

Harbor Cruises, Ltd. and International Union of Operating Engineers, Local No. 37, AFL-CIO.
Cases 5-CA-24344 and 5-RC-13990

November 30, 1995

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issues presented here are whether the judge correctly found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act and engaged in conduct that interfered with a Board representation election.¹ 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,² and conclusions,³ and to adopt the recommended Order as modified and set forth in full below.⁴

AMENDED REMEDY

As set forth in the judge's decision, the Respondent has committed numerous, flagrant, and pervasive un-

¹On June 6, 1995, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's cross-exception. The General Counsel filed a cross-exception, a supporting brief, and an answering brief to the Respondent's exceptions.

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

²The 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 find that the judge's analysis of the 8(a)(3) violations is consistent with the test of unlawful motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In sum, the judge has found a prima facie case of discriminatory conduct and has considered and rejected as pretextual the Respondent's proffered defenses of legitimate motivation. See *T & J Trucking Co.*, 316 NLRB 771, 771-772 (1995); *Garney Morris, Inc.*, 313 NLRB 101, 102 (1993); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

³Member Cohen disagrees with his colleagues in one respect. The evidence shows that the Respondent told employees that, if the Union became the representative, they would have to deal with management through a shop steward, rather than one on one. The judge found a violation because the "Respondent did not truly have an open door policy before the organizing campaign." Member Cohen disagrees. Irrespective of whether the Respondent had an open-door policy in the past, the Respondent was simply pointing out the role of a union, under Sec. 9(a), in the future. Member Cohen finds that this correct explanation of legal rights and obligations was neither unlawful nor objectionable. See *Tri-Cast, Inc.*, 274 NLRB 377 (1985).

⁴We shall substitute a new Order and notice reflecting changes made in our Amended Remedy, adding injunctive remedial provisions relating to the Respondent's 8(a)(3) violations, and conforming certain other recommended provisions to traditional Board remedial language.

fair labor practices in reaction to the Union's organizational campaign. The Respondent's vice president of operations, Kitty Bona, was personally involved in the commission of many of these unlawful acts, which interfered with the election held on March 26, 1994, and are likely to have a substantial lingering effect on employees' exercise of Section 7 rights, including their right to choose whether the Union is to represent them in a second Board election. Under these circumstances, additional remedial action is necessary to dissipate as much as possible the lingering effects of the Respondent's unlawful conduct and to ensure employee free choice on the question of union representation when the Regional Director decides to conduct a second election. We therefore agree with the judge's recommendation to require the Respondent to mail a copy of the Board's notice to all employees on its payroll from January 19, 1994, to the date the notice is posted, and to assemble all current unit employees at the Respondent's premises for a reading of the notice. See *Fieldcrest Cannon, Inc.*, 318 NLRB No. 54, slip op. at 4 (Aug. 25, 1995), and *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993). We shall amend the recommended notice reading requirement, however, to provide that Kitty Bona, at her option, either read the notice to employees herself or be present while the notice is read by a Board agent, not by counsel for the Charging Party, as the judge had recommended. We further find that a broad cease-and-desist Order is warranted because the Respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). Finally, we shall modify the judge's recommended Order and notice to include cease-and-desist provisions relating to the Respondent's violations of Section 8(a)(1).

ORDER

The Respondent, Harbor Cruises, Ltd., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing employees by threatening, in the event that they chose representation by International Union of Operating Engineers, Local No. 37, AFL-CIO, the Union, job loss, business closing, the futility of bargaining, the inevitability of a strike, limitation of access to management officials, and the willingness of the Respondent's owner to go to any lengths to frustrate the Union's attempt to win employee support and thereafter to bargain on their behalf.

(b) Implying surveillance of employees' union activities.

(c) Implicitly promising improved wages, hours, and working conditions if employees would withhold support from the Union in the Board election.

(d) Interfering with protected concerted employee speech by promulgating and maintaining a rule stating that “Gripping to other employees or outsiders is not considered a professional or appropriate manner to resolve problems.”

(e) Discriminating against employees by discharging or warning them or by eliminating or reducing their work schedules because of their union or other protected concerted activities.

(f) In any other manner interfering with, restraining, or coercing its 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) Rescind the rule in the “Harbor Cruises Handbook” that states that “Gripping to other employees or outsiders is not considered a professional or appropriate manner to resolve problems.”

(b) To the extent that it has not already done so, offer Michael Gudaitis, Kimberlee Suerth, and Walter Graham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge’s decision.

(c) Restore to the more experienced employees of its wait staff, including, but not limited to, Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts, the seasonal work assignment opportunities that existed prior to the Union’s filing of a petition for a Board representation election on January 19, 1994, and make whole these employees, with interest, for the discriminatory reduction or elimination of work assignment opportunities.

(d) Remove from its files any reference to the unlawful discharges and warnings and notify the affected employees in writing that this has been done and that these disciplinary actions will not be used against them in any way.

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

(f) Post at its Baltimore, Maryland facility and on boats operated by the Respondent copies of the attached notice marked “Appendix.”⁵ Copies of the no-

tice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Mail copies of the notice to all employees working out of its Baltimore, Maryland location on the date the notice is posted, as well as to every employee who worked for it from January 19, 1994, to the date the notice is posted.

(h) Convene during working time all its employees at its Baltimore facility or on one of its boats and have Vice President of Operations Kitty Bona read the notice to the assembled employees, or at Bona’s option, permit a Board agent to read the notice. If Kitty Bona chooses to have a Board agent read the notice, she shall be present when the notice is read. The Board shall be afforded a reasonable opportunity to provide for the presence of a Board agent at any assembly called for the purpose of reading the notice.

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

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice.

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coerce you by threatening, in the event that you chose union representation, job loss, business closing, the futility of bargaining, the inevitability of a strike, limitation of access to management officials, and the willingness of our owner to go to any lengths to frustrate the Union’s (International Union of Operating Engineers, Local No. 37, AFL–CIO) attempt

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

to win employee support and thereafter to bargain on their behalf.

