

**Department Store Division of the Dayton Hudson Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.**  
Cases 7-CA-32279, 7-CA-32433, and 7-CA-33871

February 24, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On August 3, 1994, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions and cross-exceptions and a supporting brief. The Charging Party filed an answer to the Respondent's exceptions and a supporting brief and cross-exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party's cross-exceptions and to both the Charging Party's and the General Counsel's answers to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and con-

<sup>1</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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's finding that it engaged in unlawful surveillance. The Respondent argues that it merely recorded the activity of employees who were in the company of professional union organizers when the organizers were inside the Respondent's store, thereby engaging in incidental surveillance of employees during lawful surveillance of nonemployees. The Respondent's argument is devoid of merit. The judge found that the Respondent engaged in unlawful surveillance by videotaping employee movements and actions, watching and following employees, and interrupting their conversations and monitoring their telephone calls. The judge cites credited testimony supporting this finding involving multiple employees on multiple occasions. Moreover, among these numerous incidents, there are only two which hint at the conjunction of professional union organizers with employees and activity inside the Respondent's store. Thus, Ray Lichy credibly testified that, during the last week in July 1991, the Respondent videotaped employees and professional union organizers leafletting at the employee entrance to the store. When a small group entered the store, they were filmed by Brenda McNamara, the store's security manager. Lichy did not specify whether the group which entered the store was the same as the group leafletting at the employee entrance. Similarly, Lindel Salow credibly testified that, shortly before the second election, the Respondent videotaped him at his work station in the men's fragrance department. Then within an hour, the Respondent

conclusions<sup>2</sup> and to adopt the recommended Order as modified.

CONCLUSIONS OF LAW

1. Department Store Division of the Dayton Hudson Corporation is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing reprimands to Leonard Militello Jr. on July 18 and 26, 1991, and to Vivian Armstrong on July 31, 1991, because of their union activities, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

4. By threatening employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, and by informing employees that it would be futile for them to select union representation, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

5. By denouncing and humiliating an employee in the presence of other employees, by harassing an employee and threatening his physical safety, and by screaming vulgarities at a union organizer and threatening violence against her in the presence of employees, because of employee support for the Union, the

videotaped Salow again as he waited on two customers who were wearing jackets with union insignia embroidered on them. Salow specifically testified that he did not know who the two customers were. Accordingly, the record does not reveal whether the Respondent's surveillance of Lichy when he entered the store or Salow when he waited on the two customers was merely incidental to lawful surveillance of nonemployees. We find it unnecessary to reach the issue of whether Respondent was privileged to engage in surveillance during the two instances described above. Assuming arguendo that it could, and that those instances can be divorced from the many instances in which union agents were not present (and the surveillance was therefore clearly unlawful), those latter instances are more than enough to warrant the remedial order entered herein.

<sup>2</sup>We note that the judge inadvertently failed to conform his conclusions of law, Order, and notice with the violations found. We correct this error.

Members Cohen and Truesdale do not reach or pass on the alleged unlawful interrogation of employee Harry Gersell and the alleged unlawful oral reprimand of employee Eric Gawura. These violations are cumulative and do not substantially affect the remedy.

Member Browning would affirm the judge's finding, for the reasons he stated, that the reprimand of employee Gawura violated Sec. 8(a)(3) of the Act. In Member Browning's view, that finding is not "cumulative," despite the fact that the Respondent also unlawfully reprimanded other employees. In addition, the absence of the finding does affect the Order and notice, because the Respondent will no longer be required to remove any reference to Gawura's reprimand from its records and to notify him that it will not be used against him in any way.

Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

6. By coercively interrogating employees regarding their union activities and sympathies, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

7. By impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

8. By asking an employee to remove his union button, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

9. By altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

10. By disparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and by requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork-related items, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

11. By coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

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

13. In light of the Respondent's failure to comply with the terms of the June 23, 1992 settlement agreement, in Cases 7-CA-32279 and 7-CA-32433, as shown by its continued pattern of unfair labor practice conduct in the summer and fall of 1992, the Regional Director properly set aside the agreement.

14. The Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

#### ORDER

The National Labor Relations Board orders that the Respondent, Department Store Division of the Dayton Hudson Corporation, Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Issuing reprimands to employees because of their union activities.

- (b) Threatening employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, and informing employees that it would be futile for them to opt for union representation.

- (c) Denouncing and humiliating an employee in the presence of other employees, harassing an employee and threatening his physical safety, and screaming vulgarities at a union organizer and threatening violence against her in the presence of employees, because of employee support for the Union.

- (d) Coercively interrogating employees regarding their union activities and sympathies.

- (e) Impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union.

- (f) Asking employees to remove their union buttons.

- (g) Altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union.

- (h) Disparately enforcing rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork-related items.

- (i) Coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls.

- (j) In any other 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) Remove from its files any reference to the unlawful reprimands issued to Leonard Militello Jr. on July 18 and 26, 1991, and to Vivian Armstrong on July 31, 1991, and notify them in writing that this has been done and that the reprimands will not be used against them in any way.

- (b) Post at its Fairlane Mall store, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

<sup>3</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."

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.

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

#### 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 issue reprimands to employees because of their union activities.

WE WILL NOT threaten employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, or inform employees that it will be futile for them to opt for union representation.

WE WILL NOT denounce and humiliate any employee in the presence of other employees, harass any employees and threaten their physical safety, and scream vulgarities at union organizers and threaten violence against them in the presence of employees, because of your support for the Union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT impliedly promise employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union.

WE WILL NOT ask employees to remove their union buttons.

WE WILL NOT alter the manner of distributing work schedules to employees, restrict employee conversations, or change other work rules and practices because of employee activities on behalf of the Union.

WE WILL NOT disparately enforce rules regarding solicitation and distribution against employees engaged in those activities on behalf of the Union, and WE WILL NOT require employees to remove union literature from

stockrooms, drawers, and other locations available to them for keeping nonwork-related items.

WE WILL NOT coercively surveil employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls.

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

WE WILL notify Leonard Militello Jr. and Vivian Armstrong that we have removed from our files any reference to their unlawful reprimands and that the reprimands will not be used against them in any way.

DEPARTMENT STORE DIVISION OF THE  
DAYTON HUDSON CORPORATION

*John Ciaramitaro, Esq.* and *Cindy L. Beauchamp, Esq.*, for the General Counsel.

*Timothy K. Carroll, Esq.* and *John F. Birmingham, Esq.*, of Detroit, Michigan, for the Respondent.

*Nancy Schiffer, Esq.*, of Detroit, Michigan, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on September 3 and October 10, 1991, and amendments thereto, and further charges filed on October 27 and December 28, 1992,<sup>1</sup> by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO (the Union) against Department Store Division of the Dayton Hudson Corporation (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a consolidated complaint dated February 26, 1993,<sup>2</sup> alleging violations by Respondent of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Detroit, Michigan, on April 19-22 and June 7-9, 1993, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs which have been duly considered.

On the entire record in these cases, and from my observations of the witnesses, I make the following

<sup>1</sup> The matters raised by the charge filed on December 28, 1992, in Case 7-CA-34069, were settled at trial and, accordingly, Case 7-CA-34069 was severed from this proceeding.

<sup>2</sup> Simultaneously, the Regional Director set aside, for noncompliance, the June 23, 1992 settlement agreement, between the Regional Director and the Respondent, in Cases 7-CA-32279 and 7-CA-32433, dealing with alleged unlawful conduct by Respondent during 1991.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent is engaged in the operation of retail department stores, and runs such stores in the State of Michigan, including a store located in Dearborn, Michigan, called the Fairlane Mall store. During the year ending December 31, 1992, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000, and purchased and received goods and materials, valued in excess of \$50,000, at its Michigan locations, which were sent directly by suppliers located outside the State of Michigan. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

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

## III. THE UNFAIR LABOR PRACTICES

## A. Background

Beginning late in 1989, and early in 1990, the Union made efforts to organize the employees working at certain of Respondent's metropolitan Detroit area stores. In this connection, the UAW, on May 11, 1990, won a Board-conducted election among employees of Hudson's Westland Mall store and, thereafter, was certified. Subsequently, the Board issued an order requiring Hudson to bargain, and it petitioned the Sixth Circuit Court of Appeals for enforcement. On March 1, 1993, the court remanded the case to the Board for reconsideration and further hearing.<sup>3</sup> Also in 1990, on October 12, the Union lost an election conducted at the Summit Place Mall store, in Pontiac. That election was, thereafter, set aside, and a second election was scheduled and, later, canceled, when the Union withdrew its petition.

