

**R.P.C. Inc., a Division of Rorer Pharmaceutical Corporation and Rhone Poulenc Rorer, Puerto Rico, Inc. and District 65, United Auto Workers, AFL-CIO and Local 2286, U.A.W., AFL-CIO and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.** Cases 24-CA-5888, 24-CA-6039, 24-CA-6087, 24-CA-6103, 24-CA-6217, 24-CA-6241, 24-CA-6284, and 24-CA-6288

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On April 6, 1992, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Charging Party filed a request to strike exceptions and an answering brief, and the Respondent filed a reply 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<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions as further explained below and to adopt the recommended Order.

The judge found, and we agree, that the Respondent violated various sections of the Act, including Section 8(a)(5) of the Act by, among other things, withdrawing recognition of the Union and repudiating its existing contract with the Union. In its defense, the Respondent had contended that it was privileged to act as it did be-

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Charging Party has filed a motion to strike the Respondent's exceptions because they do not comply with Sec. 102.46 of the Board's Rules and Regulations. We deny the motion to strike. To the extent that we are unable to identify the substance of the Respondent's exceptions, however, we deem the exceptions waived (oral argument may further explicate a proper exception, but it is not a substitute). The Charging Party has also filed a motion in support of the judge's decision, urging that it be affirmed in all parts. We grant the motion to the extent it is consistent with this decision.

In response to the General Counsel's request, we correct the judge's inadvertent error in describing a deauthorization petition to rescind the Union's authority to enter into a union-security agreement as a decertification petition. Case 24-RD-213 is corrected to read Case 24-UD-213.

<sup>2</sup> The Respondent has 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

cause, according to the Respondent, the Union had achieved its status as the employees' representative through a critically flawed affiliation process. We find, for the reasons set forth below, that the Respondent is estopped and time barred from challenging the Union's affiliation process.

As more fully described by the judge, prior to 1978, District 65, UAW, had a longstanding collective-bargaining relationship with USV Laboratories. In 1987, USV was acquired by RPC Inc., a Division of Rorer Pharmaceuticals. Rorer recognized District 65 and assumed the extant collective-bargaining agreement, which was due to expire on June 1, 1988. The unit of employees at Rorer represented by District 65 was referred to as "District 65-Rorer."

In May 1988, the parties commenced negotiations for a new collective-bargaining agreement. During the negotiations, in May and again on November 1, local representatives of District 65-Rorer informed the Respondent's representatives that District 65-Rorer members were in the process of leaving District 65 and becoming instead a chartered local of the UAW. The parties reached agreement on a new contract on November 1. At a contract ratification meeting held on November 4, employees voted to ratify the contract and further voted unanimously to leave District 65 and to affiliate as a separate local of the UAW. The new contract was executed on November 21.<sup>3</sup> Subsequently, according to the Respondent's minutes of a February 17, 1989 meeting between the Respondent and the Union, local union officials advised the Respondent that the membership had approved the change from District 65 to a local of the UAW and that it was expected that a UAW representative would soon inform the Respondent that this change had been approved by the UAW.<sup>4</sup> Finally, as found by the judge, the parties on April 27, 1989, entered into a stipulation in which they agreed to substitute the parties named in the stipulation—i.e., the Respondent and Local 2286<sup>5</sup>—for those set forth on the cover page of the contract executed the previous November 21.<sup>6</sup> Thereafter, the Re-

<sup>3</sup> The contract was retroactive to November 14, with an expiration date of November 13, 1991.

<sup>4</sup> By letter dated February 22, 1989, the director for region 9A of the UAW wrote to the Respondent to inform it "officially" of the change from District 65 to Local 2286. The Respondent has denied receiving this letter.

<sup>5</sup> The contract identified the company as "Rorer Pharmaceutical Corporation" and the Union as "District 65, United Autoworkers, AFL-CIO." The parties agreed to change the designations to "R.P.C. Inc., A Division of Rorer Pharmaceutical" and "Local 2286, United Autoworkers, Aerospace and Agricultural Implement Workers of America, (UAW), AFL-CIO."

<sup>6</sup> The stipulation further provided:

All internal union procedures were properly complied with, at the level of the unit employees, the District 65 and the UAW, and thus effective December 14, 1988, the internal union procedure having been properly complied with, resulted in the estab-

spondent dealt with Local 2286 as the bargaining representative of the unit employees. The Respondent, after initially deducting dues and placing them in escrow, forwarded them to Local 2286 pursuant to the contractual checkoff provision. The Respondent and Local 2286 also entered into successive stipulations to amend various provisions of the collective-bargaining agreement. On February 5, 1990, however, the Respondent withdrew recognition of the Union. As noted, the Respondent contended that the Union had achieved its status through a flawed affiliation process. Thus, the Respondent argues that: (1) the employee petition seeking a change in affiliation was flawed; (2) there was no prior notice to the employees of the proposed change and no opportunity for adequate discussion; and (3) there was no secret-ballot vote on the change.

For reasons that follow, we find, as did the judge, that the Respondent is estopped from contesting the validity of the Union's affiliation process. Similarly, the policies underlying Section 10(b) of the Act preclude the Respondent's belated challenge to the Union's affiliation.

We first examine the principle of equitable estoppel. As discussed in *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1382-1383 (1987), a party that, in obtaining a benefit, engages in conduct that causes a second party to reasonably rely on the "truth of certain facts" that are assumed may not controvert those facts later to the prejudice of the second party.<sup>7</sup> The gravamen of the harm is not the first party's original conduct but rather the inconsistency of its later position.<sup>8</sup> A party may be estopped from denying representations even though that party had no timely knowledge of

their falsity. Thus, the estoppel doctrine does not operate only when a party makes an assertion or acts in accord with a valid belief. Rather, the key is that the estopped party, by its actions, has obtained a benefit. Basically, as discussed in *Lehigh*, the validity of a party's belief is irrelevant. Otherwise, a party to be estopped could often escape the application of the estoppel doctrine by simply claiming that it was unaware of all the facts when it acted.

Here, the General Counsel has made a persuasive case for application of the estoppel doctrine. The elements of estoppel<sup>9</sup>—knowledge, intent, mistaken belief, and detrimental reliance—have all been satisfied. The Respondent had knowledge of the affiliation no later than February 1989. Indeed, the Union informed the Respondent in November 1988 that the affiliation was pending. At the February 1989 meeting, the Union informed the Respondent that the employees had approved the affiliation. At that point, the Respondent had notice that the affiliation was essentially complete and it had the opportunity to either accept or challenge the affiliation.<sup>10</sup> Finally, by entering into the April 27, 1989 stipulation, the Respondent officially accepted what it already knew and had failed to challenge. It recognized Local 2286 as the representative of its employees. By recognizing the Union, the Respondent induced the Union to believe that the Respondent would forgo any challenge it might have had to the Union's affiliation procedure. The Union, acting on its belief regarding the Respondent's intentions, relied to its detriment on the Respondent's actions. That is, if its affiliation procedure had been promptly challenged in early 1989, the Union would have been in a better position to establish that its procedure was valid or to rectify any infirmity in that procedure (and the ongoing day-to-day representation of the employees could have been assured during the time needed for any corrective action). Indeed, the Union could have resorted to the Board's processes or other means to reestablish its status as the employees' representative. Therefore, we find, as contended by the General Counsel, that all elements of estoppel have been satisfied.<sup>11</sup>

The Respondent, however, argues that it is not estopped. According to the Respondent, at the time it recognized the Union, it did not know the facts surrounding the affiliation procedure because it was af-

lishment of Local 2286, UAW to represent the employees in the appropriate unit herein.

All entities mentioned in this paragraph represent and warrant that the internal union procedures were fully complied with and agree to hold harmless the employer for any act or conduct engaged in by the employer, as a result of the recognition of the change from District 65 UAW to Local 2286, UAW.

All parties herein agree that the change in the name of the employer and the change in the name of the labor organization, as expressed herein, will be reflected by amendment of the parties, in any further proceedings in the pending Board cases, and the changes to which this Stipulation refer to will not be raised as a defense by any of them to preclude any further processing. [Sic.]

<sup>7</sup>See McClintock, *Principles of Equity* at 80 (2d ed. 1948), as quoted in *Lehigh*, supra at 1382:

The gist of equitable estoppel is that a party who has by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts, whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if thereby the other party will be prejudiced.

<sup>8</sup>In *Lehigh*, supra, the employer was estopped from challenging the merger of two unions because the employer had continued to bargain with the merged union for a year after the merger took place. Other examples of employer conduct constituting acceptance of a union's status include processing grievances, making contributions to health and welfare funds, deducting dues, and engaging in bargaining. See *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989).

<sup>9</sup>See, e.g., *Bob's Big Boy Family Restaurants*, 259 NLRB 153, 154 fn. 9 (1981).

<sup>10</sup>As previously discussed, to prove "knowledge" under the doctrine of estoppel, it need not be established that the party to be estopped had knowledge of all the details or even the bona fides of the event in issue. Rather, to be estopped a party must have had knowledge of an event and have had the opportunity either to accept or refuse to accept the ramifications of that event.

<sup>11</sup>For the reasons explained above, the Respondent's assumptions regarding the validity of the affiliation vote that led it to continue to bargain are not in issue.

firmatively misled by the Union. It submits that the Union gave it assurances that the Union—during the affiliation process—complied with its internal union procedures. According to the Respondent’s interpretation of those procedures, the Union’s representations were false. We cannot agree.

The burden is on the party seeking to avoid an otherwise binding bargaining obligation to demonstrate the irregularity justifying its refusal to bargain, as it is with any affirmative defense. See *Insulfab Plastics*, 274 NLRB 817, 821 (1985), *enfd.* 789 F.2d 961 (1st Cir. 1986). We find, contrary to the Respondent’s assertions, that it has not established that the Union intentionally and affirmatively misled it.

The judge essentially found that the Union did not misstate what had occurred during the affiliation process. The judge noted that no provision of the UAW constitution addresses the sort of change that occurred here. That is, Local 2286 was not created by a typical withdrawal from an amalgamated local,<sup>12</sup> the situation addressed by the constitutional provisions. Instead the local membership of District 65 created a chartered local of the UAW. In this rather unusual circumstance, the UAW constitution does not dictate the exact procedures to be followed. Significantly, the officials of both District 65 and the UAW have approved the change and neither organization has objected to the procedures that led to the creation of Local 2286. These facts totally undermine the Respondent’s argument that the Union misrepresented to the Respondent the Union’s internal process.<sup>13</sup> We conclude that the Respondent has failed to establish that it was affirmatively misled by the Union. We therefore reject the Respondent’s argument that it was thereby privileged in February 1990 to avoid estoppel<sup>14</sup> and challenge Local

<sup>12</sup>An amalgamated local union is a local that includes several small bargaining units with different employers located within a specific geographic area. The UAW constitution procedural requirements are for withdrawal from an amalgamated local.

<sup>13</sup>In the context of whether an employer may, as a defense to a refusal to execute an agreed-on contract, challenge a union’s contract ratification procedure, the Board has held that, in the absence of a specific agreement to the contrary, it is for the union to determine whether its internal procedures for contract ratification have been met. See, e.g., *Childers Products Co.*, 276 NLRB 709, 711 (1985), *affd.* mem. 791 F.2d 915 (3d Cir. 1986); cf. *Beatrice/Hunt-Wesson*, 302 NLRB 224 (1991) (employer may challenge method of contract ratification where parties had, prior to entering into an agreement, discussed ratification and clearly defined what procedures would be followed).

