheduled for 3-hour shifts (6 to 9 p.m.) on Monday, November 5, and Thursday, November 8. As Panion believed that 3-hour shifts were contrary to the contractual 4-hour shift rule, she protested the scheduling to Joy.¹⁹ Panion claims that Joy responded, "You have no contract. You'll work what I schedule you to work." Joy recalled making those remarks to someone but not to Panion.

By Panion's account, her shift schedule was later changed to 5 to 9 p.m. for November 5 but the 3-hour shift for November 8 was never revised. Panion implied that she was only paid for the 3 hours she worked on November 8.

According to Thomas, Joy told her that the Panion's 3-hour shifts would be a problem under the union contract. Thomas said that she immediately went to the schedule board and changed the shifts to 5 to 9 p.m. for both days in the presence of Panion. Thomas also claims that she apologized to Panion and told her that it was "a slip of the pen." Thomas concedes, however, that she neglected to change the daily schedule for Thursday, November 8. Panion denied that Thomas ever spoke to her about the 3-hour shifts.²⁰

Shortly after the boycott commenced three assistant managers were temporarily transferred to the Butte store. As a general rule, company assistant managers perform every facet of the work in a store.²¹ James Vivian, an assistant manager temporarily transferred to Butte during the boycott, described his usual duties in the following fashion: "I unload freight, I stock shelves, run check-outs if needed, take out trash, sweep the floor; whatever needs to be done it's our duty to do it if we're needed." Generally, this use of assistant managers continued during the boycott.

hours. Accordingly, all scheduling changes are lumped together hereafter as reduction in hours.

¹⁸ The Company posts a weekly schedule and a daily schedule. In general, the former reflects reporting and quitting times, the lunchbreak time, and the assigned department. The latter serves to provide an update for the weekly schedule as well as showing the breaktime and, where applicable, the person assigned to relieve for breaktime. Employees checked the daily schedule for minor revisions caused by someone taking timeoff.

¹⁹ The 4-hour shift rule (1986-1989 contract article 6(f)) reads:

Any employee who is called and reports to work shall be scheduled four (4) hours or more daily and shall be furnished not less than four (4) hours work for that particular day or four (4) hours pay in lieu thereof, except where employee is unable to work four (4) hours because of personal reasons or for those whose work period is between 6:00 P.M. and 9:30 P.M. [Emphasis added.]

²⁰ Instead, Panion claimed that she learned that her November 5 schedule had been changed to a 4-hour shift when Joy telephoned her at home later in the evening on November 3 with that information.

²¹ Store Manager Major explained that these individuals are often referred to as manager-trainees but are actually classified as assistant managers.

Ostensibly, the three assistant managers were transferred to the store to prevent sabotage of the merchandise ordering, control, and markdown processes by disgruntled employees. When they arrived, Kovar assigned each assistant manager to a section for the purpose of supervising and assisting the section merchandisers (unit employees) and the clerks in performing their usual duties. More particularly, they assisted merchandisers in ordering merchandise, and helped the clerks put out freight and keep watch for shrinkage, i.e., theft and misplacement of merchandise. Store Manager Major said that assistant managers worked their typical 48 hours per week while at the Butte store.

In the meantime, a notice over Store Manager Major's name was posted on November 12 stating that vacations would be temporarily postponed "[d]ue to the emergency which exists in our store." As interpreted, this notice also was used as justification for denying employees time off for contractual personal days and the birthday holiday. Boycott period requests by employees Joanne Black for a contractual personal day and Heather Burns for her birthday holiday were denied but both were paid for the days in the December 9 pay period.

The complaint alleges that employee Rich Condon's vacation time was canceled during the last week of November. However, Joy said that Condon, in fact, was accommodated with time off to go on a preplanned hunting trip. Condon, who did not testify, was likewise paid for his vacation pay during the December 9 pay period.