At Fairlane, the store involved in this proceeding, the Union won an election held on April 12, 1991, among the full-time and regular part-time selling and nonselling employees at the store, some 500 in number. That election was, thereafter, set aside by the Board, and a second election was conducted on August 9, 1991, which the Union lost. The results of the second election were set aside by stipulation of the parties, and the conduct of a third election was scheduled for October 30, 1992. However, immediately prior to the date of the scheduled third election, the Union withdrew its representation petition and the election was canceled.

In the instant case, the General Counsel contends that, during the periods preceding the 1991 elections, and, again, in the months before the scheduled 1992 election, at the Fairlane Mall store, Respondent embarked on a widespread, extensive, and continuing campaign of unfair labor practice conduct, including, issuing reprimands to employees because of their union activities; threatening employees with store closure, store relocation, loss of jobs, and more onerous working conditions if they select the Union to represent them; warning employees that it would be futile for them to opt for union representation; coercively interrogating employ-

ees regarding their union activities and sympathies; impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union; asking an employee to remove his union button; changing work rules, policies, and practices because of employee activities on behalf of the Union; disparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union; and coercively surveilling employees, in response to their union activities, including videotaping their movements and actions, watching and following them, interrupting their conversations, and monitoring their telephone calls. Respondent urges that, viewed in context, all of its actions should be seen as lawful.

B. Facts<sup>4</sup> and Conclusions<sup>5</sup>

## 1. Alleged threats, interrogations, promises of benefit, and requests to remove union insignia

Former Fairlane Mall store employee Karl Colston, who worked in the restaurant as a dishwasher and a cook, testified that, in late July 1991, about a week before the second election, he was called into the office of his department manager, statutory Supervisor Aruna Bazaz. She asked Colston how he felt about the Union coming in and, in reply, the employee stated that he would not mind getting more hours, money, and benefits. Bazaz told Colston that, if the Union got in, all his "absences and tardies" would have to be written up, and he would be required to report to work on time.<sup>6</sup> The employee's testimony in these regards is uncontradicted. Based on Colston's credited, uncontradicted testimony, I find that Respondent, through Bazaz, violated Section 8(a)(1) of the Act by the foregoing threat, an outright statement that union representation would result in stricter work rules and more rigid enforcement of existing rules.<sup>7</sup>

Some 2 weeks before the second election at Fairlane, the "Vote No" committee, an organization of Fairlane store em-

<sup>4</sup> The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*. In general, I have relied on the testimonial accounts of events offered by employee Leonard Militello and former employee Raymond Lichy, as both of them impressed me as honest, forthright, and in possession of a relatively full recollection of significant events. On the other hand, based on demeanor considerations, and because I found certain of their testimonial statements implausible, I have viewed with suspicion the testimony of statutory Supervisors Reggie Sneed, Lance Petross, and Cedric Jackson. To the extent that the testimony of Sneed, Petross, or Jackson conflicts irreconcilably with the credited testimony of Militello and/or Lichy, it is discredited.

<sup>5</sup> In support of certain complaint allegations, witnesses called by the General Counsel identified the claimed perpetrators of unfair labor practice conduct by first name, only. The individuals so described were, apparently, regularly employed at other Hudson Detroit area stores and were assigned, temporarily, to the Fairlane store at the time of the alleged unlawful conduct. In light of the lack of adequate record identification of these individuals, and, particularly, the lack of evidence of their supervisory status, I have made no findings of unfair labor practice conduct by Respondent based on the alleged actions of the individuals.

<sup>6</sup> Prior to this conversation, Colston had been absent or tardy, from time to time, but had not received any written warnings.

<sup>7</sup> *Jennie-O Foods*, 301 NLRB 305 (1991).

<sup>3</sup> 302 NLRB 982 (1991), remanded 987 F.2d 359 (6th Cir.).

ployees who oppose unionization, distributed, in front of the store, leaflets entitled "Red Alert." Copies of this document also appeared on all three selling floors, at employee work stations, or wrap stands, where the cash registers were located and packages could be wrapped. The leaflet stated, in part:

Hudson's Employees: Did you know that if Dayton Hudson's wanted to, it could *close* a store, *open* a *new store elsewhere*, and hire all *new employees*? Hudson's could do this legally *with* or *without* a union!

Further, according to the leaflet, regarding the Westland store, where the Union had won an election, Hudson's chose not to renew its lease with the Westland Mall, and might move the store to a new mall.<sup>8</sup>

According to the testimony of employee Harry Gersell, and that of former employee Eric Gawura, salesmen in the men's active wear department, they were approached, later that day, by Manager Diana Grandy who asked them if they had seen the Red Alert flyer and if they had any questions about it. Gersell asked about the possibility, indicated in the flyer, that the Westland store might close. Grandy stated that the store would close, and move into another mall, "because of the union activity."

Based on the credited, uncontradicted testimony of Gersell and Gawura, I find that Respondent, through statutory Supervisor Grandy, violated Section 8(a)(1) of the Act by informing employees that Respondent would close the Westland store where the employees had voted for representation by the Union, because of employee union activities. This statement constituted a thinly veiled threat to close the Fairlane store, too, if the employees there also voted in the Union.

Janetta Harrison, a Fairlane store sales employee in the children's department, testified that, in April 1991, before the first election, she and fellow employee Clarice Barrow were informed by their manager, statutory Supervisor Kristen Hickock, that Hudson would not bargain with the Union, which would leave the employees, should they choose the Union, with a strike as their only option. Harrison's testimony is uncontradicted and is credited. I find that, by so advising employees that it would be futile for them to opt for union representation, Respondent, through Hickock, violated Section 8(a)(1) of the Act.

In late July or early August 1991, preceding the second election, a document referred to as the "Westland contract" appeared on many employee counters and wrap stands at the Fairlane store. Store Manager Wozniak testified that he first saw this document when it was given to him by certain of the Westland store employees. Wozniak discussed it with Henry Bechard, Respondent's labor relations manager for the Detroit area stores, and they decided to give copies of the Westland contract to the Fairlane store supervisors and to instruct them to talk to the employees about it, particularly, about the section of the "contract" dealing with bumping. Wozniak testified that, at the time, he knew that there had not been negotiations at the Westland store; that there was not a Westland contract; that there had been no contract pro-

posals to the Company made by the Union; and that what they referred to as the Westland contract was not a Westland contract.

Employee Gwyn McKinney, a sales employee in the men's furnishings department, testified that, shortly before the second election, Greg Gibson, a corporate regional manager, came up to her work area and began to speak. Gibson told McKinney that, if the Union were voted in McKinney might be bumped and/or laid off, because of her lack of seniority. McKinney's testimony is uncontradicted. I find, based on the employee's credited and uncontradicted testimony, that Respondent, through Gibson, violated Section 8(a)(1) of the Act by threatening employees with bumping and/or job loss if they selected the Union to represent them. Gibson's warning, without reference to the collective-bargaining process, conveyed the message that bumping and/or layoffs would come about as a consequence of organization.

Bobbie Murph, a cook in the Fairlane store restaurant, testified that she met with her manager, Aruna Bazaz, in the manager's office, some 7 days before the second election. Bazaz had with her a document which she made reference to, apparently, the Westland contract. According to Murph's credited and uncontradicted testimony, Bazaz told her that, "if the Union gets in, you could lose your job, the store could close, Westland would close, and people could . . . be bumped off of their jobs." Based on Murph's testimony, I find that Respondent, through Bazaz, violated Section 8(a)(1) of the Act by threatening employees with store closure, job loss, and bumping if they voted in the Union.

According to the uncontradicted and credited testimony of Pamela Jaros, a sales employee in the Fairlane store deli department, she was approached, about a week before the second election, by Assistant Manager Lisa Nathanson, a statutory supervisor. Nathanson asked Jaros, who, apparently, wore neither UAW insignia nor a "Vote No" pin, how she felt about the Union coming in at Hudson's. Later in the conversation, the supervisor told the employee that, if a union were there, it would be harder for employees to know their schedules in advance and, with a third party involved, it would be more difficult for employees to request time off. Nathanson further told Jaros that, even if the store employees voted for the Union, this would not, necessarily, obligate Hudson to negotiate with the Union. In this connection, Nathanson pointed out that the Westland store employees had voted for the Union and, a year later, there still had not been any negotiations.

