

The Sharing Community, Inc. and District Council 1701, C.S.A.E.U.,¹ American Federation of State, County & Municipal Employees, AFL-CIO. Cases 2-CA-24612 and 2-CA-24779

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 5, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions. On September 30, 1992, the Board issued an Order Remanding Proceeding to the Administrative Law Judge (unpublished). On November 19, 1992, Judge Green issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

In adopting the dismissal of the allegation regarding the Cartagena discharge, we find that the General Counsel established a prima facie case that the Respondent's discharge of Cartagena violated the Act, but we agree with the judge's conclusion in his supplemental decision that the Respondent demonstrated it would have discharged Cartagena even in the absence of his protected activity. In so agreeing, however, we do not rely on the judge's reference in his supplemental decision to the General Counsel's prima facie case as being "rather marginal." Moreover, we do not rely on footnote 3 of the judge's initial decision because the issue of the legality of Cartagena's July 24, 1990 suspension was not before the judge, and as a re-

¹ The name of the Union appears as listed in the charge and complaint.

² The General Counsel 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 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.

³ We note that the Respondent fired a total of 20 employees in 1989-1990 (12 for excessive absences and 8 for unsatisfactory job performance) not 8 as stated by the judge in his supplemental decision. We grant the General Counsel's unopposed motion to correct the transcript.

sult the judge could not properly determine whether the suspension was given for just cause. It is enough to find that it was not shown to violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Sharing Community, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard L. De Steno, Esq., for the General Counsel.
Robert D. Brady, Esq. (Corcoran & Brady), for the Respondent.
Stephen E. Appell, Esq. (Sipser, Weinstock, Harper & Dorn), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on March 9 and 10, 1992. The charge in Case 2-CA-24612 was filed on September 4, 1990, and the charge in Case 2-CA-24779 was filed on November 21, 1990. The consolidated complaint which issued on December 6, 1991, and amended at the hearing alleged:

1. That on or about August 22, 1990, the Respondent, by its executive director, Reverend Tony Hoeltzel, threatened employees with loss of jobs and more onerous working conditions if they selected the Union as their representative.

2. That on or about August 29, 1990, the Respondent by Hoeltzel, in an effort to dissuade employees from voting for the Union, threatened employees with loss of jobs, wage cuts, more onerous conditions, suggested the formation of an employee committee to deal with management, told employees that it would be futile to select the Union, and solicited grievances while promising benefits.

3. That on or about August 30, 1990, the Respondent by Hoeltzel, interrogated employees regarding the Union.

4. That in September 1990, the Respondent by Hoeltzel, promised employees an employee assistance program.

5. That on or about October 10, 1990, the Respondent by Hoeltzel solicited employee complaints, promised benefits, and suggested that employees form a committee to deal directly with management.

6. That in October 1990 the Respondent distributed a memorandum pursuant to which it assisted in the formation of a committee of employees to deal directly with management regarding terms and conditions of employment.

7. That on or about November 14, 1990, the Respondent discriminatorily discharged and failed to reinstate its employee Jose Cartagena because of his union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union began organizing the employees of the Sharing Community in July 1990 after it was contacted by employee James Jarema, who was the employee most active on behalf of the Union. The alleged discriminatee, Jose Cartagena, signed a union card on July 23, 1990, and he asserted that he spoke in favor of the Union to the other employees in the kitchen where he worked.

On July 31, 1990, the Union filed a representation petition in Case 2-RC-0923 seeking an election among the Respondent's employees. A representation hearing was thereafter held on August 28, September 6, 7, and 28, and October 30, 1990. Among the witnesses for the Union were Jarema as well as employees Ellen MacRae and Tom Delaney, all of whom were present at the first hearing date on August 28. Among the issues presented in the representation case was the appropriateness of the unit sought by the Union.¹ In this regard, it was the Respondent's contention that the three programs run by the Sharing Community should be separate units (i.e., the shelter, the kitchen, and residence facilities). This contention ultimately was rejected by the Regional Director who found, in a report issued on September 25, 1991, that an employerwide unit was appropriate but that professional employees should be given a self-determination election.