Under the existing sick leave policy, the Company has the right to require an employee to furnish a doctor's statement to support paid sick leave. Concededly, production of such statements lies within the discretion of the store personnel manager and have not been uniformly required. Sue Joy acknowledged that she required employees Heather Burns and Sharon Henderson to furnish a supporting doctor's statement for claimed sick days during the boycott.²² Joy explained the requirement in this manner:

[During] the negotiations which I'm sure that you're leading up to, the reason that I asked for the sick slips from the two people that I did was because that *I felt with the attitude that they had at the time*, a lot of them still had sick days left and it wouldn't have been beneath any one of them, I don't think, to have put in for a sick day and not shown up when we needed them the very most during that particular time when we needed every clerk that we could have. [Emphasis added.]

On November 17, Attorney Hoey visited the Butte store to assess the situation. He prepared a handwritten memorandum for Dill who was scheduled to be at the store the following day. Among other matters, Hoey suggested that union employees be used to pack merchandise for shipment to other stores as a strategic device to "show we mean business."

In addition, the Hoey memorandum predicted that sales would be picking up and hours would have to be added to the schedule "largely from the union side." "Replace-

ments," Hoey added, "can only be used to fill hours others can't, such as the sixth day." At another point Hoey suggested that Dill:

Give Sue and Ann a little more slack in the budget. We have to have coverage, even if it means more money for the enemy. We have to cover the store, and meet Christmas business.

As noted, the boycott ended when terms of a new agreement was concluded on December 3. No claim is made that any unlawful conduct occurred thereafter.

C. Further Findings and Conclusions

1. The 8(a)(1) allegations

I conclude that Sue Joy unlawfully threatened employee reprisals following the initial bargaining session. In so doing, I reject Respondent's arguments that Joy's remarks to Brosovic and Holderman were a mere "expression of disappointment made to a friend" and that the remarks were "ambiguous and noncoercive."

On the contrary, given the context, the remarks have a clear threatening character. The bargaining table exchange grew out of efforts by the Union to secure changes in Joy's scheduling practices and, as Joy herself made clear by both her admissions and her subsequent deeds found unlawful below, she meant to, and did, exercise the discretion vested in her by the Company to the detriment of employees. Accordingly, I find Joy's remark to Brosovic and Holderman violated Section 8(a)(1) as alleged.

I further conclude that the General Counsel has failed to prove that Kovar unlawfully interfered with the handbilling as claimed but I find that no justification existed under the established standard for photographing and videotaping handbilling activities.

The complaint couches Kovar's conduct toward the handbillers in terms of "informing employees . . . that their conduct was unlawful and attempting to move employees . . . to another location." In his brief, the General Counsel asserts that Kovar was "impliedly threatening [employees] with arrest by characterizing their activity as unlawful." The proof fails to support this harsh inference suggested by the General Counsel.

Unquestionably, Kovar provoked a dispute with handbilling employees about where they could position themselves in relation to the store entrances. However, I find such conduct alone does not amount to unlawful interference. And I am unwilling to find that Kovar was "impliedly threatening [employees] with arrest" as charged by the General Counsel.

Although Brosovic claimed that Kovar told her in the presence of three other employees that it was "illegal" to engage in handbilling in front of the store, two of the three potential corroborating witnesses were not called to testify and the third did not corroborate Brosovic's assertion on this point.

For this reason, and as Kovar claims that he merely told employees that it was illegal to block the entrances, I find that the quality of the General Counsel's evidence is insufficient to merit the inference that Kovar was impliedly threatening employee handbillers with arrest or any other retribution. Accordingly, I conclude that Respondent did not violate

²² Burns said that Joy insisted on not just a doctor's note but rather some showing that she had visited a doctor for treatment. That, Burns said, would have cost her more than the wages she would have earned.

Section 8(a)(1) as alleged with respect to Kovar's efforts to re-position the handbilling employees.

I conclude, however, that the photographing and videotaping of peaceful handbilling did amount to unlawful interference notwithstanding the Union's efforts to publicize its boycott activities in the media and the Respondent's assertions that the employees engaged in handbilling unlawfully interfered with ingress and egress by store customers.