Nathanson's questioning of Jaros concerning her union sympathies was without legitimate purpose, occurred without assurances against reprisals and was coercive in nature and violative of Section 8(a)(1) of the Act. Also unlawful were the warnings to Jaros about the inevitable, undesirable changes in working conditions which would occur if the Union became the employees' representative. In the same conversation, Respondent, through Nathanson, violated Section 8(a)(1) of the Act by informing Jaros, in effect, that it would be utterly futile for the employees to opt for representation because Hudson would not engage in negotiations, anyway. Based on Jaros' testimony, I find that Respondent violated the Act by its coercive interrogation, threats of undesirable changes in working conditions, and warnings of futility.

<sup>8</sup>Store Manager Christopher Wozniak testified that, by letter dated August 8, 1991, 1 day prior to the second election, Respondent informed the Fairlane employees that decisions concerning store closures would not be based on union considerations.

Willola Gray, a sales employee in the Fairlane store infant's department, testified, credibly and without contradiction, that, during the weeks preceding the second election, Manager Kristen Hickock approached her, on several occasions, and read to Gray sections of the Westland contract. Hickock told Gray that Respondent would close the Westland store and that Gray, a part-time worker, "could be bumped." Based on Gray's testimony, I find that Respondent, through Hickock, violated Section 8(a)(1) of the Act by informing Gray, in effect, that store closure or bumping were the inevitable results of organization.

According to the credited and uncontradicted testimony of Michael Renfroe, a Fairlane store dockworker, in August 1991, preceding the second election, he was instructed to report to the office of his manager, Mike Zantini, a statutory supervisor. Zantini showed to Renfroe a copy of the Westland contract, and pointed to the bumping provisions, stating that, if the contract were to take effect at Fairlane, employees who lacked seniority could be bumped or laid off. Zantini also told Renfroe that, in the event of organization Renfroe would no longer get "the favors" he had gotten in the past, an apparent reference to the shift changes accorded to Renfroe in order to allow him to meet family obligations. Based on Renfroe's testimony, I find that Respondent, through Zantini, violated Section 8(a)(1) of the Act by informing an employee that undesirable changes in working conditions would inevitably accompany employee organization.

Gloria Kovich, a sales employee in the men's accessory department at Fairlane, testified that, before the August 1991 election, she was 1 of 18 to 24 Fairlane employees to attend a meeting conducted by Respondent's president, Dennis Toffolo. At the meeting, Kovich testified, Toffolo stated that, if the Union were selected, the Company would not agree with its demands and, so, the employees, probably, would go on strike and would not be able to survive. Further, Kovich testified, Toffolo stated that the store might close.

Kovich's testimony, concerning statements made to her as part of a large gathering, is uncorroborated. In addition, her testimonial description of occurrences at the event in question is not entirely consistent with the statements contained in her pretrial affidavit concerning the matter. For these reasons, I am unwilling to base an unfair labor practice finding on her testimony in these regards and I find, contrary to the complaint, that the evidence is insufficient to show that Respondent, through Toffolo, violated the Act, before the second election, by telling a large group of employees that, in the event of organization, a strike was inevitable and the store might close.

UAW Organizer Maureen Fitzsimmons testified that, on August 7 or 8, 1991, immediately before the second election, she and Respondent's consultant and agent, Jim Strong, exchanged unpleasant comments while Fitzsimmons was outside the store, at the main level entrance, coordinating leafleting activities. Later that day, outside, at a lower level public entrance to the store which was nearby to the employee entrance, Strong passed by, and Fitzsimmons and a cohort called him a "union buster." Strong walked over to Fitzsimmons, stood very close to her, and screamed at her: "Fuck you, fuck you, fuck you." He then said, loudly, "What is your name? You're Moe . . . I can find out where you live." Strong, before leaving, made an obscene gesture

with his finger. This incident occurred at midday, during an employee shift change, and was observed by employees coming into work and by employees inside the store, near the public entrance, who were looking out and watching.

Fitzsimmons's testimony concerning the foregoing incident is uncontradicted and is credited. I find, based on her testimony, that Respondent, by Strong, violated Section 8(a)(1) of the Act by screaming vulgarities at a union organizer, and threatening physical violence against her, in the presence of store employees.

Raymond Lichy worked at the Fairlane store, as a sales employee in the men's accessories department, from October 1987 until December 23, 1992. Lichy, who wore UAW buttons and insignia to work every day, and who frequently distributed UAW literature to employees outside the employee entrance into the store, was, indisputably, an employee leader of the organizing effort and was known to Respondent as such.

Lichy testified that, in October 1992, preceding the scheduled third election, he was at his work station speaking to his coworker, Devon Washington. The manager in the men's suits department, Lance Petross, approached and told Lichy that there was no soliciting on the floor. Lichy said that he was not soliciting and he pulled out a copy of the National Labor Relations Board notice, posted by Respondent pursuant to the June 23, 1992 settlement agreement, and, he testified, pointed to the line stating that the Company would not interfere with employees' talking amongst themselves. Petross, according to Lichy, stated that that did not mean a thing. Petross then turned to Washington and asked him if he knew that Lichy had called a manager, Cedric Jackson, a "nigger" and a "monkey," and if he, Washington, knew that Lichy was afraid to walk around the store, by himself, and without the presence of his son. Lichy denied that he had ever said these things.

Petross, Lichy further testified, turned back to him and told him to put his employee badge on, and to take his foot off the counter. Lichy complied with these instructions. Then, Petross told Lichy to go home, but the employee refused. Petross told Lichy that "I am going to knock the shit out of you in the parking lot." The manager then called for the substitute executive store manager, Rose Spencer, and he told her that Lichy had been soliciting on the floor and had refused to wait on a customer. Accordingly, Petross told Spencer, he wanted her to send Lichy home. When Spencer said that Lichy did not have to go home, Petross claimed that Lichy had threatened him with violence in the parking lot. Petross stated that he would call the police and, then, both he and Spencer left the area. While Petross did not, in fact, call the police, Lichy did do so and he was advised to leave the store for the day. The employee so informed Spencer, and he left, accompanied by a security guard. Lichy filed a police report on October 9, 1992.

Petross, in his testimony, claimed that, after he told Lichy to put his badge on, and to remove his foot from the ledge of the wrap stand, he instructed the employee to service a nearby customer. As the conversation continued, the customer started to walk away and, Petross further testified, Lichy then called to him, loudly, asking if he needed help. The customer said, "[N]o." According to Petross, during the conversation, when Lichy pointed to the Board's notice Lichy stated that, "according to this, I don't have to do any-

thing. I can do anything I want.” Furthermore, Petross testified, it was Lichy who said that they could talk about, or take care of, the matter outside. At that point, Petross called for the executive on duty, Spencer. Petross did not deny telling Washington that Lichy had called Jackson a “nigger” and a “monkey” and that Lichy was afraid to walk around the store by himself.

For the reasons stated at footnote 4, I credit Lichy’s testimony and find that the confrontation between Lichy and Petross, in the presence of Washington, in October 1992, occurred as described by Lichy. To the extent that Petross’ version of the event, as set forth in his testimony, differs from Lichy’s account, it is discredited.

In light of Lichy’s leading role in the union campaign, Respondent’s knowledge of same, the timing of the confrontation (immediately before the scheduled third election), Respondent’s contemporaneous unfair labor practice conduct, and its failure to advance any credible explanation for the confrontation, I find that Petross initiated the confrontation with Lichy in response to the employee’s union activities. By denouncing and humiliating Lichy in the presence of another employee, and by harassing him and threatening his physical safety, and because of his support for the Union, Respondent, by Petross, violated Section 8(a)(1) of the Act.

Delores McMinn, a sales support employee in the men’s sportswear department of the Fairlane store, testified, credibly and without contradiction, that, prior to the first election, she was approached, at a party, by Vince Giacobbe, the store manager of Respondent’s Eastland Mall store. McMinn, who normally wore a union badge to work, was not wearing it on that occasion. Giacobbe asked McMinn if she was “with us,” and she replied, “[N]o.”