<sup>14</sup>The fact that the Respondent accepted the hold-harmless clause in the April 27, 1989 stipulation does not prevent the application of equitable estoppel principles. Having been put on notice of the affiliation no later than February 1989, the Respondent had an opportunity to question and challenge that affiliation. In similar circumstances involving a union merger and a hold harmless clause in *Knapp-Sherrill Co.*, 263 NLRB 396, 398 (1982), the Board held that “the [e]mployer had but to question initially the merger procedures rather than recognize [the union], and as the [e]mployer conducted business with [the union] in a manner fully consistent with its rec-

2286’s successor status by withdrawing recognition of the Union.<sup>15</sup>

Section 10(b) of the Act similarly dictates that the Respondent be precluded from challenging the status of Local 2286. As set forth in *Sewell-Allen Big Star*, 294 NLRB 312, 313–314 (1989), the policies underlying Section 10(b) dictate that a party may not indirectly attack—more than 6 months after the event in issue—the validity of a merger (or affiliation) process through a defense to a later withdrawal of recognition. Here, the Respondent attempts to do just that. It seeks to justify its February 1990 withdrawal of recognition on the basis that the affiliation occurring in November 1988 (and of which the Respondent had knowledge by February 1989) was not valid. The Respondent’s challenge to the validity of the affiliation at least a year after it had knowledge of that affiliation came too late and cannot be considered a defense to the 8(a)(5) allegation. In this respect, the situation is no different from any belated attempt to attack a union’s majority status as of the time of recognition.

As it argued in defending against the General Counsel’s equitable estoppel position, the Respondent submits that Section 10(b) was not triggered because it did not have knowledge of all facts relating to the affiliation.<sup>16</sup> To be sure, the 10(b) period commences only

ognition for 2 years thereafter, we find the [e]mployer may not now challenge the procedures employed in the merger.” (Footnote omitted.)

<sup>15</sup>We need not, and do not, rely on the judge’s imputing the knowledge of Supervisor Rivera to the Respondent. The judge found that Rivera had knowledge of the affiliation process. Rivera became a supervisor in March 1989. The judge imputed to the Respondent—as of that date—all knowledge that Rivera had regarding the alleged infirmities in the affiliation procedure. Thus, the judge in effect concluded that the Respondent learned of the alleged infirmities in March, rather than December, 1989. Under our analysis, it is unnecessary to decide whether Rivera’s knowledge may be imputed to the Respondent because estoppel does not depend on the Respondent’s specific knowledge of the alleged infirmities in the ratification procedures.

<sup>16</sup>In regard to equitable estoppel and the policy of Sec. 10(b), the Respondent contends that *Sewell-Allen*, supra, as well as *Control Services*, 303 NLRB 481 (1991), support its position. According to the Respondent, these cases dictate that estoppel and Sec. 10(b) cannot be invoked unless the party to be estopped or barred had knowledge of all facts and alleged infirmities regarding an event and still chose not to contest that event. We do not agree. In *Sewell-Allen*, an employer sought to challenge the validity of a merger of a union as a defense to an 8(a)(5) allegation. The Board held that the doctrine of estoppel and the policies underlying Sec. 10(b) precluded the employer from doing so. The Board reasoned that the employer had notice of the merger and thereafter chose to deal with the merged union over a 7-month period. In so finding, and contrary to the Respondent, the Board did not rely on, or find critical, the employer’s knowledge or lack of knowledge of alleged infirmities in the merger process. *Sewell-Allen*, supra at 312–314.

In *Control Services*, supra at 482 fn. 8, the Board similarly refused to permit an employer’s belated challenge to a union merger election. The Board found that the employer was estopped where nearly a year after the merger the employer named the merged union in its proposed contract and continued to deduct dues even some 9 months

when a party has clear and unequivocal notice of the action giving rise to an alleged violation of the Act. See, e.g., *A & L Underground*, 302 NLRB 467, 469 (1991), and cases cited.<sup>17</sup> But it is knowledge of the act or event to be challenged that triggers Section 10(b); there is no requirement that an affected party have knowledge of all the circumstances leading up to, or surrounding, the event in issue. Thus, for purposes of Section 10(b), the Respondent—on learning of the affiliation and being asked to accept it—had 6 months to challenge that procedure and the resulting affiliation.<sup>18</sup> Having failed to do so, it cannot now challenge the affiliation.<sup>19</sup>

In sum, we find that the Respondent knew of the change in affiliation and had ample opportunity to challenge the propriety of that affiliation. Having instead chosen to deal with Local 2286 as the bargaining representative of the unit employees, it may not now—because of the doctrine of equitable estoppel and the policy set forth in Section 10(b) of the Act—evade its bargaining obligation by asserting facts at variance with its previous position. We accordingly adopt the judge’s conclusion that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition of the Union and repudiating the extant collective-bargaining agreement.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

after that. The union relied on the employer’s failure to challenge the merger, that is, the union did not seek to reestablish its status. As noted in *Lehigh*, supra at 1383 fn. 50, estoppel—unlike waiver—does not turn on knowledge. The Board, in *Control Services*, found, “[i]n addition” to its finding of estoppel, that the employer “knowingly and intentionally waived” its right to challenge the union’s merger. But the waiver finding was separate from the finding of estoppel. Finally, in another separate finding in *Control Services*, the Board held that Sec. 10(b) prevented the employer from challenging the merger more than 6 months after accepting that merger. Neither the conclusion regarding estoppel nor that regarding Sec. 10(b) relied on a finding that the employer—at the time it recognized the union—had knowledge of any and all alleged infirmities in the merger process.

<sup>17</sup> Although Member Devaney agrees with this general proposition and as it is applied in the context here, he finds it unnecessary to rely on *A & L Underground*, in which he dissented.

<sup>18</sup> The Board recognizes that the 10(b) period does not begin if one party has fraudulently concealed the operative facts that could give rise to a violation of the Act. See, e.g., *O’Neill, Ltd.*, 288 NLRB 1354 (1988), enf. 965 F.2d 1522 (9th Cir. 1992). For the reasons set forth above in regard to equitable estoppel, we conclude that the Union here did not fraudulently conceal the operative facts. Rather, the Union reported to the Respondent that the affiliation had been completed in a manner that it viewed—as did the UAW and District 65—as consistent with its internal procedures.

<sup>19</sup> In light of our findings regarding equitable estoppel and Sec. 10(b) of the Act, we need not pass on the judge’s finding that there was substantial continuity between the pre- and postaffiliated union and that the affiliation process complied with minimal due-process safeguards.

orders that the Respondent, R.P.C. Inc., a Division of Rorer Pharmaceutical Corporation and Rhone Poulenc Rorer, Puerto Rico, Inc., Manati, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.<sup>20</sup>

*Virginia Milan-Giol, Esq.* and *Efrain Rivera Vega, Esq.*, for the General Counsel.

*Francisco Chevere, Esq.*, of San Juan, Puerto Rico, and *Timothy P. O’Reilly, Esq.* and *Jeffrey E. Flemming, Esq.*, of Philadelphia, Pennsylvania, for the Respondent.

*Betsey A. Engel, Esq.*, of Detroit, Michigan, and *Ginoris Vizcarra DeLopez-Lay, Esq.*, of Santurce, Puerto Rico, for the Charging Party.

<sup>20</sup> In its exceptions to the judge’s recommended remedy, the Respondent argues among other things that the judge erred in imposing on the Respondent an obligation to bargain for a specific 21-month period. We agree with the Respondent. Based on the violations found, the Respondent’s obligation is to bargain, on request, with the Union and if an agreement is reached, to embody it in a signed agreement. As the judge did not include the 21-month requirement in his recommended Order, we need not modify his Order in this regard.

The Respondent also contends that it is entitled to an “offset” against certain parts of the make-whole remedy ordered by the judge because it has already paid for various employee benefits. We leave to the compliance phase of this proceeding a determination of whether the Respondent is in fact entitled to an offset for payments previously made.

#### DECISION

##### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Hato Rey, Puerto Rico, on April 8–18, and July 31 through August 8, 1991. The proceeding is based on a series of charges filed December 6, 1988; October 25, 1989; February 8, March 1, August 10, October 3, 1990; and January 22 and February 1, 1991, respectively, as amended, by District 65, United Auto Workers, AFL–CIO and/or Local 2286, United Auto Workers, AFL–CIO. The Regional Director’s consolidated amended complaint, dated March 22, 1991, alleges that Respondent R.P.C. Inc., a Division of Rorer Pharmaceutical Corporation, of Manati, Puerto Rico, violated Section 8(a)(5), (3), (2), and (1) of the Act by:

1. Withdrawing recognition from the Union on February 5, 1990, repudiating an extant collective-bargaining agreement; making unilateral changes designed to undermine the Union, including denials of access, refusals to process grievances to arbitration, and refusals to provide information; and unilaterally improving employee terms and conditions of employment in order to dissuade employees from supporting the Union.

2. Giving written warnings to employee Carmen Hilda Rolon on July 12 and September 21, and suspending Rolon from employment for a 3-day period.

3. Issuing a written warning to employee Ines Velez on August 2; and imposing more onerous terms and conditions of employment on Velez since August 1.

4. Permitting a group of employees to campaign against the Union during paid working time on August 3.

5. Engaging in pre- and postelection conduct designed to discourage the employees' support for the Union.

On brief, the General Counsel moves to amend out of the complaint paragraphs 9(j), 12(a), (b), and (c) to the extent it refers to the creation of the impression of surveillance, 12(g) to the extent that it refers to Jorge Gaitan, 14(a), (b), (l), and 16. Inasmuch as the motion is restrictive in nature it is granted.

Subsequent to several requests for extension of the filing date, briefs were filed by all parties on January 14, 1992. Thereafter certain other pleadings also were filed.<sup>1</sup>

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is engaged in the manufacture and distribution of drugs, medicines, and related products. It operates a facility at Maniti, Puerto Rico, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Puerto Rico and it admits that at all times material, it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

Prior to 1986, District 65 had a longstanding collective-bargaining relationship with USV Laboratories. The latter company was acquired by Rorer in 1986 and Rorer recognized District 65 and assumed the collective-bargaining agreement, which was due to expire on June 1, 1988.

On April 6, 1987, Samuel Cancel, the president of District 65-Rorer, notified John J. Flynn, regional director of region 9A of the UAW (which covers bargaining units in Puerto Rico), that he was "petitioning for a local union, as provided by our constitution, in article 36, §11" in order to solve their problems and enclosed a petition by a committee of eight named members. International Representative Ralph Rivera (who serviced the Rorer unit), and Renee Mendez, administrative director of District 65, also were notified.

<sup>1</sup> Appropriate motions to correct the transcript were filed by the General Counsel and the Respondent. The motions are granted and the pleadings will be identified and received as G.C. Exh. 106 and R. Exh. 40, respectively.

Subsequent to the preparation of a decision in these matters, the General Counsel, by pleading dated March 11, 1992, moves to admit as G.C. Exh. 105, a copy of the Board's February 28, 1992 Decision and Certification of Election (and a corrective Order dated March 9, 1992), in Case 24-RD-356 which affirms the hearing officials' report reflected in G.C. Exh. 2, a case involving the parties in this proceeding. The Board can obviously take notice of its own decisions and as it helps to clarify and complete the record in this proceeding, I find it appropriate to grant the motion and receive the exhibit.