On August 22, 1990, at a monthly staff meeting, the Employer's executive director, Tony Hoeltzel, spoke to the employees about a number of issues including the union representation petition. Based on the record as a whole, I find that Reverend Hoeltzel told employees that he was upset that the Union had been brought in and rhetorically asked why he was not consulted first. I also find that Hoeltzel said that if a Union was brought in, it would mean that some people might be laid off because they did not meet the criteria established for their jobs. In this regard, I believe that he said that under the present circumstances, the employer could make exceptions in hiring and retaining people who did not fit the strict job categories established in the budget (for example not having the required educational background), but that if a union came in, there likely would be strict enforcement of job classifications and categories which would eliminate flexibility and could result in some people losing their jobs. As pointed out by the General Counsel, such statements constitute threats within the meaning of Section 8(a)(1) of the Act. *Fast Food Merchandisers*, 291 NLRB 897, 906 (1988).

¹The Employer also asserted that jurisdiction should not be exercised over it because its funding was received from governmental sources and it did not have control over its own labor relations policies. This contention was withdrawn during the representation hearing and the Regional Director concluded that assertion of jurisdiction over the Sharing Community was proper under *Res-Care, Inc.*, 280 NLRB 670 (1986).

On August 29, 1990, Hoeltzel invited Jarema, MacRae, and Delaney into his office to discuss the Union. (In this regard, he states that he assumed that these three employees were the leaders as they were the ones who appeared with the Union at the representation hearing on August 28.) According to Hoeltzel, he called this meeting because "I had been struggling with the origin of the union petition that morning . . . I wanted to find out what the issues were that generated the petition."

The August 29 meeting lasted about 2 to 3 hours and none of the participants recall all that was said. Although there are some differences in their recollections, the following description is what I believe took place based on a composite of the testimony and my observation of demeanor.

Reverend Hoeltzel asked these employees why they had brought in a union and they responded that they felt that with a union they could get better wages, job security, maternity and paternity leave, etc. Hoeltzel stated that he did not understand how a union would work in this setting and he thought a union was inappropriate for the Sharing Community because as the Employer had to justify its expenditures to Government agencies it therefore would have to negotiate with both a union and then with the Westchester Department of Social Services (DSS) to fund any items granted to employees through negotiations with a union. Jarema responded that having a union could therefore be used as a wedge in the Employer's negotiations with the DSS and therefore be beneficial to everyone. Hoeltzel rejoined that having a union could be an obstacle. During the meeting, Hoeltzel stated that having a union would eliminate flexibility and that if a union demanded too much in one area, cutbacks would have to be made in other areas. (This was connected to the concept of a constant funding pie.) Hoeltzel said that he felt that with a union this would mean strict enforcement of job criteria/classifications and this would likely mean that some people would have to be laid off. A union, he said, would mean that there would be reduced communications and poorer relationships because of the intercession of a union between the employees and management. At some point during the meeting, Hoeltzel said that they did not need a union to deal with grievances or employee problems; that these issues could be dealt with by an alternative mechanism, namely, the establishment of a joint management-employee committee. He suggested that Jarema, MacRae, and Delaney present this alternative to the employees and they said that they would.

On August 30, Hoeltzel asked MacRae if she had gotten any feedback from the employees regarding the committee. She said no.

On August 31, Hoeltzel asked Jarema and MacRae to meet with him and asked what if any response the employees had to the committee idea. Jarema told him that he had made inquiries but that the employees were not interested. From that point, there ensued another 2-hour meeting which went over essentially the same ground covered by the August 29 meeting.

In relation to the transactions on August 29-31, it is my opinion that the Respondent violated the Act in a number of respects. First, Hoeltzel solicited employee grievances and impliedly promised to remedy them when he suggested the formation of a committee to deal with the kinds of problems that had precipitated the Union's petition. This constitutes a violation of Section 8(a)(1). *Fast Food Merchandise*, 291

NLRB at 906; *A.J.R. Coating Division Corp.*, 292 NLRB 148, 163 (1988). Second, by questioning the three employees as to why they brought in a union, coupled with the other 8(a)(1) conduct, the Respondent in my opinion, unlawfully interrogated employees in violation of Section 8(a)(1). *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). I also conclude that the Respondent violated Section 8(a)(1) by the unconditional statements indicating that a union would bring about a reduction in communications, a loss of flexibility regarding placing people in certain jobs, and a concomitant possibility that people would be laid off. On the other hand, the employer did not state that it would not bargain with the Union if the employees selected it and I do not construe Hoeltzel's remarks as constituting a statement that it would be futile for employees to select the Union.