During the week preceding the second election, Giacobbe visited the Fairlane store and, passing by, he stopped to ask McMinn, “[A]re you for us, yet?” She replied, stating that she was not. Giacobbe told her that, nonetheless, he was telling people that she was. McMinn protested, stating that that was a lie. Giacobbe stated, “[W]ell, nobody else knows it is.”

While the first instance of interrogation of McMinn by Giacobbe was, arguably, casual in nature, the second instance, clearly, may not be so described, even according due weight to the fact that the employee was a known union supporter. McMinn, before the second election, was asked by a high ranking company official, for the second time, where she stood on the question of the Union. The official, Giacobbe, had no valid purpose for asking the question, gave no assurances against reprisals, and refused to accept the employee’s answer to his question. The interrogation occurred in the context of an employer campaign replete with unfair labor practice conduct. Based on McMinn’s testimony, I find that Respondent, by Giacobbe, violated Section 8(a)(1) of the Act by its coercive interrogation of McMinn.

Karen King, a sales employee in the Fairlane store’s women’s shoes department, testified that she was on an approved leave of absence, for educational purposes, from February 11 until July 22, 1991. Immediately on her return, and while wearing her union pin, she was approached by Manager DeEtta Whigham, a statutory supervisor. Whigham pointed to the pin and asked King why she had come back to work if she had an attitude like that. Whigham further stated that King did not have to come back and that she could not un-

derstand why King was acting that way. Based on King’s uncontradicted and credited testimony, I find that Respondent, through Whigham, violated Section 8(a)(1) of the Act by its coercive interrogation of King concerning her union sympathies.

Employee Harry Gersell, although a union supporter, did not wear union insignia at work. He testified that, about 2 or 3 weeks before the second election, in the employee lounge, a manager, statutory Supervisor Bill Thome, approached him. Thome asked the employee why he wanted the Union, and what significance it had. When Gersell complained about employee benefits, Thome asked him if he participated in the retirement plan, and if he liked the medical and dental plan. Based on Gersell’s credited and uncontradicted testimony, I find that, by the foregoing coercive interrogation of Gersell by Thome, Respondent violated Section 8(a)(1) of the Act.

Former employee Eric Gawura testified, credibly and without contradiction, that, a few days before the second election, he was approached at his work station by Regional Manager Greg Gibson. Gibson said that he had noticed that Gawura was wearing a union pin, and he asked Gawura how long he had been working for the Company. When the employee said that it had been for a period of 9 or 10 months, Gibson asked him why an employee who had been there for such a short time would want a union in the store. Gawura started to enumerate his reasons, and Gibson became upset and raised his voice. In light of the foregoing uncontradicted testimony, I find that Respondent, through Gibson, violated Section 8(a)(1) of the Act by its coercive interrogation of Gawura.

According to the testimony of Scott McCliment, a sales employee in the Fairlane store’s men’s department, at his request, met with his manager, DeEtta Whigham, in her office, about a month before the second election. McCliment said that he needed 2 days off from work and Whigham replied, saying, “[S]ure, no problem.” Then she told McCliment that he could do something for her, namely, he could take his union pin off. The employee refused. The supervisor then told him to write down, for his own benefit, the pros and cons of having a union. Finally, Whigham asked him to tell her “what’s going on with the UAW.”

Based on McCliment’s credited, uncontradicted testimony, I find that Respondent, by Whigham, violated Section 8(a)(1) of the Act by asking McCliment to remove his union pin. Employees have a protected right to wear union insignia at work and, absent a showing of special circumstances, it is unlawful for an employer to infringe on that right.<sup>9</sup> In the same conversation, Respondent, through Whigham, engaged in coercive interrogation, in violation of the Act, by asking the employee to tell her what was going on with the Union.

Employee Willola Gray testified that, in September 1992, on her return to work after a lengthy illness, she was wearing both union buttons and “Vote No” insignia. Gray was approached at her work station by Manager Grandy, who, according to Gray’s credited, uncontradicted testimony, stated:

[Y]ou have so much going on in your chest . . . I don’t know what you are going to do. Why don’t you

<sup>9</sup> *Control Services*, 303 NLRB 481 (1991).

decide what way you are going to vote. I don't know if you are for the union or against it.

Grandy's remarks called on Gray to reveal her union sympathies, and her intentions with respect to voting in the then impending third election, and was, thus, a coercive interrogation. Based on Gray's testimony, I find that Respondent, through Grandy, further violated Section 8(a)(1) of the Act.

Gray also testified that, a year earlier, a month or more before the second election, while working in her department, she encountered Human Resources Manager Sherry Brenner. Gray complained about the work assigned to her that day, and Brenner stated that "it was all because of the union that had brought these problems into the store." Gray complained about low wages, an insufficient number of work hours and racism in work assignments. Brenner promised to get matters cleared up. She told Gray that things would be taken care of and that Gray would get proper compensation and more hours.

Gray was given additional hours, going from 24 to 30 per week. Some 2 weeks later, Respondent's president, Toffolo, appeared at her work station and asked Gray if she had gotten the additional hours. She said, "[Y]es, and also stated that she was still unhappy. Toffolo said that they would become a family again, and they would get things together. He further stated that the employees did not need a union, and that things were going to get better.

Promises of specific benefits, and promises that things will get better, made during the course of a campaign and designed to dissuade employees from supporting a union, are violative of Section 8(a)(1) of the Act. In this case, the record evidence offers no explanation, except unlawful motivation, for the timing of the promises. Based on Gray's credited and uncontradicted testimony, I find that Respondent, by Brenner and Toffolo, so violated the Act.

## 2. Enforcement of the no-solicitation and no-distribution rules

Respondent maintains written no-solicitation and no-distribution rules which are posted at the timeclocks, in the employees' lounge, and in the employees' locker room. The rules state:

No solicitation, except for the annual United Way Drive, is permitted during working time and no solicitation is permitted on a selling floor at any time during store hours. Should an employee desire to engage in such activity, it must be confined to non-working time, such as breaks and meal periods and in non-selling areas of the store if during store hours.

No distribution of literature, pamphlets, documents or any other materials, except for the annual United Way Drive, is permitted during working time and no distribution of any sort is permitted in any working area, at any time.

The General Counsel concedes that the rules, as written, are valid, but urges that they were disparately enforced against employees engaged in solicitations and distributions on behalf of the Union, in violation of the Act.

There is uncontradicted, credible record evidence, in the form of testimony by employees Delores McMinn and Leon-

ard Militello, that, prior to the advent of the Union, the above-referenced rules were not enforced. Thus, McMinn and Militello testified, employees have, traditionally, engaged in solicitations of each other, during working time and on the selling floor, with regard to the sale of girl scout cookies, raffle tickets, candies, and cans of Slim-Fast diet products. Solicitations have also occurred with regard to football pools and church-sponsored charity drives. In connection with solicitations to purchase Avon and Tupperware products, catalogue books have been passed about. These activities have been carried on openly and in the presence of the department managers, including John Karl, Elizabeth Richardson, and Lance Petross.

Fairlane Store Manager Wozniak testified that there are no exceptions to the rules, except for the United Way campaign. He further testified that he has personally stopped a solicitation for the sale of Girl Scout cookies, and another solicitation to sell raffle tickets. In each case, the store manager told the individual involved that such activities were not permitted on company time and in selling areas. Wozniak conceded that he is aware of the fact that solicitations in violation of the written rules occur, but stated that he takes no action to stop such activities unless he personally observes the occurrence.

Employee Harry Gersell testified, credibly and without contradiction, that, preceding both the first and second elections, he would observe Manager Grandy remove UAW literature from the wrap stands and deposit it in the garbage. On the other hand, "Vote No" committee literature was not so removed and, often, it would remain on the counters all day long. There were occasions when Grandy would remove UAW literature while, at the same time, allowing vote no literature to stay.

According to the credited and uncontradicted testimony of employee Lindel Salow, a sales employee in the Fairlane store's men's fragrances department, he arrived at work, several weeks before the second election, for the start of his 9:45 a.m. shift, at 9:40 a.m. Salow found vote no literature on the two register counters in his department. In response, the employee placed UAW literature on one of the counters, alongside the vote no literature. Later in the morning, his manager, Nancy Miller, a statutory supervisor, instructed him to remove the UAW literature, as it was not allowed on the selling floor. Salow told Miller that vote no literature was also on the counters, and he pointed it out. Miller merely repeated her instruction to remove the UAW literature, saying, again, that it was not allowed on the floor. Salow complied with Miller's directive and removed the UAW literature. The vote no literature was allowed to remain on the counters.