Also, subsequent to the drafting of this decision, the Respondent and Charging Party filed certain other letters or motions. They were not considered in the preparation of this decision and as any further rulings on such matters would serve no useful purpose they will be denied or otherwise rejected.

In mid-May 1987, Mendez came to Puerto Rico with Steve Protulis, an international representative of UAW region 9A, and joined with Local Representative Abigail Ortiz of region 9A to visit the plant. The employees and union representatives discussed problems with the medical plan and reasserted their interest in local control but agreed to hold the petition in abeyance.

By letter of May 19, 1987, President Cancel wrote Flynn and said that the unit was withdrawing its petition for a local based on the representative by Mendez but added:

If these promises are not kept in the date vouched for, our membership will re-activate said petition.

The local unit was given a petty cash fund and the right to contract for a medical plan other than the one administered by District 65, however, as time went by, conflicts centered around the medical plan continued to generate internal problems and disputes.

In March 1988, employee Jorge Otero Camacho filed a decertification petition in Case 24-RD-353. The petition was subsequently withdrawn and the withdrawal was approved on May 26, 1988. The Union filed a related unfair labor practice charge against Rorer, Case 24-CA-5771, and an informal settlement agreement was approved on May 27, 1988.

On June 1, 1988, Otero, acting jointly with a few other employees who were identified as the "Little Group" (which included Luz Delia Santos, Luis Enrique Rivera, Will Mercado, Rafael Herrera, and Gabriel Torres), filed a second RD petition, Case 24-RD-356, which resulted in the holding of a Board election on September 7, 1988. Of 86 valid ballots counted, 53 were for the Union, 38 against the Union, and 10 challenged. On September 14, 1988, Rorer (not the employee petitioners), filed objections. After a 9-day hearing between December 1988 and February 1989, the hearing officer left the Board. On agreement of all parties, another Board agent issued a decision on September 1, 1990, this decision overruled all objections and Rorer filed exceptions which are still pending (see fn. 1).

In the interim, in May 1988, District 65 and Rorer began negotiations for a new bargaining agreement. The employees continued to work under the expired contract, however, the Company stopped deducting union dues. A final bargaining session was held on November 1, 1988. On November 4, the employees ratified a new contract. The parties agreed on final contract language and the contract was executed on November 21, 1988, retroactive to November 14, 1988, with an expiration date of November 13, 1991.

The minutes of negotiation meetings for May and November 1988 kept by both parties each reflect that the Company was informed by the bargaining committee that the unit was in the process of changing from District 65 to a chartered local of the UAW and that the Company sought assurances about the change in a latter meeting (when the contract was signed).

The minutes (prepared by Respondent) of a February 17, 1989 union-employer meeting also show that the Union informed the Company that the membership had approved the change from District 65, and that they were waiting for a UAW representative to come to Puerto Rico and hand a letter over to the company approving such changes.

The contract executed on November 21, 1988, identified the Company as “Rorer Pharmaceutical Corporation” and the Union as District 65, United Auto Workers, AFL–CIO. On April 27, 1989, Respondent and Local 2286 entered into a stipulation whereby they agreed to substitute the parties named in the stipulation—Respondent and Local 2286—for those named on the cover page of the contract executed on November 21, to reflect the correct names of both Respondent and Local 2286. Specifically, each agreed that the respective, “correct entity” would be “R.P.C. Inc., a Division of Rorer Pharmaceutical” and “Local 2286, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.”

The stipulation further provided as follows:

All internal union procedures were properly complied with, at the level of the unit employees, the District 65 and the UAW, and thus effective December 14, 1988, the internal union procedure having been properly complied with, resulted in the establishment of Local 2286, UAW to represent the employees in the appropriate unit herein.

All entities mentioned in this paragraph represent and warrant that the internal union procedures were fully complied with and agree to hold harmless the employer for any act or conduct engaged in by the employer, as a result of the recognition of the change from District 65, UAW to Local 2286, UAW.

All parties herein agree that the change in the name of the employer and the change in the name of the labor organization, as expressed herein, will reflected by amendment of the parties, in any further proceedings in the pending Board cases, and the changes to which this Stipulation refer to will not be raised as a defense by any of them to preclude any further processing.

This quoted material was initialed in the margin by the signing representatives of the Company, Local 2286 (by President Cancel), and by District 65.

After signing the stipulation, the Respondent dealt with Local 2286 as the bargaining representative of its unit employees. Once the Union received its local number from the UAW, Respondent began remitting dues to Local 2286 on a regular basis and Respondent also met with representatives of Local 2286 to handle grievances and arbitrations.

Union President Cancel, a principal participant in these earlier events, resigned from the Company on October 10, and also resigned from Local 2286. For purposes of these proceedings he has effectively disappeared. He could not be located by the General Counsel and he was not presented as a witness by any party.

On October 23, 1989, employee Jorge Otero Camacho filed a decertification petition in Case 24–RD–213. The petition was signed by a majority of bargaining unit employees.

Victor Osuna, who became Respondent’s personnel manager in June 1989, testified that Enrique Rivera and Julio Roman came to him in mid-December 1989 (about 2 months after Osuna had negotiated a resignation agreement with Cancel), and gave him information about Cancel to the effect that Cancel had effected the change from District 65 to the new local without consulting anyone. By this time, Enrique Rivera was a supervisor but he previously had been active

in the Union and had signed the April 6, 1987 change in affiliation letter to union region 9A as a member of the union committee.

Osuna testified he then called the company attorneys who prepared a questionnaire and instructed him to interview employees who had been mentioned by Roman. The selected employees were told the interview was voluntary and their would be no reprisals. Questions included whether they received any notice of meetings to discuss or decide on a change from District 65 to a local and what happened. A questionnaire filled out by Roman was placed in the record (at the request of the court) in which he stated he had attended such a meeting where the vote was by “raising your hands.”

No other showing was made as to the number or contents of the other questionnaires, however, by letter of January 10, 1990, to Abigail Ortiz, Respondent’s attorney, Victor Comolli, requested documents and information regarding the “transfer of representation rights to Local 2286.” The Union’s attorney replied on January 24, 1990, and noted that the information referred to internal union matters, called attention to the stipulation between the Union and the Respondent and stated no other information was necessary.

In late January 1990, Rorer employee Raul Rosa resigned as secretary-treasurer and medical plan administrator for Local 2286 and contemporaneously prepared and presented Rorer with undated petition sheets signed by most Rorer bargaining unit employees which requested that they be put on the company medical plan because the Union had changed the medical plan (to become effective February 1) without the employees having had the opportunity to vote on the change. As will be discussed subsequently, Rosa also contemporaneously destroyed union records and documents that were in his custody.

By letter of February 5, 1990, from Plant General Manager Isidro Ferrer to Ortiz, Respondent said it was withdrawing recognition of “United Auto Workers and its Local 2286” because “this union is not the lawful representative of the employees.” The same day Ferrer held a meeting and stated the same information to the employees.

After its letter withdrawing recognition, Rorer ceased collecting or remitting dues to the Union or making contributions to the medical plan. In addition, Rorer notified the Union that it would not process grievances filed after February 5, 1990. It admittedly has declined to bargain with either Local 2286 or District 65 of the Union since that time.

Prior to February 5, the Respondent also engaged in several actions which are alleged to constitute denial to the Union of use of the company cafeteria and bulletin boards in August 1989, and denial of access to union representatives and prohibition of leaflet distribution in November 1989.

These allegations, as well as other alleged violations of the Act, including incidents which occurred both before and after withdrawing of recognition are described in detail in the discussions set forth below and include an allegation that former union official Raul Rosa, mentioned above, was involved in an incident, in 1989, wherein Supervisor Enrique Rivera sought to persuade him to renounce the Union.

*A. Alleged Unilateral Changes Prior to Withdrawal of Recognition*

At relevant times Abigail Ortiz was an international representative for region 9A of the Union with specific duties servicing Local 2286. Previously, his secondary duties with the region made him familiar with the activities of District 65 and he confirmed that during contract negotiations the Company was made aware of the employees' plan to convert from District 65 to a local of the UAW.

He participated in various activities with the Respondent throughout 1989 on behalf of Local 2286 and he credibly confirmed the exchange of various documents to and from various levels of the Union's organization which resulted in approval of the change from affiliation with District 65 to the issuance of a Local 2286 charter. He also gave credible testimony of his observations of the membership meeting of November 4, 1988 (when those present voted first to ratify the contract and then to approve a change from District 65 to a local union), as well as previous meetings where the latter subject was discussed.

After the ratification and affiliation meeting, Ortiz asked employees to sign new checkoff cards as the payments were different because of the change, and because the contract had expired on June 1 and, having had an election, Representative Ortiz felt that new checkoffs were necessary and therefore gave cards to Cancel, met with employees and explained the process, and turned the cards into the Company as soon as they were signed.

Contrary to the contention of Respondent, I find the latter action merely was ministerial in nature and not indicative of any relevance to the Union's majority status, a subject specifically addressed in the Board-supervised election which occurred 2 months previously.

Ortiz and District 65 Official Ralph Rivera testified that as a matter of past practice union officials (who were not employees), had been allowed to visit the production or work areas of the plant. Rivera recalled specifically that on May 13, 1988, Renee Mendiz and Steve Protulis, during a visit to Puerto Rico from the States had visited production areas and toured the plant. Ortiz testified that he normally would enter the plant through the employees' entrance, instead of through the main entrance, and walk through the plant to the cafeteria or to the administrative offices to meet with Respondent's officials, but that on November 8, Ortiz was denied permission to have a stateside UAW representative, Robert Madore, visit the plant the next day. On this same occasion he was not allowed to enter through the employees entrance.

When Ortiz again made this request Osuna agreed to consult with his superior and said he would let Ortiz know but he failed to do so. On November 9, when Ortiz went to a meeting at Rorer's office with Osuna, Production Manager Velazquez, and others regarding the medical plan, Ortiz was not allowed to enter through the workers' entrance as he had before and was told to go and register through the visitors' entrance and was then escorted to the meeting room. A phone call was made and, in the presence of Ortiz, Velazquez confirmed to another international representative that they would not permit outsiders to have a tour. After it was argued that Madore was a union official and not a stranger, Velazquez consulted with "a superior" and then affirmed his denial.

As Ortiz was leaving, employee Hilda Rolon, a union delegate, was nearby in the cafeteria and signaled to Ortiz, however, both Osuna and Velazquez stood up, and prevented him from going to Rolon.

Article XI, of the collective-bargaining agreement provides under section 5, union visits:

The company will permit an authorized union representative (who does not have to be an employee of the Company) to enter the plant after having given notice to the Personnel Office and should the same be (not) authorized, the reasons or motives will be offered.

Osuna testified that since he arrived in June 1989, the policy was that no person who is not an employee could come into the production areas, a policy that he said was established by Manager Velazquez when he arrived at the plant in February 1989 and that in June 1989 he (Osuna) established rules on visitors being escorted through the reception area for security reasons. Here, I find Osuna's testimony to be inconsistent with his and Velazquez' actions on November 9 whereby each initially consulted with "superiors" before making a firm decision and I do not credit the testimony that a policy in this area had been established prior to November 9. Moreover, the "policy" applies to a subject covered in the collective-bargaining agreement and no notice (or bargaining) or the implementation of changes in policy was given to the Union.

