Sage Dining Service, Inc. *and* Hotel Employees and Restaurant Employees International Union, Local 274. Cases 4–CA–20638 and 4–RC–17771

September 30, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues presented to the Board[1] are whether the judge correctly found no merit in allegations that the Respondent unlawfully interfered with employee discussions about the Union; unlawfully threatened reprisal against and created the impression of surveillance of employee Shawn Turner's union activities; interfered with employees' free choice in a Board representation election; and unlawfully reassigned Turner because of his support for the Union.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

1. The Respondent operates food service facilities at the Bell Atlantic Tower and One Parkway, two buildings located about a block apart in Philadelphia. On December 13, 1991, the Union filed a petition to represent a unit of the Respondent's employees at both facilities. A Board election took place on April 7, 1992.[3] Ten employees voted for representation by the Union, and 14 employees voted against it.

Shawn Turner was a key employee supporter of the Union. He made the initial contact with the Union. He spoke openly in its favor at union-conducted employee meetings and in conversations with employees at work. He was the only employee to accompany union representatives in visits to employees' homes during a 4–5-day period about a week before the election. Turner also served as the Union's observer to the election.

Turner worked in the kitchen at One Parkway. While working there on about April 3, another employee asked him a question about the Union. Before he could respond, Facility Manager Victoria Hammes told both employees that they should be working and not talking about the Union on company time. Turner testified that kitchen employees normally had personal discussions while working.

Also on April 3, Turner and employee Tanika Wright walked to the Bell Atlantic Tower to cash their paychecks at a bank there and to have lunch in the Respondent's cafeteria. As Turner and Wright entered the cafeteria, they were met by Food Service Director John Spitzer, who had operational authority over both of the Respondent's facilities. Spitzer testified that he told Turner not to ''disturb my folks.'' Earlier that day, an argument between Bell Tower employees about the Union had resulted in a customer complaint. Turner was not involved in this incident. There is no evidence that he knew about it when Spitzer spoke to him. There also is no evidence that Turner had ever been involved in any disruptive event at either One Parkway or at the Bell Atlantic Tower.

Noting that Turner had discussions with employees at work about the Union on other occasions, the judge described the actions by Hammes and Spitzer as narrowly drawn ''managerial attempt[s] to maintain production and decorum.'' He found that neither of the incidents involved unlawful interference with the employees' protected right to discuss union matters.

We find that the actions of Hammes and Spitzer disparately focused on discussions about the Union by its principal employee advocate.[4] Furthermore, we disagree with the judge that the Respondent's interests in ''production and decorum'' justified the statements in dispute. There is no evidence that a response by Turner to his kitchen coworker's question about the Union posed any threat to these interests. Indeed, Hammes' sudden termination of the employees' conversation marked a departure from a working environment in which One Parkway kitchen employees spoke freely while working. In the instance of Spitzer's admonition to Turner, there is evidence that an argument by Bell Atlantic Tower cafeteria employees about the Union had triggered a customer complaint. Spitzer, however, did not mention this incident to Turner, who had just entered the cafeteria on his lunchbreak, did not work in the Bell Atlantic Tower, was not involved in the earlier incident, and was not aware of it.

It is of no consequence that Turner may have had the opportunity to speak with fellow employees about the Union at other times. The separate, comparable efforts by two of the Respondent's officials to limit discussion of the Union by its principal employee advocate during the week before the election cannot be viewed as isolated, noncoercive events. In sum,

[1] On March 4, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The General Counsel and Petitioner/Charging Party each filed exceptions with supporting briefs.

[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 the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are 1992, unless otherwise stated.

[4] Spitzer testified that he did not expressly refer to the Union in his conversation with Turner. Absent any plausible alternative, however, Turner, as a leading union adherent, would reasonably have understood that Spitzer was warning him not to ''disturb'' other employees with talk about the Union.

Hammes and Spitzer disparately banned employee discussions about the Union in circumstances which would reasonably tend to interfere with employees engaging in protected union activity. Such conduct violated Section 8(a)(1) of the Act.