Generally, employer photographing of employees' concerted activities, such as picketing or handbilling, violates Section 8(a)(1) in the absence of "proper justification" as it tends to intimidate employees. *Waco Inc.*, 273 NLRB 746, 747 (1984), and the cases cited at fn. 4. This rule conforms to the broader objective standard used in assessing alleged 8(a)(1) conduct. Under Section 8(a)(1), the test is not whether the conduct was successful but whether, under all of the circumstances, the conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Jay Foods v. NLRB*, 573 F.2d 438 (7th Cir. 1978).

Here, Respondent failed to establish proper justification for photographing and videotaping employees engaged in handbilling. I find the claim about blocking store entrances little more than excited exaggerations by management officials. At best, Kovar—who obviously concerned himself with the issue more than anyone—was concerned mostly about handbillers positioning themselves in the center of the entrances. Although it may be true that some customers were required to walk around the handbillers, any construction of his testimony which leads to a conclusion that employees were willfully blocking the entrances could never be justified.

Major's fatuous claim that the two photos in evidence show handbilling employees blocking customer egress—coupled with Hoey's November 17 assessment of Majors as overly jittery—strongly colors the Respondent's justification evidence. Security Supervisor Ann Marie Dagen's original suggestion that large contingents (4 to 6) of handbilling employees gathered in front of the doorways simply evaporated on cross-examination. And Vivian's assertion that he failed to capture blocked entrances on film because of the speed with which employees scattered when they saw him taking photos is unconvincing.²³

Joanne Black's claim that Assistant Manager Lee waited to photograph her until she approached a customer with a handbill probably explains to a great extent why even Hoey could find only evidence of peaceful handbilling after reviewing the photographs and videotapes on November 17. In sum, I conclude that no justification existed for photographing and videotaping the handbilling activity based on claims that employees blocked store entrances.

Respondent also argues that the coercive nature of its picture taking was neutralized by the media attention sought by the Union. This element was addressed in *U.S. Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982), where that Court ultimately held that an employer's photographing of union demonstrators was not coercive. However, the court did not give controlling weight to the media coverage of the employee demonstration in that case; it simply observed that third-party picture taking is one of several factors which should be considered in determining the coerciveness of employer picture

taking. *Id.*, fn. 17. Later, in *Waco*, supra, the Board alluded to the absence of media coverage in finding the employer picture taking there unlawful.

Neither of the two cited cases had occasion to address the impact of picture taking on employees who were not photographed. The circumstances present here suggest that any thorough analysis cannot focus *solely* on the photographed employees in determining the potential picture taking has for inhibiting the exercise of Section 7 rights by employees.

To the extent that employer picture taking can be said to be intimidating, the intimidation extends equally to other employees who observe or otherwise learn of it because their willingness to participate in the concerted activity could be diminished. The point made is not unlike the intimidation suffered when an employee who is undecided about joining a union overhears his boss threaten to discharge a nearby employee for signing a union card.

I am not satisfied that the presence of media coverage here neutralizes the coercive nature of Respondent's picture taking. The picture taking occurred at times while employees were on duty in the store. Vivian said that he took photos from about 20 feet inside the store and that employees could not help but see what he was doing. The two photographs in evidence are from inside the store; if they are typical, as Hoey and Black suggest, the picture taking occurred in an atmosphere obviously void of cause to any on-looker.

Sections 7 and 8 of the Act are designed to guarantee employees the right to engage in union or concerted activity, or refrain from doing so, free of both employer and union coercion. Applied to the situation scrutinized here, the statute means all of Respondent's employees can choose to participate in all, some, or none of the boycott activities on their own time. That choice obviously includes the right to participate in any attendant media coverage.

Where, as here, the Respondent's picture taking occurred without any justification easily discernible to those employees who likely observed it, I find that it would, in fact, have a tendency to chill their free exercise of the right to participate in whatever portion of the Union's boycott activities they wanted notwithstanding other third-party picture taking.