On November 14, between the change from first to second shift, Ortiz began to hand out union leaflets near an entrance by the guardhouse but he was instructed to stop by Jorge Riquelme, the chief of Respondent's security guards. Osuna confirmed this order on the guardhouse phone and told Ortiz that if he did not go outside the company premises the guard would take him out. Ortiz told Osuna he would go to the Board and then went outside the premises and distributed additional leaflets. Both Ralph Rivera and Ortiz testified that in the past he had been allowed to distribute leaflets inside Rorer's premises, both at the cafeteria and at the guardhouse area inside Rorer's gates closest to the building and the parking lot.

Osuna again testified that it was "policy" (no establishment date was provided) that nonemployees could only distribute material outside company premises. No disruptive actions by union personnel took place on either occasion and, as noted, neither policy was communicated to the Union or bargained about prior to their enforcement on November 9 and 14.

Under these circumstances, I find that the access sought by union officials was consistent with contractual provisions and was within the scope of Respondent's past practices. The right of access includes access sought for purposes of introducing a union official, *Herk's Inc.*, 293 NLRB 111, 117 (1989), and the term "access includes the right to peacefully communicate by distributing leaflets to employees. Here, Respondent's implementation of a new "policy" in each instance shows a departure from past practice and a unilateral change in contractual granted rights and I find that it violates Section 8(a)(5) of the Act, as alleged in the complaint (paragraphs 9(i), (j), (k), (l), and (n)), see *Parkview Furniture Mfg. Co.*, 284 NLRB 947 fn. 2 (1987), and cases cited therein. These actions by high level company officials, each new

to the plant since the negotiation of the collective-bargaining agreement, occurred after the stipulated recognition of Local 2286 and after apparent changes in Respondent's management structure. The change in Respondent's attitude evidence by these actions as well as the attitude shown by its participation in other violations of the Act discussed below, clearly must be taken into consideration in evaluating its sudden decision to withdraw recognition.

#### B. *Withdrawal of Recognition*

Section 8(d) of the Act provides that when a collective-bargaining contract is in effect, "the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract." The record shows that the Respondent and the Union mutually accepted a 3-year contract effective November 14, 1988, as final and binding. The Respondent was made aware of a pending change in form of the unit representative from District 65 of the Union to a proposed Local of the same International Union during negotiations and on April 27, 1989, after discussion and investigation it entered into a stipulative regarding this recognition change of the "correct entity" to reflect "Local 2286" as well as a documented change in the form of its own corporate identity, and it stipulated that "internal union procedures were fully complied with." Respondent continued to recognize and deal with the Union as Local 2286 through February 5, 1990, when it unilaterally withdrew recognition of any Union, either Local 2286 or District 65, even though the terms of the contract extended through November 13, 1991.

Respondent's contention that it is justified in its actions is based on its alleged receipt of information in December 1989 that the affiliation had been without consulting the membership and was executed by a vote by a show of hands. This "information" was supplemented by its receipt of a petition of 178 signatures expressing dissatisfaction with the union medical plan that also requested coverage under a company-administered medical plan.

The recognition stipulation was dated April 27, 1989, well beyond the 6-month 10(b) consideration relative to the February 5, 1990 withdrawal of recognition. Although the Respondent claims it only learned of deficiencies in the affiliation process in December 1989, when it got such information from Enrique Rivera and Roman, Rivera had been an employee-member of the committee which first sought creation of a local union and then later a member of the so-called "Little Group" which sought to decertify the Union and then had become a statutory supervisor on March 10, 1989, prior to the stipulation regarding recognition.

In his testimony, Rivera asserts that no vote was taken by the membership on the change in affiliation; however, because of his earlier personal involvement he clearly knew Cancel did not act alone and a statement to this effect to Respondent clearly would have been false. As maintained by the General Counsel, however, this alleged "information" regarding any defect in union procedures in changing to a local is information shown to have been held by one of its supervisors and agents and must be imputed to be known to the Respondent, within the 10(b) period.

For this, and the additional considerations discussed below, I find that Respondent is estopped from contesting the statutes of Local 2286 as successor to District 65 of the

Union. See *Control Services*, 303 NLRB 481 fn. 8 (1991), and cases cited therein, including *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989).

I also find that Respondent is not shown to have had any objective basis for a valid belief that Local 2286 was not a proper successor to District 65 or that the Union no longer had the majority support within the bargaining unit when it unilaterally withdrew recognition.

Turning first to majority support, it is clear that Respondent's managers claim a reliance on the employee petitions it was given in January 1990. These petitions specifically address the medical plan, not union membership, and cannot be elevated to rejection of the Union in all its varied other aspects. Significantly, I find other aspects of these petitions indicate that they are of suspicious validity.

The petitions were prepared and presented to the Respondent by employee Raul Rosa who, in fact, had been the principal union official involved with the union medical plan until shortly before his apparent switch in sympathies and resignation from the Union. As discussed in part "G," below, Rosa was involved as the target of a management effort to change his union sympathies. This occurred in late 1989 and coincided with circumstances of interunion discord which centered about the medical plan. In light of these occurrences, I find that both Respondent witnesses E. Rivera and Rosa presented testimony in several crucial areas that must be found to be essentially unbelievable within the overall context of the record and the events which are shown to have occurred.

As noted, a decertification election was won by the Union on September 7, 1988, and thereafter a second valid decertification petition was filed on October 23, 1989, and is pending. It is well established that even the filing of a decertification does not afford the Respondent any basis for repudiating its contract. *Dresser Industries*, 264 NLRB 1088, 1089 (1982), and, as stated in *VM Industries*, 291 NLRB 5, 7 (1988):

In short an employer may not unilaterally modify or cancel a collective bargaining agreement on the ground that, during its pendency, the question of future employee representation is about to be decided through the medium of the machinery established by the Act to resolve such questions. Unless and until the incumbent union is supplanted by a rival union, the existing contract governs the employer's relations with its employees.

Here, the Respondent specifically disregarded the earlier election and the then pending procedures of the Board and seized on a fragment of "information" regarding suspected affiliation irregularities in the change of the unit from District 65 to Local 2286. It did not chose to fully investigate the matter but instead selected a small number of employees, apparently all identified as persons who could substantiate the irregularities, and made no apparent attempt to interview other employees or union officers. Moreover, the further information obtained was in part from a principal source of the initial information and it refuted managements' and Enrique Rivera's broad claim that President Cancel had made the changes on his own without consulting the membership inasmuch as the answers disclosed that meetings and discussions

on the subject actually were held and assertedly voted on “by a show of hands.” Based on this sketchy information (and its reading of a copy of the International Union’s constitution), the Respondent made an immediate decision to seize on the opportunity presented, to repudiate its stipulation, and to withdraw recognition of the Union.

On brief, the Respondent acknowledges that the UAW’s constitution contains no separate procedures specifically governing the transfer of affiliation from one union local to another, and I find that any evaluation of the validity of such a transfer as it affects the status of a collective-bargaining representative otherwise must be based on the basic concepts of “substantial continuity” between the pre- and postaffiliated union and an adequate “due process” safeguard for an opportunity for the members to discuss and vote on the change in affiliation, see *F. W. Woolworth Co.*, 305 NLRB 775 (1991), and cases cited therein.

Here, there is no serious question of substantial continuity as the “change” actually involves a change in name and placement within the larger framework of the same Union but retains the overall continuity of the unit of employees and merely created a more autonomous local body, Local 2286, within the continued existence of the International Union. At the time of the change local officials and practices remained essentially the same, members were the same and had the same privileges, and the effect of the change was a purely internal matter which gave *more* rather than less autonomy and administrative control to the local employees and union officers in the unit covered by the controlling collective-bargaining agreement, compare the *Woolworth* case, *supra*.

Turning to the due-process safeguards, it is clear that the majority of so-called facts said by the Respondent to support its action were matters alleged in testimony at the hearing or contained in documents subpoenaed from the records of the Union. This “information” was not shown to have been within its knowledge at the time it made and acted on its decision to withdraw recognition of the Union and such information could not have played any part in Respondent’s asserted justification for its action on February 5, 1990.

Although the Respondent makes the after-the-fact claim that the change from District 65 to Local 2286 (of the same Union) is tainted by nonconformance with the Union’s by-laws, Respondent’s position depends on the occurrence of certain events that can be viewed as indicative of duplicity on the part of management and the several union dissidents on which they purport to rely. The record otherwise hints at a pattern of intrigue on the part of the Respondent. Of particular interest is the showing that Personnel Manager Osuna and former Union President Cancel each signed a resignation stipulation under which Cancel was paid over \$18,000 as special severance pay to settle a grievance (involving a 10-day suspension). Osuna said this was done only because the Company wished to help him on a personal problem (unidentified) that he had presented to them. Then, after Cancel’s October 10, 1989 voluntary resignation from the Union, Cancel suddenly moved from his home without disclosing any forwarding address and he could not be located for service of a subpoena.

A short while later Raul Rosa (who was referred to the Company by Cancel when he left as the designated spokesman for the Union), suddenly abandoned the Union and the

medical plan he was administering for the Union and immediately surfaced as the organizer of a petition drive against the union medical plan and for the company plan.

A “paper trail” of documents relating to the change in affiliation were introduced as exhibits. They show a series of communications between local officers (which included signatures of committee members and petition signers) which clearly demonstrate that President Cancel was not operating on his own, as alleged by Respondent. The documents also show that the hierarchy of the Union evaluated and gave internal approval to the granting of a local charter. The record also shows that the subject was discussed extensively at local meetings. Some conflicts do exist regarding the nature of the notice for a vote on affiliation and the Respondent also makes much of the fact that the Union’s files contained an envelope with numerous apparent ballots that were marked “yes” in a handwriting that Respondent’s expert witness concluded was that of one person. Otherwise, however, there is no showing that these were ballots for an affiliation election nor is there any record of their custody.

As noted above, former Union President Cancel has effectively disappeared along with some records and his knowledge of the whole affair. In a similar vein, Rosa admitted that he burned or otherwise disposed of other union documents and records when he left the Union.

Despite some confusion in the minds of some witnesses regarding the nature of the vote, I find that the predominant credible testimony reveals that a confirmation vote on the creation of the local union was taken contemporaneously with the ratification of the new collective-bargaining agreement. I also find that the purported fraudulent nature of the unidentified paper ballots is a little more than a “red herring” that otherwise fails to persuasively show that the employees did not exercise a free vote on the affiliation matter.

Julio Roman, Respondent’s own witness, agrees that a vote on the local affiliation was taken but asserts that it was by a show of hands (in which case there would be no relevant paper ballots). Other witnesses assert that an attendance list was checked off (a list was placed in evidence), and voting was done after the vote on the contract by writing on torn sheets of paper at tables and then placed them in a ballot box and counted in front of everyone (with a vote of 31 in favor and none against). I find that the more credible testimony shows paper ballots were cast. In any event, I find that a vote by a show of hands in a situation such as this where their appeared to be no major opposition to a previously discussed proposal which involved essentially a change in form rather than substance (where the result would be a gain of some greater local autonomy rather than any transfer of powers to outsiders), would not be so outside due-process consideration as to require invalidation of the result. No employee<sup>2</sup> nor higher union official objected to the election or its procedures and nothing was called into question until over a year after the election when the Respondent, rather than any employee, suddenly raised a challenge through its use of this rationalization for its unilateral withdrawal of recognition.

<sup>2</sup>The exception is Julio Roman, who belatedly filed a charge on January 16, 1990, in Case 24-CB-1527 (shortly before Respondent withdrew recognition), a charge that was literally the same as a charge filed by Respondent in Case 24-CB-1524. Roman’s charge was dismissed and his appeal was denied.