2. On April 6, Hammes called Turner to her office. She told him that their conversation was personal and that she was speaking to him as a friend. Hammes said that employees from the Bell Atlantic Tower building had seen Turner riding around with union representatives. According to Turner, she then expressed ''her personal feelings, that the owners wouldn't like that, and my promotional future would be in jeopardy, and I wouldn't go anywhere in the Company any more.'' Turner said that he just shrugged his shoulders, but that, as he left, he felt Hammes was sympathetic to employees.

The General Counsel alleged that Hammes violated Section 8(a)(1) of the Act both by creating an impression of surveillance and by threatening Turner. The judge recommended dismissal of these allegations. He found that Turner openly engaged in union activities, expected employees to tell management about his house visits, and did not believe that he was under surveillance. Under these circumstances, the judge characterized Hammes' statement about what employees had observed and related to be ''a recognition of the obvious,'' rather than an unlawful implication of surveillance. He further found that Hammes' warning to Turner about jeopardizing his future with the Respondent was merely the friendly expression of a personal opinion which Turner did not regard as a threat.

We find that the judge erroneously relied on Turner's subjective reaction to Hammes' statements in analyzing their legality. It is well established that ''the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.'' *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). Using the appropriate objective test, we affirm the judge's finding that Hammes did not imply that the Respondent had Turner's union activities under surveillance. Turner had undisputedly made no effort to conceal his union activities. Hammes gave no indication that she or any other member of the Respondent's management solicited employees to observe such activities and to report them to the Respondent. There is no other objective evidence which would support a reasonable belief that the Respondent had Turner under surveillance. The General Counsel has therefore failed to prove that an employee in Turner's situation would reasonably believe that such surveillance, rather than voluntary disclosures by employees, brought his association with the Union's representatives to the Respondent's attention.[5]

We disagree, however, with the judge's finding that Hammes did not unlawfully threaten Turner. As for the alleged friendly nature of Hammes' remarks, the General Counsel aptly refers to the observation in *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977), that

> The Board has in the past noted that statements spoken as a friend which convey a threat of severe consequences are violative of Section 8(a)(1), adopting the reasoning that the impact of such statements, coming from a ''friend'' who is part of management, is probably greater in view of the authenticity and credibility of the source.

As for the alleged personal nature of Hammes' remarks, we find that the context of her conversation with Turner was far from personal and casual. Hammes was the ranking supervisor at the facility where Turner worked. During working hours, she summoned him to her office for the sole apparent purpose of discussing the dangers of his association with the Union's representatives. Under these objective circumstances, an employee would reasonably believe that Hammes, as a Respondent representative, was threatening adverse employment prospects for engaging in union activity. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act when Hammes threatened Turner on April 6.

3. The unfair labor practices by Hammes and Spitzer took place during the critical period prior to the Board election on April 7. The Union timely filed objections alleging that this unlawful conduct interfered with the election. We find merit in these objections. Accordingly, we shall set aside the results of the April 7 election and direct the Regional Director for Region 4 to conduct a second election.

4. There remains for our consideration one unfair labor practice allegation relating to Turner's work assignment after the election. The Respondent intially hired Turner as a grill cook in August 1991. In January 1992, he was promoted to the position of head cook at One Parkway. Turner received a $1-an-hour wage increase at this time. On about April 1, Manager Hammes told Turner that he would be assigned to work temporarily as the grill cook at One Parkway. Assistant Manager Marie McKenna would temporarily fill the head cook role. According to Turner, Hammes said the temporary assignment would end in about a week when employee Kevin West transferred from the

[5] Compare *Flexsteel Industries*, 311 NLRB 257 (1993), finding unlawful impression of surveillance where manager on two separate occasions told employee of hearing ''rumors'' of his union activities and there was no indication, as in the present case, that such reports were unsolicited comments by other employees.

grill cook position at the Bell Atlantic Tower to the grill cook position at One Parkway.[6]

It is undisputed that financial losses motivated a decision by the Respondent to close its restaurant at the Bell Atlantic Tower[7] and to lay off employees or to transfer them to other facilities. Senior chef Norman Bergeron, who served as the Respondent's election observer, was among those laid off. The Respondent transferred grill cook West to One Parkway on April 9. This was Turner's first day at work since the election. When Turner arrived at work, Assistant Manager McKenna directed him to work as the grill cook. West was going to work as head cook. Turner protested these work assignments. As a result, Food Service Director Spitzer reassigned Turner to the head cook position for that day.