Clearly, if employees observe management officials photographing a raucous mob scene preventing customers from entering or leaving the store, they could be expected to understand the justification for such action. But if employees observe management photographing only peaceful handbilling, as in Black's case, they could reasonably doubt management's true motives.

For these reasons, I conclude Respondent violated Section 8(a)(1) of the Act as alleged in connection with the photographing and videotaping employees engaged in handbilling.

2. The 8(a)(3) allegations

Section 8(a)(3) of the Act makes it unlawful for an employer to discriminate against its employees to encourage or discourage membership in a labor organization. The following principles, restated by the Board in *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985), govern the evaluation of evidence in discrimination cases under the Act:

The Board held in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied.

²³ Respondent chose not to offer the photos alluded to by Vivian.

455 U.S. 989, that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co.*, 256 NLRB 53 (1981).

I find that the General Counsel established a strong prima facie case with respect to the specific personnel actions of Sue Joy.²⁴ Joy's unlawful threat following the first bargaining session to, in effect, become much stricter in accommodating employee schedule requests is evident in her treatment of Burns' request for the birthday holiday and a day of sick leave, Henderson's request for a day of sick leave, and Black's personal day request.

Respondent's argument that other employees have been requested to furnish a doctor's excuses to support requests for sick leave, although true, is unavailing here. No showing was made that either employee had a history of abusing sick leave. I construe Joy's explanation for denying these two sick leave requests as tantamount to an admission of an unlawful motive as to these specific requests; her reference to employee "attitude" is obviously little other than a code referring to the employees' protected boycott activities.

Likewise, the assertion that Burns and Black could not be spared on the requested leave days when the regular employees were working a substantially reduced schedule is not at all persuasive. This is especially true in light of Joy's prior unlawful threat following the first bargaining session. Burns' and Black's requests were the type Joy specifically referred to when she explained the meaning of her threat.²⁵

For the foregoing reasons, I find Respondent has failed to carry its burden of persuasion with respect to Joy's conduct in connection with the disputed sick leave, birthday holiday, and personal day requests.²⁶ Therefore, I conclude that this conduct violated Section 8(a)(1) and (3) as alleged.

²⁴The complaint erroneously alleges that Joy was responsible for reducing employee hours and other changes found to flow from that. The proof establishes that Dill set in motion the reduction in hours.

²⁵In its brief Respondent argues that Burns and Black failed to give the contractual 30-day written notice for their personal day requests. That claim is of no avail here. Joy did not cite that reason for denying either request and in Burns' case the requirement is inapplicable because she requested to be off for her birthday, an employee holiday under the contract which is unaffected by 30-day written notice requirement.

²⁶To the extent that Respondent argument grounded on the Board's decision in *Texaco, Inc.*, 285 NLRB 241 (1987), and its progeny, is intended as applicable to these leave requests, that argument is rejected as inapposite. Those cases deal with the continuation of employee benefits during employee strikes. Notwithstanding Respondent's strained claim that its employees engaged in a "partial strike," no employee strike, in fact, occurred here.

I further find that the General Counsel made a prima facie showing that unit employees' schedule reduction during the boycott was unlawful.

By engaging in a boycott in support of its bargaining demands, the Union was exercising a lawful economic weapon available to it in the collective-bargaining process. The showing by the General Counsel that Respondent almost immediately reduced unit employee hours and thereafter covered most of those hours with the use of newly hired employees, temporarily transferred assistant managers, and on-call employees clearly permits an inference that the reduction in hours was motivated for discriminatory reasons.

Even assuming that the boycott caused a reduction in sales, the evidence suggests that the extent to which Respondent cut the hours of its regular employees was unnecessary simply to meet that situation. Other evidence showing that the Company responded in a slower and more deliberate fashion to the store's drop in sales resulting from the K-Mart competition a year earlier contrasts with the swift response it took toward the boycott. The contrasting responses in two relatively identical economic situations tends to support a conclusion that the motive underlying its reaction to the boycott was motivated by retaliation rather than by economics. For these reasons, I am satisfied that, under *Wright Line*, the burden of persuasion was shifted to Respondent.