Under these circumstances, I find that the apparent desires of the membership of Local 2286 as approved by District 65 and the national convention of the International Union should be honored, see *America Maitus*, 231 NLRB 1194 (1977). I find that this result cannot be unilaterally disregarded by a contracting party unless and until the majority of the membership clearly, objectively, and unequivocally demonstrate that they no longer desire to be represented in a collective-bargaining relationship by that specific union entity. See *Phoenix Pipe & Tube*, 302 NLRB 122 (1991), enf. mem. 955 F.2d 852 (3d Cir. 1991).

Finally, even if due-process considerations were so serious as to render void the affiliation election, this action would not dissolve the preexisting labor organization (District 65), or its collective-bargaining agreement within the employer. Contrary to Respondent's argument and regardless of whether it still has a separate office on the island, District 65 is still a viable part of the International Union and is shown to represent units at other businesses in Puerto Rico and therefore Respondent was bound to recognize this entity if Local 2286 was not a valid successor.

Under all the above circumstance, I conclude that Local 2286 is the lawful successor entity to District 65, United Automobile Workers Union, AFL-CIO and I find that Respondent is shown to be estopped from challenging that status. I further find that the Respondent otherwise has not shown any valid basis that would justify a refusal to recognize Local 2286 as its employees' collective-bargaining representative and I conclude that Respondent did not have a lawful or valid basis to withdraw recognition from the Union. Accordingly, its admitted refusal to recognize and bargain with the Union since February 5, 1990, is a violation of Section 8(a)(1) and (5) of the Act, as alleged.

#### *C. Alleged Unilateral Changes After Withdrawal of Recognition*

The collective-bargaining agreement provides that the Union be permitted to post notices relating to official union business (including union meetings, elections, and social activities) by submitting a copy to the personnel department and, prior to August 1989, posting of such notices had been routinely approved and the employees regularly had used the employee cafeteria for union meetings.

On August 20, 1989, Raul Rosa and Samuel Cancel requested permission from Personnel Manager Osuna to use the cafeteria for a union meeting on August 23, but they were denied permission without being given a reason. Approximately 2 weeks later, the Union again requested the use of the cafeteria for a meeting with new employees to provide information about the medical plan administered by the Union and to enroll them in it. Respondent denied the request because there was now a second shift and the cafeteria was used for food service.

Ortiz then asked permission to hold the meeting at an open area in the patio but Osuna said it would interrupt the arrival of the second shift. When Ortiz argues that they would have already arrived, Osuna said that Respondent's policy from then on was not to lend its facilities to the Union.

In the fall 1989, the Union requested permission to post a leaflet on the bulletin board regarding the medical plan and how to obtain benefits. Attempts by the Union to explain why they needed to take these actions in furtherance with

union business were answered by Osuna with a statement that it was "not his problem." This request also was denied and Rosa filed a grievance on the matter. Here, I do not credit Osuna's claim that the subject of the request was a multipage section of the insurance policy with an error regarding the number of days for probation. His testimony in this respect was evasive and inconsistent with the fact that the bulletin board has a glass cover which only allows the viewing of the top page and I find his asserted justification for Respondent's action is pretextual.

Here, the record shows that both Respondent's past practices and the contract permitted the Union's attempted actions discussed above. After Osuna became personnel manager, however, he unilaterally and without notice to or bargaining with the Union, made changes which had the effect of prevailing or hindering the Union's ability to communicate readily and effectively at the plant with its members. These actions had the effect of undermining the Union and I find that Respondent is shown to have violated Section 8(a)(1) and (5) of the Act, as alleged in paragraphs 9(g), (h), and 11 of the complaint.

#### *D. Alleged Refusal to Provide Information*

Representative Ortiz testified that at a meeting held on November 9, 1989, he requested a list containing the names and addresses of new employees from Respondent. This information was necessary for the Union to communicate with new employees regarding the medical plan, to enroll them, and to prepare their medical cards. Addresses were needed because Respondent had refused to allow the Union to talk to these employees at their worksite or to meet with them in the cafeteria either during or after working time. The information was not supplied to Ortiz but Osuna testified that he subsequently gave a list of names with dates of hire and department names (but no addresses), to the then acting president of Local 2286, Rogelio Cubano. Ortiz, however, did not receive copy list despite a specific request to Osuna. As bargaining representative, the Union was entitled to all the information requested, information that clearly is shown to be relevant, see *Massillon Community Hospital*, 282 NLRB 675, 682 (1987), and *Laminates Unlimited*, 292 NLRB 595, 601 (1989).

By letter of September 6, 1990, the Union also requested information relevant to the processing of a grievance about the amount of the Christmas bonus paid to certain employees, as well as information to monitor Respondent's compliance with the contracts provisions regarding the payment of a Christmas bonus. By letter of September 24 Respondent refused (because of Respondent's withdrawal of recognition from the Union).

As concluded above, Respondent has not established any valid basis for withdrawing recognition. Accordingly, its admitted refusal to furnish the requested information constitutes a failure to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act, as alleged.

On February 5, 1990, Respondent's general manager Ferrer addressed a meeting of employees at a discotheque near the plant, said the Company was withdrawing recognition from the Union, and also said that it had made a unilateral decision that unit employees would get a 30-cent general wage increase and the same or better benefits than existing ones, including: a new savings plan whereby employees

could save up to 10 percent of wages and the Respondent would match 50 percent of the employees' savings (up to 6 percent of the amount saved); a new life insurance and pension plan; a new medical plan; a new short term and new long-term disability plan; a new educational assistance or reimbursement plan; a higher Christmas bonus; yearly appraisals and wage revisions; and an in-house grievance procedure whereby employees could discuss grievances with their immediate supervisors. Ferrer also announced a \$125 bonus to be given that Friday, in order to encourage employees to feel integrated to "the Rorer family."

Respondent admits making these changes (with the exception of the Christmas bonus and the grievance procedure).

Ferrer also announced that there would be no regular work the next day but that employees were to report at 9 a.m. to the same discotheque, for more detailed orientation on the new benefits and for a celebration luncheon of Respondent's new nonunion status with the nonunit employees. Thereafter, Respondent stopped remitting union dues and contributions to the medical plan, and declined to process any grievances filed after February 5.

Although Respondent denied instituting a changed Christmas bonus and internal company grievance procedure, the employees were told they would receive the higher 6-percent Christmas bonus given yearly to the nonunit employees, instead of the lower amount provided for in the contract. Thereafter, in December, the employees did receive the higher or additional bonus. Also, copies of a new grievance procedure were distributed to unit employees in March 1990, and the Company refused to discuss any new grievance with union representatives after February.

Respondent also denied granting its employees the day off "on or about February 5, 1990," and providing them with a company sponsored party that same day. Here, it is clear the date can be corrected to specifically reflect February 6, 1990, a date recognizable as "about February 5." On this date employees reported to the orientation 2 hours after the normal shift time. They began lunch 2 hours later, were not required to go to the plant after lunch, but could stay for a party or go home, and were paid for the entire day.

It also is stipulated that Respondent thereafter eliminating January 21, 1991 (a paid holiday, under the contract), and instead made May 27, 1991, a paid holiday; an action that was done without prior notice to or bargaining with the Union.

These above-described statements and actions occurred in the context of Respondent's illegal withdrawal of recognition from the Union and, under the overall circumstance, support an inference that Respondent intended to undermine any remaining or residual support for the Union. In the absence of any valid justification for withdrawal of recognition it is clear that this conduct demonstrates Respondent's participation in unilateral changes inconsistent with its existing collective-bargaining agreement and further shows a resulting failure and refusal to bargain collectively, all in violation of Section 8(a)(1) and (5) of the Act, as alleged in paragraph 9 of the complaint.

#### *E. Alleged Unlawful Assistance*

On August 3, Raul Rosa, Jose Olivero, Julio Roman, Edwin Roure, Luz D. Santos, and Georgie Otero (persons generally identified as being in the "little group" considered by others to be antiunion in their sympathies), left Rorer's

plant around 11 a.m. and went to a nearby local newspaper's office, wherein they were photographed and interviewed by a newspaperwoman. Only Santos punched out and back in when she left the plant and returned. A company rule requires employees to punch out and in whenever they leave or enter the plant and, as discussed below, this rule previously had been enforced against union supporter Rolon. However, no disciplinary action was taken against these employees either at the time of the violation nor thereafter, when Personnel Manager Osuna personally learned of the details. Osuna admitted that he was told by Otero, Olivero, and Rosa that the purpose of the visit to the newspaper was to contradict published statements made by Union President Velez in favor of the Union and against Rorer's conduct. The employees' timecards (except Santos) reflect that they were paid as if they had only taken their regular one-half hour lunch period.

Osuna admitted that he did not investigate whether the employees had overstayed their one-half hour lunch period. Otherwise, the record shows that they went by car and that the trip would have entailed a change of uniform, a walk to the parking lot, and a drive to the gate where a security guard would stop them to write down their names and the time, and then open the gates for them to leave. The same procedure would be repeated on returning to work, as well as driving to the newspaper through at least one traffic light, parking, and time with the reporter (who admittedly was not there when they first arrived). Although the regular records kept by the security guard would have reflected when their car left and returned, these records were not offered by the Respondent. Santos' timecard, however, shows that she punched out at 11:09 a.m. and punched in at her return at 12:09 p.m.<sup>3</sup>

Under these circumstances, I conclude that the General Counsel has shown that Respondent permitted antiunion employees to violate company rules concerning punching in and out of the plant and paid some of them for the apparent one-half hour of on the clock time when they actually were away from the plant while it had earlier enforced this rule against a union steward even though her offense had been under clearly mitigating circumstances. These actions by Respondent discriminate against prounion employees and thereby interfere with the employees' exercise of their statutory right and, accordingly, I find that the General Counsel has shown a violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(b) of the complaint, see *Ducane Heating Corp.*, 254 NLRB 112, 118 (1981).

<sup>3</sup> This information is reflected on the original timecard. As noted by the General Counsel, in response to a subpoena Respondent originally provided a photocopy of the timecards, from which it appeared, in handwriting, that with Respondent's testimony that they were gone within their one-half hour lunchbreak. However, a blowup of Santos' original card shows an alteration and the machine punched hour of 11:09 a.m. under the handwritten "11:47 a.m." placing Santos' out of the plant for 1 hour, not 15 minutes as alleged. Santos was not paid for the one-half hour that exceeded her one-half hour lunch period, therefore Respondent's payroll department computed her time away from work as being from 11:09 to 12:09, and the alteration was made after payroll department processing and prior to Respondent's response to the General Counsel's subpoena.

F. *Alleged Discrimination Involving Ines Velez Ramos*

Ines Velez Ramos became acting president of Local 2286 in December 1989. Previously, she had been union secretary to the last collective-bargaining agreement negotiation committee and records secretary of Local 2286.

During the week of July 19, 1990, Velez participated in a demonstration outside the plant to protest Respondent's earlier withdrawal of recognition. Picketing was carried on by some of the Company's employees with the support of the L.A.C.L.A. (a labor council for the advancement of Latin Americans), which was holding a convention in San Juan at that time. Before the group picketing started, Velez walked outside the plant with a picket sign which accused Manager Isidro Ferrer of being antiunion. Velez testified that she was seen by several administrative employees, including Myriam Tosado from human resources, and Gladys Malave, Victor Osuna's secretary. An editorial article about the demonstration was published on July 26, 1990, by a local newspaper, which cited "Ramos" (Velez' second surname) as president of Local 2286, and said that she held Rorer's management accountable and that they were being threatened because they stood up to Respondent and defended the worker's rights.