Later that day, Spitzer met with Hammes, McKenna, Turner, and West. Spitzer announced that there were two qualified employees for the position of head cook. Consequently, Turner and West would be required to take a written theory test to determine who would become the head cook. Until that test, Turner and West would alternate days in the head cook and grill cook positions.

Hammes spoke privately to Turner after this meeting. According to Turner, Hammes said that ''she didn't think that what was going on was fair, that she felt like Kevin should have taken a layoff or just took the grill cook's position, and she felt that John [Spitzer] might have had a little animosity towards me because of the way I voted.''

The Respondent never administered a written head cook theory test. Turner and West alternated head cook and grill cook roles until June. Turner retained the same wage rate that he had earned while working exclusively as head cook. In June, the Respondent promoted Turner to an assistant manager's position at another facility, which is about a 40-minute drive away from the Philadelphia facilities involved in the Union's representation election campaign.

The judge found that the General Counsel failed to establish a prima facie case of unlawful motivation for West's initial assignment as head cook and the subsequent assignment of West and Turner to share that position. He found that any suspicion arising from the timing of Turner's work reassignment immediately after the election was outweighed by the absence of evidence of union animus, the Respondent's valid economic reasons for reorganizing its work force, Turner's retention of the same wage rate after reassignment and his subsequent promotion, and a comparison of his situation to the adverse consequences suffered by employees—including Respondent's election observer Bergeron—who were laid off during the reorganization. We disagree with the judge's analysis of the evidence.

We find that the General Counsel presented a strong prima facie showing of antiunion motivation for the reassignment of Turner from his prior position as sole head cook.[8] It is undisputed that the Respondent's officials knew about Turner's activities in support of the Union. Furthermore, we have found that both Spitzer and Hammes demonstrated Respondent's animus by unlawfully interfering with those activities. One day before the election, Hammes specifically threatened that Turner's association with the Union could jeopardize his future with the Respondent. Two days after the election, this threat was realized when the Respondent transferred grill cook West for the initial purpose of supplanting Turner as head cook. Even after Turner protested, Spitzer retained West as co-head cook and an equal competitor with Turner for the permanent head cook position. Hammes admitted to Turner that his vote for the Union may have been a factor in Spitzer's handling of the head cook assignment.

We also find that the Respondent relied on the legitimate, economically motivated reorganization as a pretext to remove Turner from his permanent position as sole head cook. While the reorganization may have prompted West's transfer to One Parkway, there is no apparent legitimate reason why he would assume or share the head cook's role there. There is no evidence that relative seniority was a factor. There also is no evidence supporting Spitzer's claim that both West and Turner were qualified to work as a head cook. West had only been a grill cook at the Bell Atlantic Tower, while Turner had served as the head cook at One Parkway from January to April. The written test which Spitzer promised to resolve the head cook competition never took place. Most significantly, Manager Hammes had informed Turner on about April 1 that he would work *temporarily* for a week as grill cook until West's transfer. It is apparent from this statement that, prior to the election, the Respondent contemplated transferring West from the grill cook position at the Bell Atlantic Tower to the same position at One Parkway and returning Turner to his permanent position as head cook. The Respondent has offered no explanation why this plan changed after the election. Absent any such explanation, and given the strong prima facie case, it is reasonable to infer unlawful motivation.

We disagree with the judge that the Respondent's failure to treat Turner worse, that is, by reducing his wage rate or laying him off, and its subsequent promotion of Turner prove the absence of unlawful moti-

[6] Hammes did not testify. Factual findings with respect to her conversations with Turner are based on his uncontroverted testimony.