Employee Willola Gray testified, credibly and without contradiction, that, in September 1992, when she returned to work following her illness, Manager Grandy told her that she knew that Gray was a union supporter. Grandy told Gray that she could not talk to anyone, or leave her department, or take personal phone calls or communicate with anyone about the Union. Grandy told Gray that these restrictions were being imposed, contrary to normal store practices, because of the Union and that she, Grandy, did not want telephone calls in which the Union was discussed.

According to the credited, corroborated, and uncontradicted testimony of former employee Raymond Lichy, in the period preceding the second election, often, he would report

to work in the morning to find vote no literature on the sales counters throughout the store. In his department, such literature would remain on the counters. On the other hand, when UAW literature would appear on the same counters, it was quickly picked up, and thrown away, by Managers Wozniak, Grandy, Petross, Richardson, David Conn, and Tony Larkins. Lichy further testified that, before the second election, Manager Bill Thome, a statutory supervisor, entered the employee lounge, a nonworking area, and observed that UAW literature was sitting on some of the tables. Thome said, "I see the UAW paper fairy has been here," and he proceeded to pick up the literature, rip it up, and throw it away. By contrast, Lichy testified, in September 1992, preceding the scheduled third election, he observed Manager Marc Pilibosian, a statutory supervisor, assist an employee in the distribution of vote no literature on the selling floor. In this connection, employee Militello credibly testified that, in July 1991, preceding the second election, he observed such activity on the part of Manager Sneed on the selling floor and Manager Thome in the lunchroom.<sup>10</sup>

Store Manager Wozniak testified that each employee is provided with a locker in which they are expected to store their personal items. However, he testified, that rule has not been rigidly enforced. Lichy, in his testimony, stated that, as the lockerroom is located at the employee entrance to the store, and away from the work areas, items stored there are not easily accessible, for example, newspapers and other reading material to be used by employees while on break. Accordingly, many, if not most, employees, store personal items in areas in the department storerooms. Indeed, some of the storerooms contain televisions, radios, and hot plates. In the storeroom connected to his department, Lichy would place a manilla folder, on top of shirt boxes, into which he put various items, including, occasionally, UAW literature, and he placed a rubber band around it.

According to Lichy's credited and uncontradicted testimony, on May 30, 1991, Manager Tony Larkins, a statutory supervisor, told him that he could not bring union literature into the storeroom, and that his personal items were to be stored in his locker. Lichy responded to Larkins, stating:

I mentioned that, well, people bring all sorts of items into the storeroom, school books, briefcases, purses, bags and I mentioned that Brice Rudder (a member of the Vote No committee) brings a briefcase in every day and nobody seems to mind that. I said, am I the only one that is not allowed to bring any items into the store and put it into the storeroom like everybody else does? He said, no, you can't do that, everything has to stay in your locker.

On the next day, May 31, Lichy again brought his folder into the storeroom. He was approached by Managers Larkins and Conn who told him that he was not allowed to bring union literature into the store, and that he was to put his things in his locker. Later in the day, Lichy was summoned to appear in Conn's office where Conn and Larkins discussed the same subject. Lichy asked if the new rule was meant only for him. The employee requested the presence of the store manager. When Store Manager Wozniak joined the

meeting, Conn stressed to him that it was "union literature" that was in Lichy's folder. Wozniak told the employee to leave the folder, and his belongings, in his locker.

Prior to the advent of the Union, employees in Leonard Militello's department, men's tailoring, kept their personal items in a file cabinet located within the department, but off the selling floor. The cabinet contains five drawers, one for use by each of the five full-time departmental employees, and Respondent placed no limitation on the types of materials stored there. Indeed, one employee stored "Slim Fast" products there, for sale to other workers, and a blender.

According to Militello's uncontradicted and credited testimony, in July 1991, Manager Petross told him that he, Petross, had noticed that the employee had "union paraphernalia" in his cabinet drawer. Petross told Militello that he had exactly one-half hour to get rid of it, and that the drawer was to be used for business-related matters, only.

As shown, above, the record evidence establishes that, prior to the onset of employee activities on behalf of the Union, Respondent did not enforce its rules restricting solicitation and distribution. When the union campaign began, Respondent instituted a sudden and selective effort at enforcement. It confiscated union literature found on the selling floor, and/or instructed employees to remove it, while it allowed vote no literature to remain; it banned all union literature from selling floor areas, other work areas, and, even, nonwork areas, while it not only permitted, but, also, assisted in the distribution of, vote no literature on the selling floor; it told prounion employees that, contrary to normal practices, and because of the Union, they could not talk to anyone, or leave their departments, or take personal phone calls or communicate with anyone about the Union. Based on this evidence, I find that Respondent began to enforce its rules with respect to solicitation and distribution in response to employees' union activities, and when it did so, it enforced the rules, often in an overly broad manner, against union solicitations and distributions, only, in violation of Section 8(a)(1) of the Act.

### 3. Changes in policies

Employee Vivian Armstrong, who worked as a lead cook in the Fairlane store's market foods deli department, testified, credibly and without contradiction, that, in her department, the work schedules of the 24 employees were, each week, posted on a board located at the kitchen entrance. However, before the second election, the department manager, statutory Supervisor Suzanne Bicknese, ceased to follow this practice. Instead, and without explanation, she gave each department employee, weekly, a piece of paper containing his or her own work schedule, only. Following the election, Bicknese returned to the former practice.

In the men's suit department, employee Leonard Militello testified, the practice had been to place the schedules, for all employees in the department, some 2 to 3 weeks in advance, in a notebook. The notebook was kept in the department and was available to employees who could check each other's schedules. However, according to Militello's further credited and uncontradicted testimony, some 4 weeks before the second election, this practice ceased and the schedules were removed from the selling floor. At that time, the department employees were advised by Manager Petross that, thereafter, they would receive, each week, a copy of an individual

<sup>10</sup>For the reasons stated at fn. 4, Sneed's denial is not credited.

schedule, only, for the following week. For the men's suit department, this change in policy was short-lived. Several days after it was instituted, a department employee pointed out to Petross that, in that particular department, there was a business need, because of customer inquiry, for the employees to know each other's schedules. Petross obtained the consent of the store manager, Wozniak, to rescind the policy change as applied to that department.

Patricia McKay, an employee in the Fairlane store china department, testified, credibly and without contradiction, that, in mid-October 1992, before the scheduled third election, she discussed with a fellow employee certain details of Respondent's vacation policy, as contained in its employee handbook which is distributed to all employees. The department manager, Derinda Olszewski, a statutory supervisor, interrupted the conversation, and ended it. She then called McKay aside, for a private talk, and told her, in a loud tone of voice, that she was not to quote store policies to anyone. Prior to this incident, employee discussion of such matters had not been prohibited.

As shown, above, Respondent engaged in changes in store policies, affecting terms and conditions of employment, during preelection periods. The changes occurred without explanation and in the midst of other, massive, violations of the Act. The record evidence does not even suggest the possibility that there were reasons for the changes which were unrelated to the employees' union activities. I therefore find and conclude that the policy changes were violative of Section 8(a)(1) of the Act.

#### 4. Alleged surveillance, interrupted conversations, following, and monitoring of employees

According to the credited and uncontradicted testimony of employee Militello, a few days prior to the second election, he and fellow employees Renfrow, Rowe, and Peters engaged in leafleting activities, by the employee entrance into the Fairlane store, an outside entrance, distributing UAW leaflets to entering workers. The employees' activities in these regards were videotaped by agents of Huffmaster, Inc., a security service engaged by Respondent in late July 1991. Supervisor Petross and other managers stood at the door and observed this.

Militello also testified that, in the weeks preceding the second election, managers from others of Respondent's stores were brought into the Fairlane store and assigned to the different departments. In this time period, a Huffmaster agent, Brian Cleary, began to follow Militello through the store, holding a cam corder pointed at the employee. Thus, Militello testified, wherever he went, inside or outside the store, Cleary would follow, whether the employee was working or on break. Sometimes Cleary walked two steps behind Militello; at other times he stood shoulder to shoulder with the employee. At one point, Cleary told him that "I am personally assigned to you, I go everywhere you go." Indeed, he did, even following Militello to the restroom twice each day.