Not surprisingly, Respondent argues that the reduction in hours was economically motivated, a result of the extreme drop in sales during the boycott period. Respondent justifies its use of temporarily transferred assistant managers on the ground that they have been utilized during prior strikes and were present primarily to provide security from sabotage by boycotters of merchandise orders, markdowns, and other recordkeeping. In addition, Respondent argues that the company normally hires new employees during the Christmas season and that the hours worked by eight new employees here coincided with hours that the regular employees worked.

Respondent also alludes to three lockout cases in fashioning its defense but it carefully avoided labeling the schedule reductions as a lockout. Citing *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965), and *Harter Equipment*, 280 NLRB 597 (1986), Respondent argues that its actions were permissible defensive reactions, sanctioned by those cases, to the postboycott sales reductions and that those cases justify its use of temporary replacements (including both new employees and assistant managers) during the boycott period. Those two cases, Respondent argues, establish that its conduct was neither unlawful nor "inherently destructive" of employee rights and it asks rhetorically: "If Respondent could lockout its employees and schedule them zero hours, doesn't it seem less severe to do what it did in the instant case?"

Arguing that it had a reasonable fear that the Union would strike during the busy Christmas retailing season, Respondent, as support for its own postboycott conduct, relies on *Birkenwald Distributing*, 282 NLRB 954 (1987). The Board concluded that the employer there acted lawfully by locking out its employees and continuing operations with temporary replacements in circumstances designed to prevent an economic strike during a busy season.

Respondent's evidence that the cut in regular employees hours throughout the boycott period was motivated by its lower sales volume is not persuasive. I have reached this conclusion for the following reasons.

First, and most importantly, the evidence proffered by Respondent in support of this claim fundamental to its defense is stunningly weak. For some inexplicable reason, Respondent avoided introducing boycott period sales records to shore up its claim about the degree of the boycott's impact. My difficulty with the nature of Respondent's evidence results not from a personal peccadillo about sales records simply because they exist but rather from my inability to square Regional Personnel Manager Dill's testimony rationally with other evidence in the case.

Dill, the management official responsible for the implementation of the postboycott schedule reductions, asserted that employee hours were reduced after the boycott began in order to keep the Butte store's cost to sell reasonable. According to Dill, the Butte store's cost to sell typically fell within an acceptable range of 10 to 11.5 percent.

During the boycott period Dill said, "[w]e had cost to sell probably thirteen, fifteen, twelve." The difficulty with this testimony is that such cost-to-sell figures are totally incompatible with the claim by Dill and other management officials that sales dropped by 50 percent, or more, during the boycott.

For example, if the merchandise sales reflected in Respondent's Exhibit 23 were half the amount actually shown, the cost to sell would skyrocket to 28.23 percent. Cost-to-sell percentages of 12 or 13, alluded to in the above-quoted testimony of Dill, would be a substantial improvement over the 14.11 percent merchandise cost-to-sell (and the overall 14.64 percent cost to sell) for the ordinary week of June 11, as shown in Respondent's Exhibit 23, unless that week was aberrant for some unknown reason. In fact, even a 15-percent cost-to-sell is not that far out of line with what actually occurred during the June 11 week.

Although the boycott unquestionably had some effect on the store's sales, the actual degree of the boycott's impact is significant where, as here, the opening of the nearby K-Mart store a year earlier provides some basis for gauging the comparative management responses. If, in fact, the two calamities were comparable in magnitude, an answer would be required to the obvious question as to why Respondent's economic reaction was so slow and deliberate in the K-Mart situation but with such haste and severity in the boycott situation. However, Respondent precluded any potential comparison by choosing to rely on demonstrably questionable testimonial claims that the impact on its sales from the boycott was about twice as severe as the impact from K-Mart's arrival.²⁷ In sum, I find Respondent's evidence about the boycott's impact unconvincing.