On October 30, 1990, another meeting was held at the facility. At this meeting Hoeltzel asked the employees to make suggestions for the budget to be presented in December and he wrote them down on a large paper taped to the wall. (Essentially a wish list). Hoeltzel then stated that he wanted to have a committee elected that would prioritize the items on the list. A few days later, a memorandum was distributed the staff reading:

Re: Committee.

In our mandatory meeting on Wednesday it was decided that a committee be formed from each program component to prioritize the listing of items to possibly include in our employee benefits package which will be presented to D.S.S.

Please select a candidate from the "Skelton-Operations" employee listing that you think would best represent our component as a committee person. You need not identify yourself, just enclose your circled choice employee listing in the attached envelope, write Ballot on the front and drop in the black box near Wanda's desk.

Your cooperation is appreciated, as we need all selections by Monday, October 19, 1990.

Reverend Hoeltzel's explanation was that as funding contracts generally expire at the end of the year, it has been the Respondent's past practice to solicit employee wishes for inclusion in the proposed budget and that ad hoc committees have been established with volunteers for this purpose. Since this was not contradicted by any of the General Counsel's or the Charging Party's witnesses, I shall assume this to be the case. The problem here, however, is that the events of October occurred while the representation case was pending and followed close on the heels of the previous unlawful suggestion to form an employee-management committee to deal with grievances. Therefore, the events of October 10 and 12, whatever their precedent, could reasonably be construed by the employees as a continuation of and implementation of the illegal statements made in August. I therefore conclude that in this respect the Employer also violated Section 8(a)(1) of the Act.

Sometime in June 1990, and before the Union came onto the scene, certain employees had suggested the creation of an employee assistance plan which would deal with drug, alco-

hol, or other employee problems. There is evidence that the employer at meetings in June or July 1990 told employees that it would consider such a program. In fact, such a program was instituted in October 1990. While the employer contends that the implementation of this program was planned prior to the petition, the evidence merely shows that it was put under consideration at that time and therefore was not decided on until after the Union filed its election petition.

The granting of wage increases or other benefits while a petition is pending will be held to violate the Act unless the employer can show that the increases either had been planned prior to the Union's advent on the scene or that they were part of some established past practice. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1963); *Baltimore Catering Co.*, 148 NLRB 970 (1964). Further, where the announcement of a benefit is timed so as to influence the outcome of an election, the Board may find a violation of the Act even where the benefit had previously been planned. In *NLRB v. Pandel-Bradford*, 520 F.2d. 275 (1st Cir. 1975), the court stated:

The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice.

Based on the above, it is my conclusion that by promulgating the Employee Assistance Program while the election petition was pending, the Employer violated Section 8(a)(1) of the Act. See also *Sears, Roebuck & Co.*, 305 NLRB 193 (1991).

The final issue in this case is whether Jose Cartagena was fired because of his union activities or for cause. For the reasons set forth below I conclude that he was fired for cause and not for reasons violative of Section 8(a)(3) of the Act.

Cartagena worked in the kitchen as a cook. As noted above, he signed a union card on July 23, 1990, and he asserts that he proselytized among the other employees in the kitchen in favor of the Union. In this connection, Janet Stewart, his supervisor, testified that after she became aware of the Union, she assumed that all the kitchen employees were in favor of union representation because since the time of her hire, she had been trying, with great vigor, to shape up these employees and get them to do their jobs properly.²

On or about November 10, 1990, Cartagena was asked by Stewart if he would switch his day off so that he could drive up to Milton, New York, to pick up some Government-do-

²Cartagena testified that at some point, Stewart told the kitchen employees that they were separate from the rest of the Sharing Community and would have to get their own union. He also contends that she said that if they got a union, they would have to pay union dues and they would work fewer hours. Stewart essentially concedes that she made the former statement but denies the latter. In either case, these comments, which are not alleged to be 8(a)(1) violations, do not, in my opinion, add anything significant to the allegations and do not overcome the weight of evidence showing that Cartagena was discharged for cause.

nated food. Cartagena agreed and, accordingly, he was scheduled to do this task on Tuesday, November 13. (His regularly scheduled days off were Monday and Tuesday).

On Tuesday, November 13, Cartagena went to the Employer's premises, picked up the paper work, and, on arriving at the U-Haul agency, discovered that they only had available a truck with a standard shift. As he couldn't drive this vehicle, Cartagena returned to the Respondent and told the secretary that because U-haul did not have a truck he could drive, he was going home. He then left to pick up his child from a babysitter.