[7] The cafeteria remained open.

[8] We note that the General Counsel does not allege that the *temporary* preelection assignment of Turner to the grill cook position was unlawful.

vation for the adverse treatment he received.[9] These matters have little relevance to the issue of why the Respondent did not retain Turner in the permanent position of sole head cook at One Parkway after the election. Where, as here, the evidence establishes that an employer has taken a discriminatory action against an employee, the mere fact that other discriminatory actions were not taken is hardly a refutation of the evidence establishing the discriminatory action. For the reasons stated above, we find that the General Counsel has proved that the Respondent acted in retaliation against Turner's union activities. It thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

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

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

3. By disparately preventing employee discussion of the Union, the Respondent has violated Section 8(a)(1) of the Act and interfered with the results of the election held on April 7, 1992, in Case 4–RC–17771.

4. By threatening an employee that association with union representatives would jeopardize his future employment, the Respondent has violated Section 8(a)(1) of the Act and interfered with the results of the election held on April 7, 1992, in Case 4–RC–17771.

5. By reassigning Shawn Turner on April 9, 1992, from the permanent position of sole head cook in retaliation against his union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, although the record does not indicate whether Shawn Turner suffered any losses from his unlawful reassignment, we shall order the Respondent to make him whole for any such loss of earnings or benefits, if any, that may be identified in compliance proceedings. Any backpay owing shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

ORDER

The Respondent, Sage Dining Service, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully forbidding employees from discussing the Union.

(b) Unlawfully threatening employees that association with union representatives could jeopardize their future employment.

(c) Unlawfully reassigning employees because of their union activities.

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

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

(a) Make Shawn Turner whole, with interest, for any loss of earnings or benefits suffered as the result of his unlawful reassignment, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful reassignment of Shawn Turner and notify him in writing that this has been done and that the reassignment will not be used against him in any way.

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

(d) Post at its One Parkway and Bell Atlantic Tower facilities in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[11] Copies of the notice shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the representation election held on April 7, 1992, in Case 4–RC–17771 be

[9] We find no need to pass on the General Counsel's suggestion that the Respondent promoted Turner in an effort to deter his participation in this proceeding. The General Counsel did not allege an 8(a)(4) violation, and such a violation would not materially add to the substantive remedy.

[10] Nothing in this Decision and Order shall be construed as requiring or authorizing the Respondent to rescind its promotion of Shawn Turner to the position of assistant manager.

[11] 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.''

set aside. Case 4–RC–17771 is hereby severed and remanded to the Regional Director for Region 4 for further proceedings consistent with the following direction.

[Direction of Second Election omitted from publication.]

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 forbid our employees from discussing Hotel Employees and Restaurant Employees International Union, Local 274, or any other union.

WE WILL NOT threaten our employees that association with union representatives could jeopardize their future employment.

WE WILL NOT reassign employees because of their union activities.

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

WE WILL make Shawn Turner whole, with interest, for any loss of earnings or benefits suffered as the result of his reassignment out of the permanent position of head cook at our One Parkway cafeteria.

WE WILL notify Shawn Turner that we have removed from our files any reference to his reassignment and that the reassignment will not be used against him in any way.

SAGE DINING SERVICE, INC.

Henry R. Protas, Esq., for the General Counsel.
Francisco and Christina J. Rodriguez, of Baltimore, Maryland, for the Respondent.
Adam H. Feinstein, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on November 16, 1992. Briefs subsequently were filed by all parties. The proceeding is based on a charge filed April 13, 1992,[1] by Hotel Employees and Restaurant Employees International Union, Local 274. The Regional Director's complaint dated May 29 alleges that Respondent, Sage Dining Service, Inc., of Baltimore, Maryland, violated Section 8(a)(1) and (3) of the National Labor Relations Act by prohibiting employees' union discussion, surveillance of employee union activity, threats of reprisal, and reassignment of an employee.

The Regional Director issued the notice of hearing on objections to election on June 4, in Case 4–RC–17771 and, on November 15, issued an order consolidating the cases.