WE WILL NOT imply that we are maintaining surveillance of our employees' union activities.

WE WILL NOT implicitly promise to give you improved wages, hours, and working conditions if you withhold support from the Union in a Board election.

WE WILL NOT interfere with protected concerted employee speech by promulgating and maintaining a rule stating that "Griping to other employees or outsiders is not considered a professional or appropriate manner to resolve problems."

WE WILL NOT discriminate against employees by discharging them, warning them, or by eliminating or reducing their work schedules because of their union or other protected concerted activities.

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 rescind the rule in our "Harbor Cruises Handbook" that states that "Griping to other employees or outsiders is not considered a professional or appropriate manner to resolve problems."

WE WILL, to the extent that we have not already done so, offer Michael Gudaitis, Kimberlee Suerth, and Walter Graham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL restore to the more experienced employees of our wait staff, including, but not limited to, Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts, the seasonal work assignment opportunities that existed prior to the filing of a petition for a Board representation election on January 19, 1994, and WE WILL make whole these employees, with interest, for the discriminatory reduction or elimination of their work assignment opportunities.

WE WILL remove from our records any reference to the unlawful actions against employees Michael Gudaitis, Kimberlee Suerth, Walter Graham, and Sheila Roberts and WE WILL notify them in writing that our unlawful conduct will not be used as a basis for further personnel action.

WE WILL mail copies of this notice to each and every employee working out of our Baltimore, Maryland location on the date the notice is posted, as well as to each and every employee who worked for us from January 19, 1994, to the date the notice is posted.

WE WILL convene during working time a meeting of all employees at our Baltimore facility or on one of our boats and have Vice President of Operations Kitty

Bona read to the assembled employees the contents of this notice, or at Bona's option, permit a Board agent to read the notice. If Bona chooses to have a Board agent read the notice, she shall be present while the notice is read. The Board shall be afforded a reasonable opportunity to provide for the presence of a Board agent at any assembly called for the purpose of reading the notice.

HARBOR CRUISES, LTD.

Sherrie Trede Black, Esq., for the General Counsel.
J. Michael McGuire and Robert H. Ingle III, Esqs. (Shawe & Rosenthal), of Baltimore, Maryland, for the Respondent.
John S. Singleton, Esq. (Gendler, Berg, & Singleton, P.A.), of Baltimore, Maryland, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The original charge was filed by International Union of Operating Engineers, Local No. 37, AFL-CIO (the Union or the Petitioner) on April 14, 1994,¹ and it was amended on May 19. The complaint was issued on August 25, and it was amended at the hearing. (G.C. Exh. 2.)

The General Counsel alleges violations, collectively, of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The former involves statements, with one exception, allegedly made by Harbor Cruises, Ltd. (the Respondent, Employer, or Company) prior to the election involved herein and the latter involves actions after the election allegedly taken against employees as a result of the effort of the employees to bring a union into the involved operation.² Respondent denies violating the Act.

By Report on Objections, order consolidating cases, and notice of hearing entered September 8, General Counsel's Exhibit 1(L), Case 5-RC-13990 was consolidated with Case 5-CA-24344. The former involves objections filed by the Union regarding alleged conduct that assertedly affected the results of the election held on March 26. According to the Report on Objections, the objections raise issues of fact and law that are substantially identical to the allegations contained in the complaint in Case 5-CA-24344.

A hearing on these consolidated cases was held on November 29 and 30, and December 1, 2, 12, and 16. Briefs were filed by the parties on February 9, 1995. On the entire record³ in this proceeding, including my observation of the

¹ All dates are in 1994 unless otherwise stated.

² In addition to allegedly terminating named employees or eliminating or reducing the work assignments of named employees, Respondent issued the "Harbor Cruises Handbook." According to par. 12 of the amended complaint, on March 30 Respondent promulgated the following rule in the handbook: "Griping to other employees or outsiders is not considered professional or appropriate manner to resolve problems."

³ At the hearing the General Counsel and Respondent were given permission to submit specified late-filed exhibits. Accordingly, G.C. Exh. 60 and R. Exh. 44 are hereby received in evidence.

witnesses and their demeanor, and after considering the aforementioned briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Maryland corporation, is engaged in the retail business of operating a charter boat service. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Monica Gudaitis, who was hired by Respondent in 1988, testified that for some time the Company had engaged in questionable scheduling practices in that an employee could be scheduled for a number of "bad" cruises in a row; and that in January 1994 she contacted the Union and shortly thereafter the first of about six meetings was held with Respondent's employees. She also testified that the employees complained about the inconsistencies in the way the Company applied its policies regarding terminations over writeups. More specifically, some employees were terminated for having three writeups while other employees who had four or five writeups were not terminated. She testified that these inconsistencies had occurred for years.

Eugene Milowicki, who was hired by Respondent in 1988 as a waiter and entertainer, was approached by Monica Gudaitis, in January 1994 about the possibility of getting a union to represent the employees. He signed a union authorization card and attended a couple of meetings at the union office. According to his testimony, the employees who attended these meetings were employees who had worked at Respondent in 1993 and before.

Milowicki was not originally scheduled for any cruises in January 1994. He asked Theresa Tomaino, who was in charge of the scheduling at the time, about it and she said that he did not turn in his availability for January. He believed that he did turn it in and he testified that previously since she knew his availability, she scheduled him even without his availability sheet. After this conversation he was put on a couple of cruises in January. Milowicki turned in his February availability sheet, General Counsel's Exhibit 14, the last Monday in January.

On January 19 the Union filed a petition for an election.