On August 2, shortly after the article appeared Velez was given a written warning dated August 1 for her absences and tardiness. The warning letter by Packaging Supervisor Luis Melendez noted 37 specific dates in 1990 where she had been late or absent and separately listed each day between June 4 and 22 (when she had been out on excused disability), and noted that he had spoken to her about correcting her problems on June 27 and that she was thereafter late four times and absent three times. (The list, however, only shows two 15-minute entries, two 8-hour notations, and a single 4-3/4-hour notation for this period, not seven problems.) When Velez asked him why separate days were listed when she had permission to be absent and was hospitalized, he said that he did not know, that she would have to ask Osuna. Velez also asked Melendez for her timecards so she could verify the dates reflected in the warning, but the request was ignored. Velez thereafter wrote to Melendez and stated that she did not have a copy of Respondent's rules with regards to tardiness and absences and requested a copy and otherwise explained that her supervisor's authorization had been obtained for all absences.

Osuna testified that all absences are evaluated individually for each employee and that Respondent does not have a fixed policy or rule to follow and explained that having a policy which establishes "firm guidelines would be unjust." Osuna failed to state how Velez' absences were evaluated.

For most of her 6 years as an employee Velez has worked on the packing lines; however, 6 to 8 months prior to the April 1991 hearing in these proceedings she was assigned to work in the manufacturing department inspecting damaged products in a room by herself. The person who operated the machine previously was sent to take Velez' place on the packing line. Velez testified that she never had operated the inspection machine before nor had she previously performed inspection work (except to the extent that it is done on the packing line). The new work required her to lean into the machine which made it uncomfortable because of back problems and she unsuccessfully asked her group leader for a transfer. Her group leader asked Supervisor Gadiel Nieves who told Velez that she would not be transferred because

they needed her at that machine. Velez also testified that her group leader told her they had her there (in the inspection room) so she would not be in contact with the rest of the people in the shop and so that he could watch her.

Her predecessor at the inspection machine had worked there for only 2 weeks before her request for a change was approved. Also, two other employees who worked there had done so for about a month at a time. First-Shift Supervisor Gadiel Nieves testified that prior to Velez' being assigned to work in that area various persons did the work and generally they assigned the jobs to whomever was available from another area. Nieves also testified that Velez had not been trained and was not qualified to do other work in the manufacturing department (such as operate machines and make batches) and therefore was kept on inspection.

Velez had been under the care of Dr. Pablo Forestier, Rorer's doctor, from February 18 to March 3, 1991, for back problems. When she reported back to work in March, she brought a doctor's certificate which stated that she suffered from "acute lumbosacral muscle spasm and acute tendonitis," and it called for no hard work and to alternate between sitting and standing. Velez brought the certificate to the nurse who gave it to Supervisor Nieves. Nieves had Velez start her first day back on the job from her back ailment by having her sanitize the room she was working in. Sanitizing a room consists of washing the walls and ceiling with a sponge squeegee and mopping the floor.

In a discipline case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activity was a motivating factor in the employer's decision to warn, transfer, or otherwise discipline an employee. Here, the record shows that Velez was acting president of the Union and previously had served as secretary for the union negotiating committee. She also notoriously engaged in picketing outside Respondent's facility in mid-July and had been named in a newspaper article about that event. In view of the above, as amplified by the timing of her disciplinary warning (approximately a week after the article), and her transfer to a different job assignment (about a month later), I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that Velez' protected union activities were a motivating factor in Respondent's decision to take these actions. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth *Wright Line*, 251 NLRB 1083 (1983); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's principal defense is an assertion that Velez was treated no differently than other employees. Certain warnings were placed into the record as General Counsel's Exhibits 78 and 29 and Respondent's Exhibits 23 and 24. These exhibits show warnings regarding attendance problems, however, as pointed out by the General Counsel, most of them are not as detailed as the one against Velez. Moreover, I find no explanation for the Respondent's lack of response to Velez' questions which disputed the number and nature of the offenses. Respondent offers no explanation as to why absences taken with supervisory approval for such

things as hospitalization and recovering time should be listed as a separate item of absenteeism for each separate day or why such excused absenteeism should be a matter requiring any disciplinary action. Respondent further admits that it has no fixed policy in this area and that the employees are not given any regular guidelines. As noted above, the written warning itself contains unexplained internal inconsistencies and I conclude that it was hastily prepared without an apparent, valid business reason for its issuance at that particular time. I find that the detailed warning given to Velez is not fully comparable with occasional warnings given to others and, in view of Respondent's failure to persuasively explain its policy, I find that it has not met its burden of showing that the warning to Velez was for nondiscriminatory reasons. Accordingly, I conclude that Respondent is shown to have violated Section 8(a)(3) of the Act in this respect, as alleged.

In a similar vein, Respondent asserts that Velez was not discriminated against as an inspector because other employees have been put in that position and because Velez was not qualified to change to other positions in the operations area. It also points out that others were required to perform cleaning duties and that someone was assigned to help her. Respondent's contentions, however, beg the question as to why she was transferred from the packing department in the first place or why she couldn't go back to that department after a short period as an inspector. Other employees were only required to perform that job for short periods and otherwise were transferred, even to other departments, as was the case with her predecessor on the job.

Here, I credit Velez' testimony that her group leader<sup>4</sup> (not Enrique Rivera directly, as alluded to by the Respondent), said she was placed in the inspection location so that she would not be in contact with other employees and where he could watch her. In this connection, I find it irrelevant that Supervisor Enrique Rivera denied having any contact with her during this period inasmuch as the remark was communicated to Velez by her group leader. Otherwise, it appears that once she was assigned to inspection (for no clearly valid reason), Respondent engaged in disparate treatment by retaining her in that job for a comparatively excessive time for reasons that appear to be pretextual (no persuasive explanation was offered as to why she couldn't be trained or returned to her old department), and I conclude that the highly suspicious timing of the assignment, shortly after Velez, as union president, publicly challenged the validity of Respondent's withdrawal of recognition, supports a conclusion that her assignment to an isolated work station was not motivated by a legitimate business reason but was done for the illegal reason stated by her group leader.

This conclusion is reinforced by the showing that Respondent made no effort to provide less harsh working conditions when it disregarded a doctor's certification of conditions for her return to work for acute back problems, by requiring her to participate in physically washing the walls and ceiling of her room. Accordingly, I find that Respondent is shown to have discriminatorily assigned Velez to an isolated and more onerous work station because of her union activi-

ties in violation of Section 8(a)(1) and (3) of the Act, as alleged. See *Fimco, Inc.*, supra.

#### G. Miscellaneous Alleged 8(a)(1) Violations

The several categories of illegal conduct discussed above did not happen in isolation but occurred over several years in an atmosphere where other seemingly minor alleged incidents occurred. Taken together, these actions are shown to be classic examples of conduct that interferes with or has a reasonable effect or tendency to discourage the employees' exercise of their statutory rights under Section 7 of the Act. The violations found below have a cumulative effect which show a corporate mindset or pattern of conduct apparently designed to build on the failed decertification vote in September 1988 and designed to dispute the legitimacy of its employees' exercise of their statutory rights. These violations reinforce the conclusions reached above regarding the other conduct engaged in by the Respondent and show a pattern of overall conduct whereby Respondent has repeatedly gone beyond the bounds of permissible conduct and illegally interfered with its employees in an apparent effort to build on a perceived opportunity to operate without any obligation to deal with a labor organization.

##### 1. Paragraphs 14(c), (d), (e), and (f) of the complaint

Rosa, who testified as a witness for the Respondent, admitted on cross-examination that after the September 1988 elections Supervisor Rosario went to his work area and told him that the employees were fools, because they would have gotten a 65-cent raise if they had voted against the Union or gotten rid of the Union. Rosario also told Rosa that there was no need for a union and asked him why he was a union leader. The supervisor then said that "they" had good opportunities and that he could help Rosa make progress and be promoted.

Employee Edwin Arce worked in the manufacturing department for 14 years. On several occasions 3 or 4 days before the election in September 1988, William Rosario (then his immediate supervisor), told him that if the Company won they would get a 65-cent raise.

Carmen Lydia Marrero, who still is an employee, testified that about a week after the election of September 1988, Rosario, in the presence of other employees (including Edwin Arce), stated that because the Union won Respondent was not going to give its employees a 65-cent increase. She also testified that Rosario was "always joking" and that she didn't understand that his remarks on the raise were made on behalf of the Company; however, it is noted that she testified under subpoena and, in the middle of her testimony, interrupted to say that 2 years had gone by since this case began and that she did not want to continue with it, demeanor that indicates she wished to qualify her testimony because she was in front of Respondent's officials.

Witness Arce also was reluctant to testify and had gone to Osuna, on being subpoenaed, to express that he "was not interested in the case." His demeanor indicated that he was concerned over the consequences of his appearance as a witness in these proceedings, however, when counsel for Respondent asked him if he felt coerced or intimidated by Rosario's pre- and postelection remarks, he answered that he

<sup>4</sup>Compare the similar type statement by a "semi-supervisor" leadman found to be admissible hearsay in *Fimco, Inc.*, 282 NLRB 653, 662 (1987).

“took it badly” because at that time there was the problem that “they” were trying to take the Union out.

Under each of these circumstances, I find that Respondent’s supervisor made comments attributable to the Respondent’s which constitute a promise of benefit that has a coercive, influential effect on employees’ voting intentions or their continuation of support for the Union, and I conclude that the General Counsel has shown a violation of Section 8(a)(1) of the Act in each instance, as alleged.

## 2. Paragraphs 14(g) and (h) of the complaint

Rogelio Cubano has been a packaging mechanic for 15 years. He served as shop steward and then as acting president of Local 2286 when Cancel resigned.

Cubano testified that in November 1988, about a week after the ratification of the contract, Respondent’s head of personnel from the U.S. held a meeting with the engineering personnel to present Isidro Ferrer as the new plant manager. In Ferrer’s address to the group he stated that the truth is that if there were no union at Rorer the employees would be better paid.

Ferrer was not called as a witness to rebut this testimony given by Cubano.

Jose Rodriguez worked for Rorer since January 1973 as a material handler. On January 28, 1989, he gave a Board agent a statement (G.C. Exh. 84). In his statement Rodriguez avers that about 3 weeks prior to the elections Roberto Bonilla, his immediate supervisor, “again” told him at his office that “if it were not for the fact that we had a union, we would be earning more money.”

On January 27, 1991, Jose Rodriguez died by electrocution and therefore was not available to testify and I find that his statement constitutes reliable, probative evidence under Rule 804(a)(4) of the Federal Rules of Evidence. Supervisor Bonilla also was not called by Respondent and accordingly, in each instance I find that the Respondent is shown to have made statements that constitute an inference with the employees’ Section 7 rights and I conclude that Respondent is shown to have violated Section 8(a)(1) of the Act in each instance, as alleged.