According to Militello's further testimony, starting some 3 weeks before the second election, other managers, including Sneed and Petross, followed him, everywhere he went in the store, trailing behind him by some 10 or 15 feet. He observed that other employees who, concededly, had been identified by Respondent as employee leaders in the Union's

campaign, were also followed by managers, throughout the store, namely, Raymond Lichy, Glenna Gildersleeve, and Vera Hawkins.

In the weeks before the second election, Militello testified, Sneed, Petross, and other managers would step in so as to overhear the employee's conversations with customers, and would get close enough to overhear Militello's telephone conversations when he used one of the phones at the wrap stand. Also, they would interrupt his conversations with fellow employees. After the second election, management returned to the policies that existed prior to the advent of the Union, and the above-described occurrences ceased.<sup>11</sup>

According to the credited and uncontradicted testimony of employee Lichy, the employees, prior to the start of the UAW campaign, were allowed to converse with each other, on worktime, if they had neither customers to wait on nor a special task to perform. Also, an employee on break was permitted to visit another department, spend breaktime there and converse with an employee working in that department. Such conversations were not interrupted.

Lichy testified that, on May 24, 1991, on his way out of the store to have lunch, he stopped to speak to employee Agnes Walsh, at her work station. Manager Grandy approached, asked, "[W]hat's up" and, then, stood there and listened. There were no customers in the area. In July, Lichy further testified, he, during his break period, walked into the men's suit department, as he had done in the past, and sat down on a chair. Manager Petross approached and asked Lichy if he was on break. When Lichy said, yes, Petross told him that "I don't want to see you taking your break in my department ever again." Lichy left.

During the last week in July 1991, Lichy, along with Walsh, Militello, Hudson's employees who worked at other stores, and one or more people employed as organizers by the UAW, passed out leaflets at the employee entrance to the store. Their activities were recorded by two of the Huffmaster agents, using cam corders. Later, when they walked into the store, they were filmed by the store security manager, statutory Supervisor Brenda McNamara.

Lichy also testified that, within a few weeks of the second election, the number of managers in the Fairlane store doubled, as individuals were brought in from other Hudson stores. Thereafter, there were two to four managers, each day, assigned to stand in Lichy's department and to watch him all day long. Similarly, before the scheduled third election, there was a large increase in the number of managers at Fairlane. At that time, an individual named Paul LaBlanc was assigned by Hudson's to station himself in the corner of Lichy's work area and, for 4 to 6 hours each day, to stand there and watch him. When Lichy moved out of his work area, LaBlanc would follow right behind him. Manager Kevin Debri, a statutory supervisor, told Lichy that managers were, indeed, watching him.

Between the time of the second election in August 1991, and the time of the scheduled third election in October 1992, Lichy testified, statutory Supervisor Cedric Jackson, a group manager, "would come down and stand on the aisle way looking at me and he would grunt and snort." Jackson would

<sup>11</sup> There is a conflict in the record evidence concerning whether management officials, before the second election, also monitored and interrupted the conversations of known vote no supporters.

make noises, for long periods of time, as he looked at Lichy, at work, and, then, he pretended to laugh. At other times, when Jackson saw Lichy, he would come very close, sometimes brushing Lichy, and make noises. On occasions, Jackson would stick his elbow out and poke Lichy, or he would bump into him. Such incidents, Lichy testified, occurred at least once each day. Jackson, in his testimony, denied that any of the foregoing had ever occurred. For the reasons stated at footnote 4, the denial is not credited.

Fairlane store employee Janetta Harrison, who regularly wore union insignia at work, testified that, shortly before the second election, on her break, she entered the mall and stopped at the pit area, a recessed rest area by Hudson's first floor mall entrance. While seated in the pit talking to fellow employee Tania Collins, and to a UAW organizer, Harrison looked up and saw that they were being videotaped.

Employee Willola Gray testified that, before the second election, each time she went to lunch, took a break, or went to the bathroom, she was followed by one or more of the managers. Indeed, one manager would follow her into the bathroom. Gray was followed, closely and in lock-step, to and from her department. Prior to the advent of the Union, employees were not followed, and they freely conversed with each other, and made personal phone calls at the wrap stands, in front of managers.

Fairlane store employee Scott McCliment, who wore a union pin to work every day, testified that, prior to the union campaign, there was no limitation on where employees could take their breaks, and worktime conversations between employees were not interrupted. However, prior to the second election, and again, before the scheduled third election, managers interrupted and/or monitored his conversations with coworkers.

Employee Lindel Salow, who wore union insignia to work each day, testified that, shortly before the second election, while he, Salow, was at his work station in the men's fragrances department, a Huffmaster agent pointed a cam corder at him, and videotaped Salow for 15 or 20 seconds, and, then, left. Within the hour, Salow waited on two individuals who were wearing jackets that had the UAW insignia embroidered on them. The Huffmaster agent returned and videotaped Salow and the customers, until the customers left.

Employee Patricia McKay, who wore union buttons to work, testified that, before the second election, managers would monitor her conversations with fellow employees by approaching and standing next to them. Further, she testified, on one occasion, she was videotaped while seated alone in the pit area, reading a UAW leaflet which had just been handed to her by a leafleter. The camera then returned its focus to the leafleters. McKay was also videotaped on the frequent occasions when she, outside the employee entrance, engaged in leafleting for the Union, along with other employees, and, at times, UAW organizers.

According to the testimony of employee Caroline Lakoff, who worked as a salesperson in the Fairlane store's lamp department, prior to the scheduled third election, managers monitored her conversations with coworkers, by approaching and listening, and, also, similarly, monitored her telephone conversations. Prior to the advent of the Union, she testified, the employees used the wrap stand phones for business and for personal calls.

Cathran Vickroy, a Fairlane store gift wrap department employee who wore UAW pins to work each day, testified that, in September 1992, before the scheduled third election, she, on her lunch hour, shopped at the store with her brother. As they went from department to department, Vickroy and her brother were followed by statutory Supervisor Elizabeth Richardson, and two other individuals who were with her.

Employee Louise Lasiter, who worked in the Fairlane store's men's sportswear department as a salesperson, wore union insignia at work. She testified that, on or about August 5, 1991, while seated alone in the pit area, she was videotaped by a Huffmaster agent. Later that day, while talking to Irene Kowal, an organizer employed by the UAW, in the pit area, Lasiter was videotaped, again, for a 10-minute period.

Glenna Gildersleeve, a Fairlane store cosmetics department sales employee, was, the parties stipulated, an "open and notorious" supporter of the UAW. She testified that, prior to the scheduled third election, her manager, statutory Supervisor Nancy Miller, would follow her, within 4 to 5 feet, everywhere in the store that she went, including into the lavatory. Rossalyn Fuhr, a sales employee in the Fairlane store's men's updated sportswear department, testified that, during the week preceding the second election, she observed statutory Supervisors Wozniak, Conn, and Petross follow employee Militello, from close behind him, and, also, she saw Supervisor Whigham follow employee McCliment about the store. During September 1992, Fuhr testified, preceding the scheduled third election, she, herself, was followed from the store to the parking lot, back into the store, and back out to the parking lot by Supervisors Conn, Brenner, and Petross.

The foregoing testimony of employees Harrison, Gray, McCliment, Salow, McKay, Lakoff, Vickroy, Lasiter, Gildersleeve, and Fuhr is uncontradicted and is credited. In addition, I note the testimony, by Militello and others, that Respondent's security personnel, in the period before the second election, enforced more rigidly against union supporters than vote no committee members, the policy of random inspection of employee packages going into, or out of, the store. As such testimony was based on impressions, only, I have not relied on it.

Henry Bechard, Respondent's labor relations manager for the Detroit department stores, testified that the impetus for Respondent's retention of Huffmaster, and the utilization of video cameras at the Fairlane store, was the activities of the UAW at their rally at Respondent's Detroit area, Oakland store, on July 20, 1991. According to Bechard, at 10 a.m. on that day, pursuant to previous announcement, some 700 people arrived, in vans, cars, and on foot, into the Oakland mall, parking facility, and grouped together. That assemblage included UAW and Teamsters union officials, and:

They all gathered together. There were bull horns, there were speeches made, they all clasped their hands together and were singing Solidarity Forever, cheering, shouting. It was pretty impressive.