On February 1 Kitty Bona, who is Respondent's vice president of operations, mailed a letter to all of Respondent's employees, Respondent's Exhibit 21. In it she indicated that the Company believes that "there is no need or desire for a union here" and "I do not believe that a union is the answer to anyone's problems."⁴

⁴This exhibit contains three other letters that are dated February 18 and March 10 and 18. The first, among other things, deals with who is eligible to vote in the upcoming election. The second treats the fact that "[i]n the give and take of collective bargaining, you can end up with *less* than you currently have, and have to pay union dues on top of it," and it requests that the employees vote no. (Emphasis in original.) And the third letter advises the employees of the date of the election, the voting procedures and the time of the election, and it includes a sample ballot. Also the exhibit contains a leaf-

According to her testimony, in mid-February Monica Gudaitis received a telephone call and was told by Bona not to report for a cruise because of the inclement weather. Gudaitis testified that Bona mentioned during this conversation that she thought that Gudaitis lived in Hartford County but Gudaitis informed her that she had lived in Baltimore City for 2 years; that Steve Penn had come to pick her up in his four-wheel drive vehicle and Bona told her to still have Penn come to the boat; and that Tina Bender, who lives six blocks from the boat, was canceled while employee Walt Graham, who lives at the Pennsylvania state line, was called to come to work. Bona testified that she started canceling the women scheduled on the cruise because she was concerned about their well being; that while the two cruises were scheduled to go out that night, only one went out; that Graham must have switched with someone because she did not call him in;⁵ and that the five wait staff members and the two bartenders who went on the cruise are listed on Respondent's Exhibit 19. Roselie Coleman, Respondent's office manager, sponsored Respondent's Exhibit 20, which is Respondent's sales report, and that shows, among other things, that one cruise went out on Saturday, February 12, Valentine's Day.

Sometime shortly before February 17 employee Douglas Strader, who had worked for Respondent for over 5 years, wrote a letter to Bona, Respondent's Exhibit 15, asking for a meeting. Attached to the letter was an agenda for the meeting, which, as here pertinent, reads as follows:

Introduction: The need for standardization.

I believe this to be one of, if not the, main problem I see from a bartenders perspective. Employees need to know what to do, when to do it, and how they will be compensated. The systems, now, are just too disorganized causing unnecessary headaches. As bar manager I could see both sides of an issue, the administrative side as well as the employee side. The employees, however, do not get this understanding. It is this ignorance that seeds many insurgences. [sic]

Scheduling: Seniority. Non-biased. A policy for last minute changes of schedule by either office of personnel.

According to his testimony, at one point during a subsequent meeting with Bona in February, Strader probably described

let titled "WHAT CAN THE UNION GUARANTEE FOR YOU?" The leaflet was mailed to the employees' homes. Citing court and Board decisions it states that "[a]n employer is not required to agree to any of the union's proposals during collective bargaining," "[d]oes not have to retain all current benefits after bargaining," ". . . may permanently replace economic strikers," and "[f]urther, a union must obtain the employer's assent to gain improved benefits."

⁵Respondent employee Sheila Roberts testified that when she realized how bad the weather was she telephoned Graham and asked him to take her shift; that when Bona telephoned her to say that she, Roberts, was not needed she told Bona that Graham had agreed to take her shift and she asked Bona if Roberts should telephone Graham and tell him his shift was canceled; that Bona said that Roberts should not telephone Graham; that nonetheless she did telephone Graham who told her that when he telephoned Bona she told him to come in; and that Graham lived near the Maryland and Pennsylvania state line.

the union organizing campaign as “Monica’s campaign.”⁶ Strader also testified that Bona told him that the Company was not going to do a show anymore because it required a lot of work and effort and with the Union there was not the time to prepare—to go through the hiring, training, and trying to find someone to set up the show.⁷ On cross-examination Strader testified that in the past Respondent never had any type of seniority scheduling whatsoever and in the past the scheduling was biased.

On February 22 Monica Gudaitis and another of Respondent’s employees, Sherri Pie, met with Bona at a restaurant. With respect to the meeting, Gudaitis testified that Bona said that before she left for the meeting the owner of the Company, Larry Stappler, asked her if she was “going to meet the girl that’s heading all this Union activity”; that Bona said that she assured Stappler that she would find out what was going on; that the meeting lasted for 3 or 4 hours; that

⁶Monica Gudaitis testified that bartender Matt Potter told her that Strader threw her “under the bus” and she spoke with Strader on the telephone and told him that he should not be saying this; and that Strader said that it was common knowledge that this is “Monica’s campaign.” Bona testified that she never heard Strader say “Monica’s campaign” during the course of her meeting with him.

⁷Monica Gudaitis testified that she heard rumors around January 1 about the Company not having a show in 1994. Bona testified that having a show was very costly and Respondent had been reducing this expenditure over the last few years so that in 1993 it involved an opening number, a closing number, and people doing vocals; that Respondent received complaints about the show in 1993; that the structure of Respondent’s operation changed in that whereas in the past Saturday was a big day for the show, Respondent began using its two boats on Saturdays for weddings and crab-feast day tours; that the decision to not have a show in 1994 was made mid-season in 1993 but the decision was not announced to the employees until January 1994; that in 1994 Respondent hired waiters and waitresses and not entertainers; and that whereas in the past employees were recruited from music institutes and schools as performers, in 1994 employees were hired at a job fair and from an ad in the newspaper. Bona also testified that in 1994 the Company had dancers on Hawaiian nights and bands on Batman and other cruises but it no longer advertised that it had a show. According to C.P. Exh. 4, Respondent offered cruises with a “lively musical review” in the April 13, 1994 edition of *The Catholic Review*. Bona testified that Respondent did not place the ad; that an ad from 1991 was used by the publication; and that the publication was attempting to charge Respondent for running the ad but Respondent has not paid the bill. Bona also testified that there is an Easter Bunny on the Easter cruise, a Santa on the Santa cruise and the staff and patrons sing during the cruise but this is not a show; that the entertainment that was advertised in 1994 was a disc jockey and a band; that several groups in 1994 requested a show and the Company complied with the request; and that in prior years there was a show on every cruise. Tomaino testified that she was involved in the decision not to have a show in 1994; that the decision was made in December 1993; that the show was dropped because “it wasn’t working very well . . . [i]t was a large organization task, larger than any of us could handle, and it . . . wasn’t effective for us at all”; that “lively” and “show” were taken out of the entertainment described in the sales brochure for 1994; that there is still entertainment such as Italian music on Italian night; and that after January 1 employees were advised that the Company was not going to do a show. Subsequently Tomaino testified that she received Respondent’s sales brochures back from the printer around the middle of January and that her first drafts of the brochure that she sent to the printer in December 1993 reflected that Respondent was eliminating the references to shows in the brochure.