Second, the use of newly hired employees, at least one on-call employee, and the cost-subsidized assistant managers who spent the vast majority of their time performing unit work is inconsistent with Dill's cost control claim. The actual cost savings from the schedule reductions were likely offset to a substantial degree, if not altogether, by the cost of these replacements.

²⁷ Respondent sought to buttress its sales-loss claims with evidence elicited from employees that up to 50 percent of potential customers approaching the store turned away in response to the boycott appeal. Even though the Union and its supporters undoubtedly like to believe that the boycott had a dramatic effect on the store's sales, it would be wildly irrational, in my judgment, to infer that sales dropped by 50 percent based on the employee evidence.

Respondent's claim that the temporary transfer of assistant managers to the store was justified to provide security against sabotage of the merchandise ordering, control, and mark-down process by obviously disgruntled regular employees fails to account for the number of assistant managers who were utilized at Butte during the boycott.

Based on Store Manager Major's and Assistant Manager Vivian's testimony, the assigned merchandise security duties at Butte consumed little of the transferred assistant managers' time. Clearly, the vast majority of their time was spent performing routine duties normally performed by the unit employees. Even, the original strike contingency plan called for temporarily transferring for only four assistant managers to Butte in the event of a full scale walkout. Hence, I conclude that the three temporarily transferred assistant managers were utilized principally as replacement employees to meet the store's inadequate coverage that resulted from reducing regular employee hours.²⁸

Third, Ann Thomas' testimony that she was following a "norm" in scheduling unit employees which amounted to the minimum hours necessary for the retention of regular employee benefits suggests little, if any, correlation between the sales activity and postboycott scheduling.

Fourth, Major's announcement postponing vacations and the denial time off to Burns and Black during the boycott served no discernible cost-reduction purpose.²⁹ Instead, the only impact these actions seemingly would have is to compel the affected employees to remain available for assignment while other unit employees, in effect, were underemployed.

And fifth, Hoey's November 17 memo urging Dill to budget additional hours to provide adequate coverage is couched in terms ("even if it means more money for the enemy") suggestive of a retaliatory motive.

For the foregoing reasons, I conclude that the preponderance of evidence supports the finding I make here that the reduction in hours and attendant scheduling changes following the commencement of boycott was designed to punish unit employees for the Union's boycott and had little, if anything, to do with controlling store costs.

Furthermore, I reject Respondent's argument that its postboycott scheduling practices are justified under the cited lockout cases. By claiming an impasse and actually implementing its most significant bargaining proposals concurrent with the schedule reductions here, Respondent substantially undercut any available claim that its purpose was in support of its bargaining demands. Moreover, the claim that this action was taken because it feared a strike by employees during the busy Christmas season fails to withstand critical analysis. While that claim may well have justified a complete lockout, the potential harm of a strike during the busy retailing season still remained after the November 5 schedule changes were instituted.

²⁸ In general, the term "coverage" as used here can be defined as having enough personnel in the store at any given time to readily assist customers, stock the shelves and racks, and watch for shrinkage, i.e., shoplifting and other misplacement of merchandise. However, as Hoey's testimony on the subject suggests, the adequacy of coverage is not readily quantifiable in any mathematical sense; he suggests that it is part of the retailer's art, so to speak.

²⁹ As the General Counsel failed to prove that Rich Condon was actually denied any vacation time, I will recommend dismissal of that allegation.

In my judgment, the circumstances here are comparable in principle to those in *Riverside Cement*, 296 NLRB 840 (1989). There, the Board found that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to permit certain employees to work if they declined, in support of their union's bargaining demands, to provide tools exempted by contract but which they had historically provided. Rejecting the employer's claim of a legitimate lockout, the Board concluded that the employer's action was unlawful retaliation for employee union activity.

Based on the foregoing, I find that Respondent's postboycott scheduling practices violated Section 8(a)(1) and (3) as alleged.