Following the speeches and the singing, which lasted less than an hour, Union Official Bob King directed everyone to enter the store. At that point, Bechard testified:

[T]hey all came charging through the front entrances and first surrounded the piano player who was on the

lower level by the escalator. . . . We had some employees and managers passing out balloons at the front entrance and we were giving balloons to those folks as they came through the door. Some of the customers were pushed out of the way . . . and all of a sudden you started hearing balloons popping and kids screaming and pretty general mayhem . . . [they stayed for] about three to four hours . . . did a lot of things. Rode in groups up and down the escalators, roamed from department-to-department on every floor. Went into the restaurant and they were making purchases and paying them with pennies, nickels and dimes. Backing up our lines, generally wising off to some of the sales consultants and they had a difficult time determining who was the managers or not, but just pretty much causing a lot of mayhem. In the restaurant, a group of them went in there, I would say twenty or thirty, paid with pennies and dimes, got up and sang Solidarity Forever. A lot of the customers left that area. Went into our electronics department and turned up all the amplifiers, turned the sound up on all the electronic equipment so when the power did kick on, it was really loud. Just generally a lot of mayhem . . . just four hours of just generally mayhem, people wandering around up and down the escalators, a group of them singing Solidarity Forever, marching through departments, making purchases. They also came back, they returned some of those goods and demanded payment, as well. They weren't long-lasting purchases. I think what I could see was designed to jam up our lines and upset customers.

According to Bechard's further testimony, in anticipation of the Oakland store rally, he, prior to the event, engaged Huffmaster so as to "beef up our security." As a result, on the day of the rally, there were 16 Huffmaster agents present, using 12 video cameras, and they videotaped people moving about the store. The resultant films were reviewed by Bechard and others of Respondent's officials. Yet, despite the increased number of security agents present at Oakland, the filming of the movements of the "visitors" as they went about the store and the general conditions of "mayhem" which they allegedly created, there was not a single arrest made that day and Respondent did not file any police reports, even after its review and study of the films.

Bechard also testified that there was media coverage of the rally and that, on a newscast, Union Official King announced that there would be further rallies. In addition, according to Bechard, a newscaster, quoting a UAW source, said there would be further activity until Hudson learned their lesson. In response, Bechard decided to increase security at Fairlane, and Huffmaster was retained to supply two to four people at that store, to stop "mischief."

There were no UAW rallies at the Fairlane store after the July 20, rally, at the Oakland store.<sup>12</sup> Nor were any such rallies ever planned or announced. No police reports were filed, and no arrests were made, as a result of the extensive filming at Fairlane, and the study and review of such films by Respondent. Bechard, in his testimony, pointed to three inci-

<sup>12</sup> On July 28, 1991, 1 week after the Oakland store rally, the vote no committee staged a brief rally outside the Fairlane store. This was met by a UAW-sponsored counterdemonstration, and the two groups exchanged heated words.

dents of "mischief" at the Fairlane store, namely, a threat by an individual who was walking in the store with King, directed at Supervisor David Conn, to "kick your fucking ass"; the appearance of UAW stickers on mannequins and display counters; the action of a leafleter, standing in the mall, who, on one occasion, yelled "vote UAW" into the store.

Paul Strickland, Respondent's corporate director of employee relations, testified that, preceding the second election, additional managers were brought into the store in response to increased UAW activity, in particular, an escalating number of UAW officials and members who were entering the store. Also, in response, "we tightened up on our rules in the store, particularly in regard to people wandering out of their areas," so that employees would stay at their assigned posts and serve customers. In an effort to prevent campaigning on paid time, Strickland testified, employees were followed, even to the restrooms, and were told not to use the phones for personal calls. Security personnel were reminded to check all employee parcels coming into the store and, in general, there was a "tightening up" on those rules.

Store Manager Wozniak, on the other hand, testified that the instructions to security personnel with respect to checking employee parcels was not changed after the onset of union activities and that random inspections continued, as before. Wozniak also testified that, while, prior to the advent of the Union, it was the "understood policy" that the store phones were to be used for business purposes, only, he knew that employees used the phones for personal calls and they were not disciplined for doing so.

It is well established that, absent legitimate justification, an employer's videotaping or photographing of its employees, while they are engaged in protected concerted activities, constitutes unlawful surveillance, in violation of Section 8(a)(1) of the Act. In particular, the videotaping, during an election campaign, of employees lawfully and peacefully engaged in handbilling at a gate or store entrance, where such videotaping reveals whether proffered campaign literature is accepted or rejected, reasonably tends to intimidate. When an employer's monitoring of such open, public union activities goes beyond "mere observation," as in the case of surveillance by photographing or videotaping, and the employer seeks to justify its actions on the ground that it reasonably anticipated misconduct, it must provide "solid justification" for its resort to the anticipatory photographing. The belief that "something might happen" is not sufficient to justify the conduct in view of its tendency to create fear among employees of future reprisals.<sup>13</sup>

Here, Respondent videotaped employees while they were peacefully and lawfully engaged in leafleting activities, outside the employee entrance to the store, during the election campaigns. It did so when the employees were accompanied by agents of the Union, and it also videotaped employees when they leafleted without the presence of union agents. Such videotaping revealed which employees accepted, and which rejected, proffered literature. Respondent also videotaped employees who supported the Union when they sat alone in the mall, when they conversed in the mall with

<sup>13</sup> *Brunswick Hospital Center*, 265 NLRB 803 (1982); *Sunbelt Mfg.*, 308 NLRB 780 (1992); *F. W. Woolworth Co.*, 310 NLRB 1197 (1993).

union agents and, even, when they serviced customers inside the store.

In addition to the videotaping, Respondent, as shown above, engaged in other serious acts of surveillance and intimidation. It followed the leading union activists, into and out of the store; and into and out of the bathrooms; into and out of the parking lot. It engaged in sudden and close supervision of supporters of the Union, staring at them, and making intimidating noises directed at them, for long periods. At the same time, during preelection periods, Respondent abandoned previous policies and began a practice of monitoring and interrupting employee conversations and telephone calls.

Respondent engaged in the foregoing inhibiting and stifling conduct in an atmosphere, so far as this record shows, devoid of mischief on the part of the employees, and, or, the Union, at the Fairlane store. Indeed, Respondent seeks to justify its actions at Fairlane by reference to the union-sponsored rally at the Oakland store, and the claim that that rally resulted in "mayhem." In rejecting this defense, I note, again, that the Union did not sponsor a rally at Fairlane, nor did it ever announce or plan such an event. Moreover, in light of the fact that no arrests were made at Oakland, and that Respondent, after reviewing its extensive films of that rally, decided not to file a police report, I am of the view that the term "mayhem," as contained again and again in Bechard's uncorroborated testimony, perhaps, does not accurately describe what happened there. In any event, whatever occurred at the Oakland rally did not provide justification for the daily, constant acts of intimidation at Fairlane, on the theory that "something might happen" there. In this connection, for example, I am not persuaded that Respondent had a legitimate need to follow Fairlane employees into the restrooms in order to head off mischief at some future rally that was not planned, not announced, and which never occurred. Nor is there any evidence that campaigning ever occurred in the restrooms, on paid time, justifying action by Respondent. I conclude that Respondent, by its acts of surveillance, including videotaping, interrupting employee conversations, and monitoring and following employees, as detailed above, violated Section 8(a)(1) of the Act.

#### 5. Issuance of reprimands

##### a. *Vivian Armstrong*

Armstrong testified that she worked on Sunday, July 28, 1991, performing her duties as a lead cook. Specifically, she spent the day frying 60 pounds of chicken, and preparing 10- to 15-pound bowls of salad, as assigned. The next 2 days, Monday and Tuesday, July 29 and 30, were her days off, and Armstrong visited the store on Tuesday, July 30, to exchange some merchandise. She wore a jogging suit, and a shirt reading "Vote Yes UAW." The employee was approached by her manager, Suzanne Bicknese, who told her that she, Bicknese, did not like Armstrong's shirt. Thereafter, Bicknese, and, later, Store Manager Wozniak, followed the employee about the store.