Bona, tearing up napkins, said that the Company could tear up proposed agreements; that Bona said that the Union would want benefits, the Company could not afford benefits and “the Union could put you on strike,” the Company would hire replacements and the only way the present employees would get their jobs back would be when an opening became available; that she told Bona that the employees were only part-time and they were not looking for benefits; that at one point in the conversation Bona said that Monica’s job was salvageable but Stappler “does play hardball, and he’ll do whatever he has to do”; that Bona said that with shop stewards the employees would not be able to communicate with the office people any more; that Bona said that the Company was not General Motors and the expenses could put it out of business; and that she told Bona that most of the employees had already submitted union authorization cards. On cross-examination, Gudaitis testified that Pie contacted Bona about the meeting; that Bona was told that the employees were upset about the scheduling, the inconsistencies, and the favoritism, and they felt that they needed a mediator; that Bona said that she had some ideas but she could not share them at this point, they would have to wait until after the election; and that she told Bona that only two employees (apparently from the bartenders and wait staff) did not sign union authorization cards and they were not asked to sign. Monica Gudaitis testified that typically there were some changes in policies and procedures each spring and these changes are normally announced at the spring meeting. Also she testified that this meeting occurred about 4 to 6 weeks before the normal spring meeting time. Bona testified that Pie asked her to meet with Monica Gudaitis.

Milowicki turned in his March availability sheet, General Counsel’s Exhibit 15, on or about the last Monday in February.

When Graham, who was hired by Respondent in 1993, realized that he could not attend the meeting scheduled by Respondent for February 24 to present management’s position regarding the Union, he told Bona. Graham testified that he then had a conversation with Bona; and that Bona said the Union would just cause a lot of problems, it would destroy the family atmosphere, it would make demands that the Company could not afford and would not accept, the only recourse would be for the Union to go out on strike, and the Company would replace the workers so that it could continue to operate.

On the evening of February 24 Respondent held a meeting with about 25 of its employees on one of its boats. When called by the General Counsel as the first witness at the hearing, Bona testified that she was Respondent’s spokesperson at this meeting; that she and John Wancowicz, Tomaino, and Martas Redd, all of whom hold management level positions, answered the employees’ questions; that she spoke from a text prepared by Respondent’s attorneys, General Counsel’s Exhibit 6 with attachments received as General Counsel’s Exhibit 7; that she did not read the entire prepared text; that she did not tell the employees at this meeting that Respondent was not General Motors and Respondent could not afford health insurance and if this was what the employees were looking for they would put the Company out of business; that she did not tell the employees that the negotiations could last up to a year and the Union could get tired of this and go out on strike; that she did not tell the employees that they

would be precluded from talking directly with management if the Union came in; that she did not tell the employees that she knew several people who attended union meetings; that she did not talk about the union meetings at this meeting; and that there was no suggestion made at this meeting that Respondent intended to change policy. Subsequently, Bona testified that it was her understanding that she was supposed to stick to the script prepared by the attorneys; that while there is nothing about a vacation plan or health benefits in the prepared text, she discussed this in response to a question that was asked; that the only time she left the prepared script was in response to a question; that she was positive that she did not say, "I know that several people have gone to union meetings, and have attended meetings, and that's your priority, I'm not holding that against anyone"; and that she was sure that they did not discuss the need for a different policy regarding scheduling at this meeting. The second witness called by the General Counsel, Tomaino, testified that when Bona spoke about the possibility of a strike she was reading from the prepared speech; that Tomaino did not remember saying that if the Union says that you have to go on strike, you have to go on strike; that with respect to her telling employees about new policies that the Company might be implementing, she told the employees, in answer to a question, that "we are doing what we always did"; that she did not tell the employees that the Employer does listen to them; and that she did not tell the employees that the Employer can choose never to sign a contract. Tomaino also testified that she had her own copy of the script in her hand and she was following along; that she was positive that she did not talk about the tip policy; that Bona did not say that the Company was not General Motors and health benefits and vacation would put Respondent out of business; that at this time she was aware that she could not talk to employees about changing policy; that Wancowicz did not say anything during this meeting; and that she did not hear Redd say that "we can solve our own problems from the galley's position." The third witness called by the General Counsel, Wancowicz, testified that he did not say anything at this meeting; that Bona deviated from the script but she did not tell the employees that they would have to go to the shop steward and that the employees could not come to management; that before the meeting Bona told them that they could not make promises about the upcoming season until the election was over with; and that Bona did not talk about scheduling and availability. One of Respondent's former employees, Judith Jelenko, testified that she attended the February 24 meeting that was held about 3 of 4 p.m.; that she sat in the front row and recorded what was said at this meeting, General Counsel's Exhibit 9; that the tape was transcribed, General Counsel's Exhibit 10; and that after the tape was transcribed, she made some notations regarding what was on the tape after listening to it another time, General Counsel's Exhibit 11. Also Jelenko testified that she received the invitation to the February 24 meeting in the mail. Subsequently, Jelenko testified that when, as set forth on page 17 of the transcript, Tomaino said something about policy, Bona said, "[w]e can't talk about that now," which statement is not in the transcript. Monica Gudaitis testified that Jelenko was sitting in the front row of employees, about 4 or 5 feet from Bona. Gudaitis believed that this meeting, at which a meal was served, started before 5 or 5:30 p.m. because the sun was still out during the meet-

ing. Gudaitis was never served dinner by the Company before.