However, the General Counsel's separate allegation concerning Brosovic's 3-hour shift assignment lacks merit independent of Respondent's overall unlawful scheduling strategy. Put another way, except to the extent that her hours were reduced generally as a part of Respondent's unlawful scheme to punish the unit employees, the allegation that her 3-hour shift assignment was unlawful has not been proven especially where, as here, at least a colorable contractual claim exists for such an assignment.

In view of the foregoing conclusions, I find it unnecessary to consider the General Counsel's claim that Respondent's actions were unlawful as inherently destructive of employee rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

3. The 8(a)(5) allegation

As the evidence merits the conclusion that Respondent's actions in reducing hours and otherwise altering its scheduling practices during the boycott were discriminatorily motivated, I find the General Counsel's allegation that this conduct was an unlawful unilateral change in violation of Section 8(a)(5) of the Act to be inapplicable to the situation at hand. To hold otherwise would lead to the anomaly of fashioning a bargaining order remedy requiring Respondent to notify the Union and provide it with an opportunity to bargain about discriminatory changes in the future. And even if it is assumed that Respondent's conduct was a lawful response to the Union's boycott activity, which I do not, no duty to bargain over tactics responsive to the implementation of economic weapons in support of collective-bargaining positions exists. *Laclede Gas Co. v. NLRB*, 421 F.2d 610 (8th Cir. 1970).

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

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

CONCLUSIONS OF LAW

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

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

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by threatening employees because of issues raised on their behalf during collective-bargaining negotiations, and by photographing and videotaping employees engaged in union activities without proper justification.

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by discriminatorily: (a) reducing employee hours, (b) denying employee holiday and personal leave requests, and (c) denying sick leave requests under its sick leave policy, all during the period of the Union's boycott.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

As Respondent has engaged in certain unfair labor practices, the recommended Order requires it to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

Respondent is required to make its employees whole for the losses incurred as a result of reducing the unit employees scheduled hours during the boycott period, and to make Burns and Henderson whole for the sick pay discriminatorily denied them during the same period together with interest in accord with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As Burns and Black were paid their personal and holiday pay, additional pay for those days is not required.

Finally, Respondent must post the notice attached to this decision at store 1934 in Butte, Montana, in order to inform employees of the outcome of this matter and their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

The Respondent, F. W. Woolworth Co., Butte, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees because of issues raised on their behalf during collective-bargaining negotiations.

(b) Photographing or videotaping employees engaged in union activities without proper justification.

(c) Discriminatorily reducing employee hours, denying employee holiday and personal leave, and denying sick pay its sick leave policy.

(d) 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) Make its employees whole for all losses incurred by them in the manner specified in the remedy section of the this decision.

³⁰All outstanding motions inconsistent with this decision are overruled. 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.

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

(c) Post at its Butte, Montana Store 1934 copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that all complaint allegations not sustained by the administrative law judge's decision in this case be dismissed.

³¹ 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

Following a hearing before an administrative law judge, the National Labor Relations Board found that we violated the

National Labor Relations Act and ordered us to post and abide by this notice.

Under the National Labor Relations Act you have the right to organize; to join or assist unions; to bargain collectively with your employer through a representative freely chosen by a majority of employees in an appropriate bargaining unit; to engage in other group activities for your mutual aid and protection on the job; or to refrain from any or all of these activities.

WE WILL NOT threaten employees because of issues raised on their behalf during collective-bargaining negotiations with United Food and Commercial Workers Union, Local 4R.

WE WILL NOT photograph or videotape employees engaged in union activity without proper justification.

WE WILL NOT reduce employee hours, postpone or deny employee holidays or personal leave, or refuse to pay sick pay under our sick leave policy because employees engage in union activity.

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

WE WILL make employees whole for losses incurred by reducing their hours of work between November 5 and December 3, 1990, and by denying sick pay to Heather Burns and Sharon Henderson in the same period, together with interest as required by law.

F. W. WOOLWORTH Co.