On the next day, Wednesday, July 31, Armstrong returned to work and she asked Bicknese why she had followed her. Bicknese said that she could follow Armstrong, and she threatened to write up the employee for questioning it. Armstrong told her to do what she had to do. A short while later, Bicknese called Armstrong into her office and showed her a

writeup for failure to make 60 sandwiches on Sunday, July 28. Armstrong told Bicknese that she had not been assigned to make sandwiches, and she would not sign the writeup. At trial, Armstrong again insisted that, on the day in question, she had not been asked to make sandwiches.

In light of Armstrong's credited, uncontradicted testimony, it is clear that it was the employee's UAW shirt, worn on July 30, and not her work performance on July 28, that was of concern to Bicknese. One day after telling Armstrong that she, Bicknese, did not like her shirt, and then, following the employee about the store in concert with the store manager, Bicknese gave Armstrong a writeup for failure to perform duties that were never assigned. The discipline was in obvious retaliation for the demonstrated union sympathies of this employee, and would not have occurred absent the protected conduct. I find that Respondent, by Bicknese, violated Section 8(a)(3) of the Act when, on July 31, 1991, it issued a written reprimand to Armstrong.

##### b. *Eric Gawura*

Gawura wore union pins to work. For a long period of time, he had been in the habit of working crossword puzzles, at his wrap stand, in the absence of customers. This was known to the managers and, on previous occasions, Managers Grandy and Petross had told him to stop. He was not, however, reprimanded.

A few days before the August 9, 1991 election, at a time when there were no customers in the area, Gawura, at his work station, was doing a puzzle. He was approached by the Eastland store manager, Vince Giacobbe, who asked Gawura if he were working a crossword puzzle. The employee said, yes, and he put it away. Giacobbe looked at Gawura's union pin and then said, in a very loud tone of voice, "[Y]ou are doing a crossword puzzle on my time? Do you think if the union were here, you would be able to do a crossword puzzle?" Giacobbe told Gawura not to let him catch the employee doing it again.

The foregoing is based on the credited and uncontradicted testimony of Gawura. That testimony shows that, by Giacobbe's choice of words, he made clear that the verbal reprimand was the result of Gawura's union sympathies and that, absent such sympathies, the employee's conduct, as in the past, would not have resulted in a reprimand. Accordingly, I find that, in orally reprimanding Gawura, before the second election, Respondent, by Giacobbe, violated Section 8(a)(3) of the Act.

##### c. *Leonard Militello*

Militello testified that, on July 18, 1991, on the selling floor, he and Manager Sneed discussed certain statements contained in a UAW leaflet. There were no customers in the area. Manager Petross joined the conversation and, at that point, Militello testified, the discussion charged from pleasant to loud and heated, and the subject matter broadened to include, generally, the veracity of the commentary contained in both union and employer publications. When the two supervisors laughed at an argument made by Militello, the employee looked at Petross, said, "[Y]ou are full of shit," and walked away. It is undisputed, as Militello testified, that other employees, in the presence of managers, use this and similar language. Employees have not been told that such

speech is not permissible. Indeed, Petross has used such words in conversations with employees. Nonetheless, on July 19, Petross showed Militello a writeup for his conduct on the previous day, namely, yelling in front of customers, challenging Petross' ability and commitment as a manager, and telling Petross that "you're full of shit."

Sneed, in his testimony, claimed that there were customers present when the conversation occurred, and that it was Militello's voice, and only his, that got louder during the course of the discussion. However, Sneed further testified that he could not remember what the conversation was about. Petross testified that the discussion took place in the presence of customers; that Militello was the only one to raise his voice; that the employee ignored Petross' requests that he keep his voice down; and that Militello told Petross that he was "full of shit" in a loud tone of voice. Petross claimed that he gave Militello the warning because he had been loud, within earshot of customers, and had directed his curse words at the supervisor, personally.

For the reasons stated at footnote 4, I credit Militello's testimony concerning the July 18 event, and find that his discussion with Sneed and Petross occurred outside the presence of customers, and became loud and heated only after Petross joined the conversation. I also note that the discussion, held shortly before the second election, occurred in the midst of massive violations of the Act by Respondent, and that much of the unlawful conduct was directed, individually, at Militello. For example, it was in this time period that Respondent began to videotape Militello's activities and, by Sneed and Petross, followed the employee wherever he went in the store. The conversation between Militello and the supervisors dealt with the inherently emotional subject of leaflet veracity, and the epithet used by the employee was a mild one, and not at all out of line with the language commonly spoken in the store by employees and supervisors. To say, as claimed by Petross, that, in context, Militello's language challenged the supervisor's commitment and ability, and was directed at him personally, is to strain and drain the words beyond all logic.

On the state of this record, I can find no explanation for the discipline meted out to an employee for language and actions well within the range of what was normally tolerated, except this: Militello was known to Respondent as one of the leading union activists, and this Respondent was in the midst of a massive campaign of unlawful conduct designed to defeat the Union. In light of the General Counsel's strong prima facie case, and Respondent's failure credibly to show that it would have disciplined Militello even absent his protected activities, I find and conclude that Respondent, by Petross, violated Section 8(a)(3) of the Act by issuing a written warning to Militello because of his July 18, 1991 conduct.

Militello also testified that, late in July, he was advised by employees Lucy Ene and Paulina Cvetanovski, women from eastern European countries who worked in the alterations department, that they had been required by Manager Sneed to wear antiunion buttons on their clothing. Militello told them that they did not have to wear the buttons and, 2 days later, he left a "just say yes" button for Cvetanovski, at her machine. Later that day, Militello was called into Sneed's office and told by the supervisor that he, Sneed, had learned that Militello had been harassing and threatening the women.

Militello stood up and said, "Reggie . . . I am not going to let you do this to me," and he walked out. Sneed followed Militello back to his work station and told him to stay out of the alterations room unless he had business to conduct in there. Later that day, or the next day, by memorandum dated July 26, 1991, Militello received from Petross a written warning for insubordination to Sneed, by walking out on him; harassment of fellow employee Cvetanovski; and solicitation in violation of the no-solicitation rule.

Sneed, in his testimony, stated that Ene and Cvetanovski had told him that they were afraid of Militello because he was upset that they were wearing pro-Company pins, and he had entered their room to lay down a "vote yes" pin. When he, Sneed, attempted to discuss the matter with Militello, the employee refused, and walked out. Sneed reported the matter to Petross, Militello's manager. Petross testified that, in addition to the report he received from Sneed, he, Petross, had gotten a complaint directly from Cvetanovski, that Militello had solicited her to wear a UAW button. Petross decided to give Militello a written warning for soliciting Cvetanovski and Ene to wear UAW buttons while he and they were on working time, harassing the women, and refusing to meet with Sneed about the matter.

In resolving this issue, it is sufficient to note that the warning, on its face, shows that it was imposed, in substantial part, for violation of the no-solicitation rule. I have previously found that Respondent violated the Act by its disparate enforcement of the no-solicitation and no-distribution rules. Accordingly, the rules, as enforced, were invalid, and the discipline of Militello, for violation of an invalid rule, was unlawful. I conclude that, on July 26, 1991, Respondent, by Petross, violated Section 8(a)(3) of the Act by the written warning issued to Militello.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

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

#### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

#### CONCLUSIONS OF LAW

1. Department Store Division of the Dayton Hudson Corporation is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing reprimands to Leonard Militello Jr. on July 18 and 26, 1991, to Vivian Armstrong on July 31, 1991, and

to Eric Gawura in early August 1991 because of their union activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

4. By threatening employees with store closure, store relocation, loss of jobs, and more onerous working conditions if they select the Union to represent them, and by informing employees that it would be futile for them to opt for union representation, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

5. By coercively interrogating employees regarding their union activities and sympathies, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

6. By impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

7. By asking an employee to remove his union button, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

8. By altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union, Respondent has engaged in

unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

9. By disparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and by requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork-related items, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

10. By coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

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

12. In light of Respondent's failure to comply with the terms of the June 23, 1992 settlement agreement, in Cases 7-CA-32279 and 7-CA-32433, as shown by its continued pattern of unfair labor practice conduct in the summer and fall of 1992, the Regional Director properly set aside that agreement.

13. Respondent has not otherwise violated the Act, as alleged in the consolidated complaint.

[Recommended Order omitted from publication.]