In March Wancowicz began to do the scheduling. Tomaino, Respondent's director of marketing, had that responsibility for one-half of 1992, all of 1993, and January 1994. When she was out of town in February 1994 someone described only as Vivian did the scheduling. Wancowicz testified that he became personnel manager in March; that in this position he did the hiring, scheduling, interviewing, training, and firing; that before he became personnel manager he was boat manager supervising the wait staff, bartenders, galley staff, and dock hands; and that Bona hired him as personnel manager. Strader testified that he helped Wancowicz with the scheduling of the bartenders for about 90 days after which time Wancowicz did the scheduling himself. Wancowicz testified that he became responsible for the scheduling of employees on March 1; that he decided that the employees should not be telling the Company when they are available to work on a month-to-month basis but rather they should have a fixed availability and request time off when they needed it; and that Strader had no involvement in helping prepare the schedules. Further, Wancowicz testified that he did not have any standard or any ceiling in scheduling and it was totally at his discretion.

Also in March Respondent sponsored a job fair and it took job applications at its catering operation for its boat charter service. Bona testified that this was the first time Respondent hired in this way. Bona also testified that prior to the 1994 season it was, as noted above, a showboat operation and Respondent hired waiters and waitresses who were entertainers who could sing; that early in 1993 it was decided to stop doing shows in 1994; that people were hired at the job fair because it was decided that people hired could possibly work at both Respondent and at its affiliated company, Overlea Caterers; and that most of the hiring for the 1994 season was done in March 1994. Subsequently, Bona testified that the decision to no longer do shows was made in mid-season 1993, which was July 1993, and that Respondent's first revised brochure for the 1994 season was sent to the printer in January 1994. Wancowicz testified that of the 10 to 15 people interviewed at the job fair 2 were told that they would be hired; that before the election Respondent ran an ad in the newspaper for employees and he interviewed at least 30 people; that he could have told 20 of these people that they were going to be hired; that only 7 to 12 of the wait staff from 1993 remained; that he tried to contact some of the people who worked for Respondent in 1993; and that Bona told him to hire at least 30 people. Further Wancowicz testified that it was not mandatory that the new hires have 100-percent availability and he did not ask the applicants if they could sing.

When he was not scheduled for any cruises in March, Milowicki spoke to Bona who told him that Respondent did not have any availability sheet for him so he wasn't scheduled. He told Bona that the sheet had been submitted. Bona said that she would probably be able to put him on some cruises during the remainder of March. He was called in to work six cruises that month and one was canceled.

On or about March 12 Graham went to Respondent's office and initiated a conversation with Bona. Regarding the conversation, Graham testified that he told Bona that the vote was very important to him because he had been a member

of Local 24 IBEW and he knew the benefit of having a union; that Bona said that the Union would want benefits and higher wages and the Company could not afford that, there would be a strike, and those on strike would be replaced; that he told Bona that the employees did not want medical or vacation benefits but rather only wanted someone to be a go-between for the Company and the employees; that he told Bona that scheduling was a problem;⁸ and that the Union could take the monkey off her back. According to Graham's testimony, apparently referring in part to both conversations he had with Bona regarding unionization, Bona did not say that a strike was definitely going to happen, everything was a hypothetical and she said that management could best handle the scheduling. This conversation occurred in the reception area of Respondent's office trailer. Bona testified that Graham initiated the meeting.

On March 20, originally described by Jelenko as a Sunday 2 weeks before the election was held, Wancowicz telephoned Jelenko and asked her to come to Harbor Cruises and, along with three or four other employees, meet with Bona. Jelenko testified that she arrived at the office at about 3 p.m.; that Bona was the only other person in the office; that Tomaino was in the facility, which is a mobile home-type trailer, moving furniture but she was not in the room; that Bona told Jelenko that she could not close the door because Bona could not have a one-on-one meeting with her; that Bona said the Company (1) did not want a union, (2) was small and if the Union asked it to pay vacation and insurance benefits, the Company would most likely go out of business, and (3) did not have to sign any contract that is given to it by the Union in negotiations and the Company can just throw it right back at the Union;⁹ and that she was not scheduled to work that day. On cross-examination Jelenko testified that this occurred the Sunday before the election or, in other words, 6 days before the election; that Bona said that if the Company had to pay vacation, insurance, and benefits for its full-time workers, it "could put them out of business"; that in her opinion anyone working five or more shifts or cruises was full time; that the cruises last from 2 to 6 hours; and that Bona said that the Company not accepting a contract "can continue forever." Bona testified that she told Jelenko that Bona just wanted to make sure that Jelenko was aware (1) that this is a private ballot, (2) how the voting was going to be handled, (3) there would be one person sitting at the table with the Union, and (4) the Company would have a representative sitting at the table.

On March 21 Milowicki submitted his April availability sheet to Respondent, General Counsel's Exhibit 16.

On March 26 an election was held. There were 16 votes were cast for the Petitioner and 20 votes cast against the Union. On the night of the election Graham turned in his availability sheet for April 1994, which showed 100-percent availability.¹⁰ He did not recall receiving any telephone calls from Tomaino after March 26.

⁸ Graham testified that scheduling was a problem in 1993; that there did not appear to be any rhyme or reason to scheduling; and that when he believed in 1993 that he was not receiving his fair share of cruises he complained and he received more cruises.

⁹ Jelenko testified that when Bona said this she threw what she had in her hand on the desk.

¹⁰ Graham testified that he was available 100 percent notwithstanding the fact that he was going to be working for Carpet Care because

During the following week Graham telephoned Respondent's office on two occasions to find out if he was scheduled for the weekend and both times he was told by a salesman, identified only as Rick, that the schedule was not ready. According to Graham's testimony, in the past when the schedule was not available on the first of the month he would pick it up at the office or telephone the office. Graham testified that he "felt that the two phone calls . . . [were] enough"; and that it was not an unusual situation at the beginning of the month that a schedule was not ready and management would have to telephone him and tell him what his schedule was for the first week.