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 a corporation engaged in providing institutional food services in Philadelphia, Pennsylvania, and other locations. It annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Pennsylvania and it admits that at all times material it is and 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

The Respondent provides cafeteria and restaurant services to businesses and schools and, as pertinent, it provided these services to Bell Atlantic at the Bell Atlantic Tower Building and at One Parkway in Philadelphia, two buildings that are about one block from each other.

Respondent employed five managers or supervisors at the Bell locations: John Spitzer, Geri Barton, Victoria Hammes, Marie McKenna, and Bruce Hodgdon, as well as approximately 24 hourly employees.

John Spitzer is Respondent's senior food service director, responsible for supervising Respondent's operations at both buildings. At relevant times, Respondent's onsite manager at One Parkway was Victoria Hammes and Marie McKenna was assistant manager.

In December 1991, employees at the Bell locations spoke with representatives of the Charging Party about a union. Following a solicitation attempt and a showing of interest, a petition was filed and a stipulated election agreement covering both locations was signed on March 9, which established an election date of April 7.

Shawn Turner previously had been hired as a grill cook at One Parkway on August 5, 1991. In January or February, he was promoted to the position of head cook at One Parkway and given a $1-an-hour raise.

[1] All following dates will be in 1992 unless otherwise indicated.

Turner had called Thurston Hyman, the organizer for the Union, and expresssed interest in having the Union organize the Respondent's employees. Once the campaign started, Turner assumed a prominent rule and spoke to fellow employees about the Union and attended union meetings. He was the only employee who accompanied Union Organizers Thurston Hyman and Michael Fagan when they visited employees at their homes over a period of 4 to 5 days about a week before the election and he served as the Union's observer at the election on April 7.

During February and March, Company President Francisco Rodriguez addressed all employees and explained what would transpire during the election campaign. He used the phrase ''no coercion and no rewards'' to explain that employees could not be punished for supporting the Union, nor rewarded for opposing it, an understanding held by Turner.

It otherwise appears that throughout the course of the union campaign, there was a substantial discussion about the Union both on and off the worksite, and employees freely discussed union issues while working, while on break, during lunch, and on premises. There is no implication that the Company systematically inhibited the employees' free speech nor interfered with solicitation efforts.

On one occasion, however, in March or April, employee Turner was involved in a discussion with fellow employee James Murray. Turner had stopped working in the middle of his normal activity when he was questioned by Murray and they were having a conversation in the production area. Manager Victoria Hammes told both employees they should be working and not talking about the Union on companytime. Turner testified that he had an opportunity to talk to Murray about the Union later that day and on other days.

On the morning of April 3, a group of employees from the Bell Tower had a loud and heated discussion about the Union during their work hours in the customer serving area and one customer called the manager, John Spitzer, to complain about the disturbance.

When Turner went there for lunch Spitzer spoke to him as he and another employee approached. In response to questions asked by a Board agent and set forth in an affidavit, Turner said Spitzer told him that he was not permitted to speak to anyone about the Union and that he did not want Turner promoting the Union.

Otherwise, Turner had difficulty remembering the occasion when he was questioned on direct examination by the General Counsel. Spitzer testified that he spoke to the employees at that location about avoiding loud disturbances and that when Turner came over he asked him not to upset the employee or to cause an uproar and although he did not use the word ''union'' he testified that he was relating his request to the earlier loud union discussion that had occurred earlier.

On April 6, Hammes called Turner into her office and advised him that their conversation was personal and that she was speaking to him as a friend. She told him that some of the employees from the Tower Building had seen him riding around with union representatives. She said that she felt that the owners would not like that and that his future would be in jeopardy and that he would not go anywhere in the Company. Turner did not respond. He testified that he thought Hammes' comments were an indication of sympathy for the employees and it appears that Hammes reassured Turner that she was giving her own opinion, not the Company's position.

Throughout the election campaign, Turner was an outspoken advocate and supporter of the Union. He made no efforts to keep his views a secret and in early April he openly accompanied a union organizer on home visits to prounion and antiunion employees alike to promote the Union.