## 3. Paragraphs 14(j) and (m) of the complaint

Carmen Marrero testified that during November 1989, she approached Supervisor Enrique Rivera, about giving her brother a job and that Rivera told her that he could not help her but added that if she spread propaganda against the Union, said that she did not want to have anything to do with the Union, and joined the “Little Group,” then he possibly could help her. Marrero described the “Little Group” as a group of employees who began the campaign against the Union and identified Delia Santos, Gabriel Torres, Enrique Rivera (before he became a supervisor), and Julio Roman, as founders of the “Little Group.” The Respondent elicited further testimony to the effect that Rivera was always “joking” but Marrero also said she “wouldn’t know what to say” if Rivera was joking when he made these comments. Rivera testified that Marrero had initiated a joke that “now—she would join the little group,” however, this was not Marrero’s only statement and otherwise it is clear that Rivera’s suggestion that she speak and spread propaganda against the Union in exchange for the securing of a job for her brother is an

offer of benefits that interferes with employee rights, regardless of whether or not it was clothed in a possible joke about joining the “little group.” Accordingly, I find that it is shown to be a violation of Section 8(a)(1) of the Act, as alleged.

In December 1990, the former unit employees received two Christmas bonuses. Rolon testified that the bonuses were handed out by Ferrer and that he said one was for the amount they would receive if the Union had been “in” and one was trying to bring them up to the amount that the non-unionized employees received. Osuna testified that unit employees were given a second Christmas bonus in 1990 because of excellent production for that year and agreed that two checks were handed out to the employees: one in the amount they would have received under the contract, and another as a “gift” for their performance during 1990. The amount of the second check was the difference between the amount they would have received under the contract and 6 percent of their salary as a Christmas bonus. The record also shows that in 1989 production volume was more than double that of the previous year; however, there was no additional Christmas bonus given in 1989.

Under these circumstances, it appears that Osuna’s explanation for the added 1990 bonus is pretextual and that the real reason, as indicated by Ferrer, was that former unit employees would receive the same as nonunionized employees (as he had promised in his speech to employees when he withdrew recognition on February 5), because the Union was “out.” The granting of this additional benefit also conveys the message that employees will be rewarded for being non-union and it interferes with employee rights in violation of Section 8(a)(1) of the Act, as alleged.

## 4. Paragraph 14(i) and (k) of the complaint

Raul Rosa admits that Enrique Rivera tried to convince him to renounce to the Union and join management and he specifically testified that when Supervisor Gary Butney came into a bar (to be joined shortly thereafter by Ferrer and Osuna), and asked Rivera what was he doing there with Rosa, Rivera said he was trying to convince Rosa to change to management. This conversation took place a few weeks after Rivera had told Rosa that it was easy to solve his problem with management rules (which disapproved his upcoming marriage to a nonunit employee), and said that all he had to do was to resign from his union position. Rivera also had implied that he could help Rosa get a managerial position, and Rosa had agreed that it sounded interesting and asked if they could talk about it.

Rivera admits that he made the statement to Rosa at the bar that he told Rosa in the same conversation that there was no need for a union at the plant, and that Butney added that Rosa was very intelligent and there was a good future in the Company and opportunity for progress. As otherwise shown, Rosa subsequently married, was transferred to an apparently better job (but not to management), resigned from the Union, and became an activist against the union medical plan he had helped administer.

On October 1, 1990, Hilda Rolon told Osuna she would report the matter of her suspension and demotion to the Union (see the discussion in pt. H). Osuna allegedly asked her if she wanted to sign a paper saying that she did not belong to the Union because he did not want third persons ap-

pearing at the gate and much less Abigail (Ortiz). Rolon admits that Osuna also told her that she had a right to go to the Union when she insisted that Rorer was committing an injustice with her. Osuna and Rivera, who was present, deny that he asked her to sign a nonunion statement and the Respondent argues in brief that it is unbelievable that an experienced personal manager would make such a request of an employee. Which this might be likely in many situations, the overall circumstances of these proceedings indicate that Osuna or other supervisors, including Rivera (who was himself transformed from a union official to a production supervisor), were participants in matters of apparent intrigue whereby former union officials withdrew their support and participation in union affairs and became supporters of management or, as in the case of Cancel, accepted a seemingly large settlement for a minor grievance and then disappeared. Accordingly, I find that Rolon's testimony is not inherently unbelievable and should be credited over that of Osuna. Accordingly, I find that in each of the above instances involving both Rosa and Rolon, Respondent is shown to have made implied offers to induce them to withdraw their right to union representation or to withdraw their support for the Union in violation of Section 8(a)(1) of the Act, as alleged.

#### 5. Paragraphs 9(t) and (u) of the complaint

On September 14, Respondent asked its employees to individually sign a document authorizing Respondent to reduce their lunch hour from 1 hour to half an hour. It did so without prior notice to or bargaining with the Union and by soliciting its employees to sign a document waiving their right to a 1-hour lunch period, which is a term and condition of employment, Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) of the Act, as alleged.

Also, in early April 1990, Osuna solicited employee Gonez to put her request to withdraw a grievance in writing and did not contact the Union. Section 9(a) of the Act allows employees to meet directly with their employer to adjust a grievance provided the Union is given the opportunity to be present. Here, the grievance was being handled by the Union pursuant to Respondent's agreement to arbitrate all cases pending arbitration as of February 5. Accordingly, Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) of the Act, as alleged.

#### H. *Alleged Discrimination Involving Carmen Hilda Rolon*

Rolon has worked for Respondent for over 6 years. She is accurately described in the General Counsel's brief as a serious lady who is shown to be highly respected by everyone at the plant (as demonstrated by witnesses, including management personnel) referred to her as "Dona" Hilda ("Dona," is described as a term of respect in Spanish). In 1986, Rolon was selected as an employee of the month and in 1990 she received a commendation and a reward for excellent production in her line. Rolon also became shop steward in the packing department and among her duties she has processed grievances for employees.

On July 11, 1990, Packing Supervisor Melendez called Rolon from the line to talk on the phone to her husband who was at the gate. She was told there had been a fire involving

her mother and her sister, became upset and had to be helped to the infirmary. Melendez was aware of her condition and the cause and authorized her husband to come into the plant to get her and gave her permission to go home. She then learned her family's possessions were lost in the fire but they were not physically harmed and she calmed down, felt better, and went back to the plant. She got her belongings at the infirmary and reported back to Melendez and her line. Melendez confirmed that she was out for only about 1 hour, however, the next day Melendez wrote and placed in her file a memo describing an oral reprimand to Rolon because of her failure to punch her timecard when she left the previous day. Rolon, however, testified that Melendez never gave her any verbal warnings and up to the time of the hearing she had no idea that this warning was in her file since she believed that due to the circumstances surrounding her departure, including her leaving with Melendez' authorization, she had been excused from punching her card. It was shown that on leaving the plant from the infirmary Rolon would not have to go by the timeclock. It is also noted that despite being involved in and aware of the circumstances of her departure, Melendez made no mention of punching in or out when she returned to the production line. The memo said she had not complied with company rules and stated that "circumstances like this one should not be repeated" and it was recorded in the usual company format use to issue warnings to other employees.

Subsequently to the occasion of Rolon's warning, five employees left the plant and went to the newspaper to dispute published comments by Velez against the Company. These employees received no discipline for leaving the plant without punching their cards (one, Luz Delia Sandos did punch her card) and were paid for a full day's work. Two of these employees said they understood they didn't have to punch out as they were excused.

On September 11, Second-Shift Supervisor Luis Melendez met with her line employees, including Rolon. At the end of the meeting, one employee asked Melendez if it was true that the plant would be moved to Guayama or Guayanilla. Melendez said that was news to him and Rolon then said something to the effect that if the plant was moved, since he was their supervisor, she would rent her home and they would all move there (to Guayama or Guayanilla). Rolon considered it to be general friendly banter between the employee and the supervisor about a subject that previously had been raised by Manager Ferrer in an employee's meeting in June. At that time Ferrer had spoken about possible relocation of the plant to some other area where the Company would have room to expand. He also had said that he would try to acquire land in the Arecibo area, that a consultant had recommended other locations which were far from the area where the present employees lived, and that if the plant relocated to such areas, it would mean the present employees would have to relocate also or lose their jobs.

At 8 p.m., that same day, Supervisor Enrique Rivera called Rolon to his office and told her that employees had told him she had made (upsetting) comments about the factory moving to Guayama. Rolon denied making the comment, asked if he would tell her who had made those comments, and said she was going to get her people together to discuss this because she had not made that type of comment. Rivera agreed she had the right to meet with her people because she was

the group leader but did not identify Olga Burgos, the complaining employee.

Rivera said he also decided to investigate further, spoke to two or three employees, decided to give Rolon a warning, and then did so.

Rolon was upset and admits that when she went to the lockers to change around 11:40 p.m., she commented that there were many "SOB's" who like to hurt other people. Rivera testified that the next day Burgos (who was not called as a witness), told him Rolon had "insulted the employees" at the locker room and had asked "who were the bitches and motherfuckers who took the gossip [to Rivera]."

When Rolon came to work on September 14, she was escorted to Personnel Manager Osuna's office. In the presence of several other supervisors, Osuna told Rolon that Melendez was going to "escort" her out of the plant because he was going to suspend her while he conducted an investigation and that she should report back the following Monday at 3 p.m. Rolon requested she be spared the shame of having a supervisor escort her out of the plant. She stated that she was a serious person and that they could trust her to go to the line, get her belongings and leave, which she did.

On behalf of its investigation Respondent obtained written statements from seven employees. On Monday morning, September 17, Rolon received an anonymous call informing her that there were orders at the guardhouse entrance to the effect that she would not be allowed to enter. Rolon phoned Osuna who told her that she would have no problems entering the plant. Rolon also testified that Osuna then added a comment that if she wanted to sign a paper stating that she would renounce the Union, then nothing would happen.

When Rolon arrived at work the guard stopped her at the gate and told her she could not go in until he spoke with Osuna. After 5 to 10 minutes she was taken to the lobby where Osuna met her and took her to his office. Rivera was there and handed her a letter stating that she was being suspended for 3 days from Friday, September 14, until Tuesday, September 18, and that she was being demoted from group leader to senior packer for "violating the Company's Rules of Conduct" (no specific rules were indemnified).

The improper conduct referred to in the letter was for making false comments about the plant moving to Guayama or Guayanilla that created an atmosphere of worries for the employees and for using abusive language against employees.

Although the letter makes no mention of it, Respondent also asserts that Rolon and her husband threatened another employee on Saturday, after her initial verbal suspension, an incident that was reported to Supervisor Rivera at his home that same day. Rolon admitted that she had seen that employee but denied that any threat was made.

On September 27, Rolon hand delivered a letter to Rivera in which she denied any wrongdoing and objected to her suspension and demotion and further stated that she did not know what Rules of Conduct he was referring to in his letter and further. The letter also objected to the suspension because the Company had not followed the procedures set out in its "Policies and Procedures" handed to her on April 27 by Rivera. After Rivera refused to sign for receipt of the letter, Rolon arranged a meeting with Manager Ferrer who called in Melendez, Osuna, and Production Manager Evaristo Velazquez. Ferrer then promised Rolon he would reinves-

tigate the matter and that she should go by Osuna's office the following Monday for the final answer. On Monday, Osuna told her he had made a new investigation and the result was the same. After further discussion, Osuna finally told her that he could do nothing because there were seven persons against her.

In addition to the 3-day suspension, Rolon was demoted from her position as group leader to that of senior packager. She denied that the comment and incidents had occurred as described in the letter but indicated a willingness to accept the suspension but not the demotion; however, Osuna said the Company could not do anything else. Rolon testified that when she said she would report this matter to the Union, Osuna again asked her if she wanted to sign a paper saying she did not belong to the Union. I credit Rolon's testimony regarding the circumstances and contents of her remark about the warning letter, the plant moving, and the subsequent exchange of comments with other employees and supervisors (see the discussion in pt. G,4, above).