On March 28 Monica Gudaitis submitted her availability, General Counsel's Exhibit 20, and the availability of her son Michael for April to Wancowicz. Monica Gudaitis testified that she told Wancowicz that her son worked at his day job on Monday, Tuesday, Wednesday, Friday, and Saturday until 6 p.m. and he could not get to the boat until 6:40 p.m.; that if Respondent took the same approach that it had taken with her husband, David Campofreda, who worked at the same place as her son during the day, and have someone else set up the bar before her son arrived at the boat, he could work 7 p.m. cruises;¹¹ that she told Wancowicz that because she was in school she was not available Tuesdays and Thursdays, and Saturdays and Sundays, and mornings but, in view of Wancowicz's indication that the employees would be requested at the March 30 meeting to henceforth submit permanent availabilities, her schedule would change in May when she was finished with school; that she told Wancowicz that she did not believe that 2 days' notice of the March 30 mandatory employee meeting was enough time for her to cancel a meeting that she had scheduled with her school director that evening;¹² that when Wancowicz asked if her son could make the meeting, she told him that he did not get out of work until 6:30 p.m. and he would have to contact her son; and that she gave Wancowicz her son's work telephone number. Monica Gudaitis also testified that she filled out her son's availability sheet in front of Wancowicz. According to her testimony, her son's April availability sheet was no different than his March availability sheet. On cross-examination Monica Gudaitis testified that she told Wancowicz that if she could change her meeting with her school director from March 30 she would let him know; that she had her March schedule when she arranged the meeting; and that she was not scheduled to work that night.

Jelenko testified that on March 29 Wancowicz telephoned her at home and informed her that there was a mandatory meeting on the evening of March 30; and that she told him that she could not attend because she had to work that evening and he said, "[O]kay."

On March 30 Respondent conducted a mandatory meeting for employees at which it distributed to employees a Harbor Cruises handbook, General Counsel's Exhibit 5. As noted above, the handbook contains the following: "Gripping to

he had flex hours with that Company. This differed from his March availability sheet in that in March he was only available on weekends. G.C. Exh. 18.

¹¹ Bona sponsored R. Exh. 18, which is a payroll computer print-out which shows that Campofreda had total earnings of \$991 in 1993.

¹² She testified that in prior years she had always received 2 weeks' notice for such meetings.

other employees or outsiders is not considered professional or appropriate manner to resolve problems.” During the meeting Respondent announced a change in its policy regarding employees submitting their availability. In the past employees could submit their availability the last week of each month for the following month. As of April, employees had to submit their availability for the season.¹³ Subsequently, if they needed time off, they had to request it in writing.¹⁴ Bona testified that this policy change was decided at a management meeting in March attended by Tomaino, Wancowicz, Ken Thomas, and herself; and that the purpose of the change was to make it easier for Wancowicz to do the scheduling. Wancowicz testified that employees were notified of this meeting by letter “unless they picked that up in their paycheck”; that he personally verbally notified the new employees that he intended to hire about the meeting; that he did not tell any of the older employees about the meeting; that he did not know of any other mandatory meetings during the 1994 season; and that 10 to 15 employees did not attend this meeting but not all of these employees were written up because some of them telephoned before the meeting to explain why they could not attend. Subsequently Wancowicz testified that someone named Vivian sent the letters notifying older employees about the meeting; that after receiving the letter some of the older employees telephoned to say that they could not attend; and that it was sufficient for the new employees who missed the mandatory meeting to just read the handbook and another meeting was not held for these people. According to Jelenko’s testimony, she never received any written notice of this meeting. Bender testified that she received no notification about the March 30 meeting; that she learned of the meeting a day or two after it was held; that she gave Bona a doctor’s note that indicated that she should not go to work or anything for a couple of days; and that to her knowledge she had not been written up for missing the meeting. Milowicki believed that he was notified verbally about this meeting during the March 26 cruise that he worked. On direct Graham testified that he did not think that Respondent communicated to him that there was a mandatory meeting on March 30. On cross-examination he testified that the first time that he learned of the March 30 mandatory meeting was when he testified herein on December 1; and that in view of his reference in his affidavit to the National Labor Relations Board to not being able to attend a company meeting after the election because of his other job,¹⁵ it appears that possibly he did know of the March 30 meeting before testifying. According to Bona’s testimony,

¹³ Bona testified that Respondent’s good season is March through October and that it slows down drastically from November through February; and that during the height of the season Respondent, with two boats, can operate 35 cruises a week. The 1993 and 1994 schedules of operations were received as Jt. Exhs. 1 and 2, respectively. And 1994 employee availability data was received as G.C. Exh. 60. Bona testified that no priority is given to seniority or experience and that the schedules are made up on the basis of availability; that someone with 100-percent availability gets preference over someone with limited availability for the same shift; and that this has always been the rule.

¹⁴ Wancowicz testified that in addition to permanent availability, another change that was announced at the March 30 meeting was that employees could not swap cruises directly with other employees.

¹⁵ On March 30 Graham would have been working at Denny’s Restaurant from 3 to 11 p.m.

her handwritten note at the bottom of Respondent’s Exhibit 26, namely, “Wed employee meeting at 6 pm!” refers to the seasonal mandatory meeting of the employees that was held in 1994 on Wednesday, March 30. Wancowicz sponsored Respondent’s Exhibits 37(a), (b), and (c), which are writeups to Sara Derrenberger, Mark Potter, and Matt Potter, respectively, for missing the mandatory March 30 meeting. Wancowicz signed on the “SIGNATURE OF EMPLOYEE” line of the forms. He also did this on Graham’s writeup, General Counsel’s Exhibit 34, for failing to attend the mandatory meeting. A list of those people who attended the March 30 meeting or provided a reason why they could not attend, which according to Wancowicz’s testimony is incomplete, was received.¹⁶

In response to Bona’s direction to henceforth submit permanent availability, Roberts submitted an availability sheet showing that she was available only for double shifts on Saturdays. General Counsel’s Exhibit 38. She testified that she never advised Wancowicz that she was available in 1994 to work evenings or Sundays.¹⁷

Jelenko testified that on March 31 she received a telephone call from Wancowicz asking her where she was on March 30; that she reminded him that she had told him on March 29 that she was not going to be able to attend the meeting; that he said that she should have reminded him; and that she told him that she did not believe that was necessary because she had already told him that she was not able to attend and he had said, “[O]kay.”