The election was held on April 7, and, of 24 potential votes, the Union received 10.

During the Spring of 1992, Respondent Sage's financial position at Bell Tower deteriorated. A restaurant operation on the 50th floor which had opened in February saw a steady decline in clientele. The cafeteria, which experienced very strong business on its opening in February, was also experiencing sharply reduced sales.

I credit exhibits presented by Respondent showing that the Company lost money at the Bell Tower cafeteria/restaurant in both March and April. In March, the Company was budgeted to earn $4075 at the account; it loss $3482 instead. In April, the budgeted profit was $4441; the loss was $7274.

Labor cost at the account was substantially over budget. The March budget called for a $15,420 expenditure on labor; actual cost was $26,169, or $10,749 in excess of plan. April likewise saw actual labor cost exceed budget by $6243. Labor cost as a percent of sales was 63.5 percent in March, and 76.3 percent in April.

The Company decided to trim its labor force, moving employees, where possible, to the Bell Parkway location or to other locations. The first person to be cut from the rolls was Executive Chef Norman Bergeron; Bergeron was requested by management to be its observer at the union election. Bergeron was laid off because of his pay at $10.75 per hour, was the highest of all employees.

A number of employees, including cooks, cashiers, and waitresses were transferred among the various Bell operations to help reduce costs at the Bell Tower. Among the next group of employees transferred was Kevin West. On April 9, West was moved from cook at Bell Tower to either a cook or grill cook position at Bell Parkway, where there was an opening. West joined Turner, who was already in the cook's position. Previously on April 1, Turner had been made temporary grill cook while Supervisor Marie McKenna filled in as head cook. Turner and West then alternated between the cook's job and the grill cook's job from one day to the next because in management's opinion they were of largely equal cooking ability. Respondent had planned to administer a cooking test to both Turner and West to determine who would permanently occupy the cook's position but it was never administered because of the filing of unfair labor practice charges and subsequent events.

In May 1992, Respondent won the contract for a new account, Sisters for the Blessed Sacrament, in Bensalem, Pennsylvania. Turner accepted a promotion to the position of assistant manager of that facility and transferred there in June 1992.

III. DISCUSSION

On brief, the General Counsel argues that the conversations between Supervisors Spitzer and Hammes and employee Turner, respectively, improperly prohibited the employees from speaking about the Union and that Hammes' conversation with Turner indicates improper surveillance and a threat of reprisal. He also contends that Turner's reassignment in jobs was made for discriminatory reasons. On brief,

the Charging Party asks that the election be set aside and that a rerun election be scheduled.

This proceeding arose over a few events surrounding an unsuccessful union organizing campaign. During this campaign, the Union sought to closely monitor the Employer's contacts with employees and it made frequent or daily request for reports from Turner about the Employer's conduct. Conversely, shortly before the hearing, the Respondent consulted with employee Turner and he failed to meet with the General Counsel an hour before the hearing, as had been arranged. Thereafter, Turner's testimony reflected that he couldn't remember some things such as Spitzer's possible reference to ''Unions,'' that had been alluded to in his statement to a Board agent.

Here, regardless of whether the word ''union'' was used by Spitzer, it is clear that both supervisor and employee understood that the admonition to Turner to avoid an uproar or disturbance in a public area related to an earlier ''union'' discussion. The Respondent's conduct in this respect was in response to a customer complaint after a prior disturbance, and it was a measured request that conveyed a nonrepressive statement that was designed to promote and maintain employee discipline in a public area. It was not taken by Turner to be an infringement on his activities and, in fact, he thereafter freely pursued his organizing contacts with other employees.