At this point, Leo Carlo, who was in charge of the kitchen for that day, contacted Stewart at the Javits Convention Center and told her what had happened. She instructed Carlo to switch assignments with Cartagena so that Carlo could pick up the food and Cartagena could work in the kitchen. When Carlo tracked down Cartagena and they returned to the facility, he told Cartagena that Stewart wanted him to stay and work in the kitchen while Carlo drove upstate to pick up the food. Cartagena refused to stay. When Stewart returned to the kitchen about 5 p.m., she saw that the kitchen was a mess and when she asked where Cartagena was, she was told that he had refused to stay. She testified that at this point she decided to fire Cartagena and, after reviewing his personnel records, drafted a memorandum which read:

You were scheduled to go to Milton, New York to pick up Government commodities per discussion last week, and again this morning; however while trying to rent the U-Haul you were told the only truck available was a stick shift. I don't know what actually conspired after this, or what happened in between, but a direct order was given by Louis Carlo to have you take his place in the kitchen and he was to drive the truck.

I arrived at the Sharing Community around 5:15 pm and discovered there was only 1 person (staff member) in the Soup Kitchen, you did not show up at all. The kitchen was untidy, the dining room not properly cleaned. This showed 1) lack of responsibility 2) lack of interest and care of job 3) no regard of fellow employees 4) Not showing up for work is the same as abandoning job.

You cannot be depended upon. I finally conclude that you must be terminated from employment . . . for gross negligence and disrespect for your work here.

On the following day, Stewart discharged Cartagena and handed him the above-noted memorandum. When Cartagena protested his discharge to Schneider, he told Cartagena that Stewart was part of management and he believed her. Some days later, Cartagena attempted to apologize to Stewart but she told him, in essence, that it was too late. (In the meantime, Stewart had hired a woman who had been working in the kitchen as a volunteer).

On direct examination, Cartagena claimed that he had never received any warnings prior to his union activities. This, however was shown to be incorrect when he began to admit during cross-examination that Stewart, on other occasions, had threatened to fire him and that she had given him a series of poor evaluations. On July 24, 1990 (1 day after he signed a union card but several days before the RC petition was filed), Stewart gave Cartagena a 2-day suspension

in relation to an incident that occurred on July 23. In the memorandum, she specified that unless Cartagena showed improvement, "He will not be rehired in the future."³

In view of his past work and disciplinary record, it seems to me that the discharge of Cartagena for abandoning his work assignment on November 13 was amply justified and motivated by reasons unrelated to his union activities. Nor do I conclude that the Respondent's refusal to rehire him on or about November 16 when he apologized, was motivated by union considerations. In this case, Cartagena apologized after a new employee was hired to take his place and I see no evidence indicating any discriminatory motive in failing to give him a second chance for conduct which clearly was insubordinate.

CONCLUSIONS OF LAW

1. By threatening employees with job loss and more onerous conditions of employment, the Respondent has violated Section 8(a)(1) of the Act.

2. By soliciting grievances and by soliciting and assisting in the formation of a committee to deal with grievances, the Respondent has violated Section 8(a)(1) of the Act.

3. By interrogating employees regarding their union activities and sympathies, or the union activities and sympathies of others, the Respondent has violated Section 8(a)(1) of the Act.

4. By promising and granting an employee assistance program and by promising to remedy employee grievances while a petition for an election was pending, the Respondent has violated Section 8(a)(1) of the Act.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, The Sharing Community, Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with job loss and more onerous conditions of employment if they select a union to represent them.

(b) Soliciting grievances and soliciting and assisting in the formation of a committee to deal with grievances.

(c) Coercively interrogating any employee about their union support or union activities.

³As this suspension is not alleged to be a violation of the Act, it is concluded that it was given for just cause.

⁴If 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.

(d) Promising and granting an employee assistance program and promising to remedy employee grievances while a petition for an election is pending.

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

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

(a) Post at its New York City facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁵If 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 threaten employees with job loss or more onerous conditions of employment if they select a union to represent them.

WE WILL NOT solicit grievances or solicit and assist in the formation of a committee to deal with grievances.

WE WILL NOT coercively interrogate any employee about his or her union support or union activities.

WE WILL NOT promise and grant an employee assistance program or promise to remedy employee grievances while an election petition is pending.

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

THE SHARING COMMUNITY

Richard L. De Steno, Esq., for the General Counsel.