Toward the end of March or the beginning of April Respondent hired 14 people for its wait staff.

In April, according to the testimony of Bona, Wancowicz started working full time and he began handling his personnel responsibilities.

Also in April Milowicki was scheduled for four cruises. He spoke to Wancowicz about this, indicating that it appeared that the new people were getting more cruises than the older people. Wancowicz said, according to Milowicki’s testimony, that he had “screwed up or something.” On cross-examination Milowicki testified that in April 1993 the new people did not get as many cruises as the older people because the new people were engaged in rehearsals and shakedown cruises; that he was available for 15 cruises that were booked and believed that if he had been scheduled for one half of these he would have been satisfied; and that he was scheduled for three cruises and since a customer asked for him for a cruise, he had four cruises in April. Wancowicz testified that he did not remember any employee complaining in April about their scheduling.

On April 1 Wancowicz telephoned Monica Gudaitis. She testified that he told her that she was scheduled to work that Sunday but the schedule had not come out yet; that he told her that her son was scheduled to work that Saturday morn-

¹⁶ G.C. Exh. 28. G.C. Exh. 29 is the same list with check marks and some “doodling.” According to G.C. Exh. 30, which is a letter from Bona to the Board, the following employees did not attend the March 30 meeting but they did provide a legitimate reason before the meeting to the Respondent for not being able to make it: Bender, Tami Howie, Dorothy Eddy, Strader, Pie, Bobby Kelly, and Jelenko.

¹⁷ Roberts testified that R. Exh. 40, a note that refers to availability, was given to Respondent in the summer of 1992. It is noted that while Roberts, according to Respondent’s business records, was terminated on June 24, the note refers to “August.”

ing and she told Wancowicz that her son could not work that Saturday; that Wancowicz said that it did not matter and he would speak to her son; and that he asked her why she did not attend the March 30 meeting or phone and she reminded him that she previously told him that she could not attend the meeting and would call him only if there was a change in her prior plans. Later that evening Monica Gudaitis spoke with her son and told him about having to work on April 2. She testified that her son said that the Respondent knew that he could not work on April 2 and he would telephone Wancowicz.

On April 2 Graham returned home about 10:30 p.m. and had two telephone messages on his answering machine. The first message was from Wancowicz and it was that Graham was scheduled to work that night. The second message was also from Wancowicz who said, "It's 4:30, Walt and you're not here and you're scheduled and you really, really . . . have to work tonight. It's very important that you be here tonight." Graham testified that the cruise would have been over at that point in time.¹⁸

¹⁸ Graham testified that subsequently, he could not remember exactly when other than it was not on the morning of April 3 and it may have been the week after the first week of April, (1) Monica Gudaitis telephoned him and told him that he was not on the schedule for the month of April and that she had heard from one of the bartenders that Graham had been fired, and (2) one of the waitresses, Roberts, told him that Wancowicz told her that he fired Graham because he did not show up for a shift. On cross-examination Graham testified that Monica Gudaitis said that Pie said that Wancowicz said that Graham was terminated because he did not show up for work on April 2. Also Graham testified that after he heard these rumors he made no effort to telephone the Company because "I was very busy with my other job. And, frankly, was making more money and it just wasn't that important to me." Graham testified that he did not see any need to contact the Respondent on April 3 to indicate that he received the messages, he did not know in advance that he was scheduled for April 2 and he needed a schedule. In the beginning of April, he believed that it was on the fourth, Graham began working for another company, Carpet Care, Inc., as an independent contractor who was able to adjust his hours. Graham's affidavit to the Board reads, "On April 2, 1994, I was working at my job, Carpet Cleaning, returning home at about 10:30 p.m." Also while it refers to Monica Gudaitis telling him that he was fired, there is no reference in the affidavit to Roberts. Subsequently, Graham testified that he was aware of the fact that another employee had missed a scheduled cruise without telephoning in beforehand; that he was not aware that the employee was terminated for missing one scheduled cruise; that usually it took something in addition to missing one scheduled cruise for the Company to actually terminate the employee; that to his knowledge neither Monica Gudaitis nor Roberts mentioned missing the March 30 meeting in their telephone calls to him about being fired; and that they only referred to the April 2 cruise. Monica Gudaitis testified that she thought that Graham telephoned her after he had spoken with Roberts; and that she told Graham that she had heard that he was fired and that on the April schedule that she had his name was on the first 2 weeks of the schedule and his name was removed off the last 3 weeks of the schedule. Tomaino testified that she telephoned Graham twice after he did not show up for his shift and she left messages on his machine; and that he was eventually taken off the schedule when he did not telephone in or contact someone at Respondent. Wancowicz testified that he took Graham off the schedule after he did not show up for his cruise and he did not telephone in response to management's telephone calls; and that he did not terminate Graham. Wancowicz testified that he did not tell Roberts that he terminated Graham because he missed shifts; and that Graham did not receive

In the beginning of April employee Michael Gudaitis was told that he was terminated. Bona testified that Wancowicz made the decision to terminate Michael Gudaitis without any input from her. Wancowicz testified that he alone decided to terminate Michael Gudaitis; that the basis for his decision was the fact that Gudaitis missed the March 30 mandatory meeting and his scheduled April 2 shift, he had two other prior 1993 writeups,¹⁹ and the policy is three writeups and you can be terminated; that he wrote up one of the prior writeups; that Michael Gudaitis telephoned him on April 2 and Gudaitis said that he heard that he was written up for not coming to the March 30 meeting; that he told Gudaitis that he missed "today's" shift that was April 2, that was his fourth writeup and he was going to have to let him go; that while there were other employees who have had four writeups and not been discharged, those employees, unlike Gudaitis, "fought for their job" and he gave them another chance; that if Gudaitis had been more contrite he might have been given his job back; and that Gudaitis did not argue about being fired. Wancowicz conceded that Gudaitis' March availability sheet, Charging Party's Exhibit 1, which Respondent had in its possession at the time of the 4 p.m. March 30 mandatory meeting, shows that Gudaitis was not available during that day. Wancowicz also testified that Gudaitis was not scheduled to work at Respondent for the entire month of March and, therefore, he would not have received his April schedule with his paycheck; and that he tried to contact Gudaitis several times regarding being sched-