In a similar vein, Hammes' statement to, in effect, get back to work and stop talking about the Union on company time, was made in the conjunctive and clearly was tied to an employee conversation that both interfered with work and mentioned the Union. This was not a broad prohibition and it did not inhibit Turner from subsequently continuing his union conversations and solicitations. It appears that under similar circumstances (where normal work had been stopped) this admonition would have been given regardless of the subject of conversation and I find in both instances that the Employer's actions were based on valid managerial attempts to maintain production and decorum and that they did not have a broad prohibative effect that could be considered to rise to the level that would constitute a prohibited interference with employee Section 7 rights. Under these circumstances, I find that the evidence of record is insufficient to persuasively show that the Respondent's conduct violated Section 8(a)(1) of the Act in these respects and, accordingly, I conclude that these allegations should be dismissed.

Turner testified that he did not keep his organizing activities secret, that he expected employees to tell management of his house visits on behalf of the Union, and that he never believed or told the Union that he was under surveillance. The fact that Supervisor Hammes acknowledged that other employees had told her that they had seen Turner driving around with a union representative, standing alone, merely shows a recognition of the obvious. It was not accompanied by other statements or factors that would impute coercion or a repressive inteference on employee rights and I find that the General Counsel has failed to show that it constitutes a violation of Section 8(a)(1) of the Act, as alleged.

Hammes' statement to Turner, which expressed her fear that the company owners wouldn't like his driving around with a union representative and that it could jeopardize his future with the Company, was accompanied by her assurance that it was her personal opinion and that she was speaking on her own, as a friend. Turner's testimony indicates that he accepted her assurance and that he considered her comment to be sympathetic and not a threat or a statement of company policy. This personal opinion is not shown to be related to any other probative factor (including the alleged discriminatory job reassignment, discussed immediately below) that would tend to corroborate that the owners would be likely to take retaliatory action against a union activist and there is no substantial basis to support a conclusion that this was an expression of management policy that should be attributed to the Respondent. I find that this comment is in the nature of an isolated, personal statement in casual conversation and that the General Counsel has failed to show that it was a threat by the Company that would interfere with employee Section 7 rights, as alleged in the complaint. Accordingly, allegations in these respects also should be dismissed.

Turning to the matter of Turner's job reassignment, applicable law requires that the counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were a motivating factor in the Employer's decision. Here, the record fails to show that the Respondent engaged in probative, improper antiunion conduct that would tend to impute a climate of antiunion animus. The mere fact that Turner was the leading union activist, standing alone, is of limited significance and, in view of the nonpretextual reason demonstrated by the Respondent as the basis for its action, I am not persuaded that the General Counsel has met his burden of showing improper motivation.

The principal showing relative to motivation is that a managerial decision was made regarding its work assignment for Turner at a time close to that of the union election. Here, however, Turner is not shown to have suffered any reduction in his rate of pay or other adverse effect and, it was part of a reorganizing effort that affected a number of other employees (i.e., Bergeron, the senior chef who was the Company's election observer, was laid off) and several other people were transferred in what is shown to have been a valid consolidation of operation dictated by legitimate economic reasons.

Although Turner's work reassignment may have raised a valid ''suspicion'' that action had been related to Turner's involvement in the Union's drive, this suspicion essentially stands alone and, in view of all the circumstances, including the Company's showing of valid business reason, the absence of other meaningful or probative illegal or coercive conduct on the part of the Respondent, and the Company's subsequent promotion of Turner to an assistant manager position, leads to the conclusion that the assignment was not motivated by any union or other protected activity, as asserted by the General Counsel.

Under all the circumstances, I also find that Respondent has shown that it would have taken the same actions, for valid business reasons, regardless of Turner's participation in union or protected activities and, accordingly, I conclude that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

The Charging Party's objections in the embraced RC proceeding are directly related to the matters discussed above and, accordingly, I find the objections are lacking in merit and that the election was held free of unfair practices that might otherwise be sufficient grounds for invalidation of the

election. As Respondent is not shown to have engaged in conduct which affected the result of the election, I find these are not valid grounds for setting aside the election and, accordingly, the objections will be dismissed.

CONCLUSIONS OF LAW

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

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

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

4. The Petitioner's objections in Case 4–RC–17771 are lacking in merit and their is no showing that improper conduct occurred which would constitute grounds for setting aside the election.

[Recommended Order for dismissal omitted from publication.]