Robert D. Brady, Esq. (Corcoran & Brady), for the Respondent.

Stephen E. Appell, Esq. (Sipses, Weinstock, Harper & Dorn), for the Union.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On September 30, 1992, the Board remanded this case to me for further consideration regarding the discharge of Jose Cartagena.

In accordance with *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), if the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

In the present case, the General Counsel arguably has made out a prima facie showing of discriminatory motivation. But this showing is, in my opinion, rather marginal in light of Cartagena's testimony on both direct and cross-examination.

Cartagena signed a union card on July 23, 1990, and expressed his support for the Union among the other kitchen employees. The supervisor of the kitchen employees, Janet Stewart, conceded that she assumed that all the kitchen employees including Cartagena were in favor of the Union inasmuch as she had, since assuming her position, been cracking down on these employees in an effort to make them perform their jobs better. There was testimony that Cartagena spoke at a couple of union meetings expressing his pronion sympathies.

There is no doubt in my mind that the Respondent made efforts, including illegal efforts, to avoid unionization. This is a factor supporting the General Counsel's claim that Cartagena's discharge was motivated by illegal considerations. Also supporting this claim is the timing of his discharge which occurred on November 14, 1990, soon after the close of a representation hearing where the parties were litigating who should vote in an election. (That hearing closed on October 30, 1990.)

On the other hand the evidence established that Cartagena, after agreeing to work on November 13, his normal day off, abandoned his job to go home and left the facility without sufficient personnel. This was not simply a matter of not being at work as scheduled, but was contrary to instructions to work in the kitchen when Leo Carlo, the person in charge of the kitchen that day, switched assignments with Cartagena so that a load of food could be picked up from an upstate location. This constituted, in my opinion, insubordinate conduct as Cartagena, by leaving without permission, demonstrated a disregard for his responsibilities.

The incident that occurred on November 13, 1990, had it happened without any background, would not have justified

Cartagena's discharge. Nevertheless, despite his initial testimony that he had a prior spotless record, Cartagena, on cross-examination, admitted that Stewart had, prior to any union activity, threatened to fire him and had given him a series of poor evaluations. Thus, the November 1, 1990 incident should not be viewed in isolation, but rather in the context of Cartagena's past record with Stewart.

The General Counsel argues that the Respondent has been very lenient to its employees and that the discharge of Cartagena does not fit into the pattern of its past practice.

Whether or not a company acts in any particular case in accordance with its past practice is, of course, important in determining whether the motive of its actions in the disputed instance was for discriminatory or nondiscriminatory reasons. This does not mean that it is possible to arrive at a precise mathematical formula by which we can say with certainty what was in the employer's mind when it took its action.

The facts in the present case do not persuade me that the Respondent's discharge of Cartagena was outside the range of its past practice. During the years 1989 and 1990 the Respondent discharged a total of eight employees, one of whom was discharged twice and one of whom was in probationary status.¹ Of these, some were discharged in situations where the employee's conduct was worse than that of Cartagena. These would include Charles Ennist (drug abuse), Angelo Buoncore (a bookkeeper discharged for inaccurate and illegal accounting and check writing practices), and Pablo Cortez (driving while drunk and hitting two parked cars).

¹This number of discharges over a 2-year period does not strike me as showing that the Employer was particularly lenient.

On the other hand, Darryl Barnes, another kitchen worker, was discharged for his overall poor performance and lack of respect on two separate occasions. (The fact that Barnes was rehired after his first discharge, does not, in my opinion, affect Cartagena's situation because, although Cartagena apologized on November 16, Stewart had already hired another person, Sharon Smith, who had previously been doing work in the kitchen as a volunteer.) If anything, Cartagena's discharge most closely resembles the discharge of Ray Rivera who walked off the job despite his supervisor's order not to leave and after he missed four shifts without calling in. While the facts of Cartagena's discharge are not precisely the same as those in Rivera's case, there is a similarity in the nature of the insubordination. It also must be kept in mind that Cartagena had previously been warned about his work performance and Stewart had threatened to discharge him at a time when there was no union activity.

In conclusion, I am persuaded that the Respondent has demonstrated that it would have discharged Cartagena on November 14 because of the November 13 incident, notwithstanding his union and protected activity.

It therefore is recommended that the allegations of the complaint alleging that the Respondent unlawfully discharged and refused to reinstate Jose Cartagena be dismissed.²

²If 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.