Here, the record shows that Rolon was a union steward (who processed grievances), during a period when the Respondent was appealing the Union's victory in the September 1988 Board election. The Respondent also had started to deal with union matters under apparently new concepts guided by a new plant manager, Ferrer, and new personnel director, Osuna, and under a new overall corporate organization. Moreover, the Respondent contemporaneously was challenging other persons involved in union activities with actions otherwise found to be unfair labor practices as discussed above and it was pursuing a pattern of conduct whereby it appeared to be setting the stage for a challenge to the Union's majority status among its employees.

Under these circumstances, I find that the General Counsel has presented sufficient evidence to support an inference that the employee's union activities were a motivating factor in the Respondent's decision to warn and suspend her on the occasions discussed above.

Turning to an evaluation under the *Wright Line* criteria, supra, Respondent's defense is based on a contention that each instance was a matter of legitimate discipline.

Rolon was selected as a group leader in May 1989 over 11 coworkers for his superior overall work qualities, shortly before Osuna became personnel manager. However, after Rolon exercised her duties as shop steward and filing two grievances in August 1989, Respondent seized on a minor incident of semantics and twisted her words into a matter of making "totally false" statements about the plant moving and creating an "atmosphere of uncertainty and worries among the employees." Her attempts to defend herself were allowed to escalate and then presented as an additional violation of rules based on a purported investigation. This "investigation" failed to seek out Rolon's description of events but instead relied on seven statements of employees regarding the locker room incident. A review of testimony and these statements, however, shows many discrepancies and that one witness said only five women were there, the statement by Olga Burgos (she was not called as a witness even though she was a principal character in the events) related only to Rolon's plant moving comment, only three of the statements purportedly relied on were placed in evidence, and the statements of two employees were of what another employee had told them because they had not witnessed the incident in the

locker room. Despite the lack of persuasive evidence, Respondent went forward with discipline and imposed both a suspension and a demotion (for someone who had an essentially superior past work history). The severity of the discipline, combined with Respondent's apparent exaggeration of the offense (especially the initial plant moving remark which engendered any following incidents), suggests that its reasons were pretextual and I find that its argument fails to persuasively support Respondent's claim that it had a legitimate nondiscriminatory basis for its action. Accordingly, I conclude that Respondent was motivated by Rolon's union activities and therefore I conclude that it is shown to have violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

Although paragraph 12(f) of the complaint also originally was directed to another warning on September 21, this matter was not pursued on brief and I find no persuasive reason to find a violation of the Act in this respect.

#### CONCLUSIONS OF LAW

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

2. District 65, U.A.W. and Local 2286, U.A.W., AFL-CIO and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material, the latter entity, Local 2286, has been the exclusive representative for purposes of collective bargaining in the following described unit, which is a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act and it is the lawful successor to District 65, which otherwise continues to be a labor union and entity:

All production and maintenance and warehouse employees employed by the Company at its locations in Manati, Puerto Rico, but excluding all other employees, laboratory technicians, chemists, other laboratory employees, clerical employees and executives, quality control inspectors, guards and supervisors as defined in the "National Labor Relations Act."

4. By unilaterally withdrawing recognition on February 5, 1990, and thereafter failing and refusing to recognize and bargain collectively with Local 2286, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By denying union representatives access to the plant, denying union access to and use of the company cafeteria, bulletin boards prohibiting the distribution of union literature within company premises, and failing to process grievances, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By failing and refusing to furnish the Union with certain requested information, as described in the above decision, which was and is necessary and relevant to the Union's performance of its functions as the exclusive bargaining agent of the unit employees, and dealing directly with employees, Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By paying and assisting employees with antiunion sympathies to campaign off premises on company time and fail-

ing to enforce applicable company rules regarding punching out when leaving the plant, Respondent has given such employees unlawful assistance and has violated Section 8(a)(1) of the Act.

8. By providing employees with a party and day off with pay, by telling employees the Union isn't needed and offering better conditions and promotions, by offering promotion or other benefits for the employees' withdrawal of union support and telling employees they would have received specific raises if the Company had won a decertification election, or that they would be better paid without a union, Respondent has violated Section 8(a)(1) of the Act.

9. By giving disciplinary warnings to, suspending, demoting, or transferring (to isolated work stations or more onerous working conditions), employees Ines Velez Ramos and Carmen Hilda Rolon because of their union activities or support, Respondent has violated Section 8(a)(1) and (3) of the Act.

10. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

#### REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to revoke the warnings given to Carmen Hilda Rolon and Ines Velez Ramos; to reinstate Rolon to her former position as group leader and make her whole for any loss of earnings she may have suffered because of the discrimination practiced against her by payment to her a sum of money equal to that which she normally would have earned on the days suspended and from the date of the discrimination to the date of reinstatement as group leader in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987);<sup>5</sup> to reinstate Velez to her former position on the packing line and that Respondent expunge from its files any reference to the unlawful warnings to both Rolon and Velez and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Having found that Respondent has refused to recognize and bargain with Local 2286 as the exclusive representative of the employees in the appropriate unit as described, I shall recommend that Respondent be ordered to recognize and, on request, bargain in good faith with Local 2286 as the exclusive representative of the employees in the appropriate unit with respect to wages, hours, benefits, and all other terms and conditions of employment, and on request of the above Union, retroactively restore the terms and conditions of employment that existed immediately before it withdrew rec-

<sup>5</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ognition of the Union, including wage rates and benefits that would have been paid absent unlawful changes on and after February 5, 1990, until it negotiates in good faith with the Union to agreement or to impasse; this also includes the processing of grievances. Inasmuch as the parties' contract had an expiration date of November 13, 1991, the term of the bargaining obligation shall be extended to recommence when Respondent properly recognizes the Union and extend the number of days left on the agreement after February 5, 1990, when Respondent illegally withdrew recognition. Any remission of wages shall be computed as prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make these payments. Any amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Because of the serious nature of the violations and Respondent's egregious misconduct demonstrates a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act, *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, R.P.C. Inc., a Division of Rorer Pharmaceutical Corporation and Rhone Poulenc Rorer, Puerto Rico, Inc., Maniti, Puerto Rico, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Local 2286, U.A.W., AFL-CIO and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive bargaining agent of its employees in the following appropriate unit:

All production, maintenance and warehouse employees employed by the Company at its location in Manati, Puerto Rico, but excluding all other employees, laboratory technicians, chemists, other laboratory employees, clerical employees and executives, quality control inspectors, guards and supervisors as defined in the "National Labor Relations Act."

(b) Unilaterally implementing changes in terms and conditions of employment without first notifying or bargaining with the Union.

<sup>6</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.

(c) Advising unit employees that it would withdraw recognition of the Union and operate without the Union and repudiating its collective-bargaining agreement with the Union because of their union or other protected concerted activities.

(d) Issuing disciplinary warnings to or suspending or demoting employees or transferring employees to isolated and more onerous work positions.

(e) Denying plant access to union representation, denying union access to and use of the cafeteria and bulletin boards and prohibiting the distribution of union literature within its premises.

(f) Failing and refusing to process grievances and dealing directly with employees.

(g) Failing and refusing to furnish the Union with requested information necessary and relevant to the Union's performance of its function as bargaining representative.

(h) Discriminatorily assisting employees with antiunion sympathies.

(i) Providing employees with a company party and a day off with pay because in recognition of the Company going nonunion.

(j) Soliciting employees to drop their support of the Union and promising the opportunity for promotions, better working conditions, or raises or other benefits or otherwise telling employees that they would have received such benefits if there was no union or if they had voted against the Union.

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

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

(a) Offer Carmen Hilda Rolon and Ines Velez Ramos immediate and full reinstatement to their former positions and make Rolon whole for the losses she incurred as a result of the discrimination against her in the manner specified in the remedy section of the above decision.

(b) Expunge from its files any reference to the warnings and suspensions of Rolon and Velez and notify them in writing that this has been done and that evidence of the unlawful suspension and warning will not be used as a basis for future personnel actions against them.

(c) Furnish the Union with the requested information it previously failed to provide as described in the above decision.

(d) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the above unit, with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

(e) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondent's unilateral withdrawal of recognition on February 5, 1990, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees and all benefit funds whole by remitting all wages and benefits that would have been paid in the absence of the unilateral changes in the manner specified in the remedy section of this decision.

(f) On request, allow union representatives access to the plant, allow union representatives the use of the cafeteria or

an equivalent facility for union meetings and for processing grievances or for otherwise communicating with employees.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze Respondent's compliance under the terms of this decision.

(h) Post at its Manati, Puerto Rico facility copies of the attached notice marked "Appendix,"<sup>7</sup> in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by 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.

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

<sup>7</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.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail and refuse to bargain in good faith with Local 2286, U.A.W., AFL-CIO and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive bargaining agent of its employees in the following appropriate unit:

All production, maintenance and warehouse employees employed us at our location in Manati, Puerto Rico, but excluding all other employees, laboratory technicians, chemists, other laboratory employees, clerical employees and executives, quality control inspectors, guards and supervisors as defined in the "National Labor Relations Act."

WE WILL NOT unilaterally implement changes in terms and conditions of employment without first notifying or bargaining with the Union.

WE WILL NOT advise unit employees that we would withdraw recognition of the Union and operate without the Union and repudiate our collective-bargaining agreement with the Union.

WE WILL NOT issue disciplinary warnings to or suspend or demote employees or transfer employees to isolated and more onerous work positions because of their union or other protected concerted activities.

WE WILL NOT deny plant access to union representation, deny union access to and use of the cafeteria and bulletin boards, and prohibit the distribution of union literature within our premises.

WE WILL NOT fail and refuse to process grievances or deal directly with employees.

WE WILL NOT fail and refuse to furnish the Union with requested information necessary and relevant to the Union's performance of its function as bargaining representative.

WE WILL NOT discriminatorily assist employees with antiunion sympathies.

WE WILL NOT provide employees with a company party and a day off for antiunion reasons.

WE WILL NOT solicit employees to drop their support of the Union and promise the opportunity for promotions, better working conditions or raises or other benefits, or otherwise tell employees that they would have received such benefits if their was no union or if they had voted against the Union.

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

WE WILL offer Carmen Hilda Rolon and Ines Velez Ramos immediate and full reinstatement to their former positions and make Rolon whole for the losses she incurred as a result of the discrimination against her with interest.

WE WILL expunge from our files any reference to the warnings and suspension of Rolon and Velez and notify them in writing that this has been done and that evidence of the unlawful suspension and warning will not be used as a basis for future personnel actions against them.

WE WILL furnish the Union with the requested information it previously failed to provide as described in the administrative law judge's decision.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the above unit, with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondent's unilateral withdrawal of recognition on February 5, 1990, retroactively restoring pre-existing terms and conditions of employment, including wage rates and benefit plans, and make the employees and all benefit funds whole by remitting all wages and benefits that would have been paid in the absence of the unilateral changes in the manner specified in the remedy section of this decision.

WE WILL, on request, allow union representatives access to the plant and allow union representatives the use of the cafe-

teria or an equivalent facility for union meetings and for processing grievances.

R.P.C. INC., A DIVISION OF RORER PHARMACEUTICAL CORPORATION AND RHONE POULENC RORER, PUERTO RICO, INC.