a written discipline for his failure to show up for this cruise. Two new hires, Amos Jones and another employee described as Andrew M., did not show up for their first scheduled shift and they were fired. R. Exhs. 41 and 42 were received by stipulation of the parties, with the indication that they reflect that Graham began working for Carpet Care, Inc. on March 30 and continued, as here pertinent, at least through April 30. The latter exhibit lists a number of jobs that Graham performed for Carpet Care on April 2. On rebuttal Monica Gudaitis testified that her copy of the April schedule, C.P. Exh. 10, which she received sometime after March 28, has Graham's name on the first and second page of the schedule but it does not appear on the other pages of the schedule. Albeit she asserted at one point that she had it on April 1 (which is unlikely in light of her prior testimony that Wancowicz telephoned her on April 1, indicating that the April schedule was not out yet), Monica Gudaitis was not able to testify as to exactly when she received the April schedule other than to testify that she had it when she received her May schedule because she made some notes on the back of her April schedule regarding her May schedule.

¹⁹ According to Wancowicz' testimony, writeups can stay in an employee's file indefinitely for years and be considered in taking subsequent disciplinary action. Michael Gudaitis' four writeups, along with his payroll change (termination) form, were received in evidence as R. Exh. 1. The oldest of the 1993 writeups was from Wancowicz on June 30, 1993, for not showing up for work. The other 1993 writeup was from Manager Thomas on September 9, 1993, which indicates as follows: "CALL SAID HE WAS GOING TO BE LATE AND DID NOT SHOW UP OR CALL." Wancowicz testified that he never gave a copy of any of the writeups to Gudaitis and he, Wancowicz, did not know if Gudaitis was aware of the writeups; that the idea of having writeups is to warn the employee to change his or her behavior; and that there is a line on the writeup, which is titled "WARNING SHEET," for the signature of the employee and Gudaitis' signature does not appear on any of the warning sheets.

uled to work on April 2 but he did not succeed.²⁰ Wancowicz further testified that he was aware that Gudaitis worked in a pawn shop on Saturday and Wancowicz could not recall Gudaitis ever working at Respondent on a Saturday during the day; that, nonetheless, he scheduled Gudaitis to work during the day on Saturday April 2; that one of the other bartenders scheduled to work on that cruise, Derrenberger, did not show up, she received her fourth write-up for this but she was not fired because when he telephoned her on April 3 to tell her that he was letting her go she argued with him and talked him out of firing her; and that he knew that Gudaitis worked on Saturdays at the pawn shop and was not available to work on Saturday, April 2, at Respondent. Wancowicz was sure that Michael Gudaitis was on the April schedule for April 2 when it was put out on March 25 and Wancowicz was pretty sure that Monica Gudaitis, Michael's mother, was at the mandatory March 30 meeting. Subsequently, he testified that he was sure that Monica Gudaitis did not attend the March 30 meeting. Also Wancowicz testified that if there was no availability sheet for Michael Gudaitis for April 1994, Wancowicz would have referred to Gudaitis' March availability sheet in determining when he would have been scheduled in April; and that Gudaitis' March availability sheet showed that he was not available during the day for any Saturday in March. Jelenko testified that in the approximately 4 years that she worked for Respondent only once or perhaps twice was she scheduled notwithstanding the fact that her availability sheet showed that she was not available.²¹ Michael Gudaitis, who started working for Respondent in April 1991, worked as a bartender in 1994 and who signed a union authorization card and went to union meetings, testified that he signed his February 1994 availability sheet, General Counsel's Exhibit 12;²² that in the third week of February 1994 he began working at Greenmount Loan and Jewelry; that he did not prepare his March 1994 availability sheet, Charging Party's Exhibit 1, and he believed that his mother, Monica Gudaitis, prepared it and submitted it to Respondent; that he was not scheduled for any cruises in March;²³ that when his mother

told him on March 28 or 29 about the mandatory March 30 meeting at Harbor Cruises, he asked her to advise Respondent that he had to work at his other job and he would not be able to attend the meeting; that about 4 p.m. on April 1 he learned from his mother that he was supposed to work the next day, April 2; that later on the evening of April 1 and at 9:15 a.m. on April 2 he telephoned Harbor Cruises but no one answered the telephone; that he was not able to telephone again during the remainder of the day; that the following Monday or Tuesday he heard from his mother and a friend who works for Respondent that Respondent had terminated him; that on April 5 he telephoned Wancowicz and asked him what his job status was; that Wancowicz told him that he had been let go for not showing up for the March 30 meeting and for not coming to work on Saturday, April 2; that he told Wancowicz that if he looked at the availability sheet it would have been clear that he was not available to go to the meeting or come to work; that when Wancowicz said, "[T]hat's the way it is" Gudaitis said, "[O]kay"; that Wancowicz told him in mid-1993 that he had a writeup; that in mid-1993 his car broke down on the way to work and he telephoned Respondent and spoke to Bona and later to Thomas; that he took a cab to the harbor but the boat had already left; that no one ever said anything to him about this incident and he did not believe that he was written up over the incident; that in all the years that he worked for Respondent he could not recall another instance of being scheduled when he had indicated that he was not available; and that it was routine for employees to have other employees take their assignments and verbally advise a manager of the situation. On cross-examination Michael Gudaitis testified that he lived with a roommate for 1 year and 2 months in Parkville, Maryland, until the end of February when he moved in with his grandmother; that he had received telephone calls from Respondent at the Parkville apartment; that there was an answering machine at that apartment; that he did not change the telephone number Respondent had for him when he moved in with his grandmother; that, to his knowledge, the last telephone number that the Company had in its records was for the Parkville apartment; that for evening cruises the bartenders are supposed to report for work at 5:30 p.m.; that with his job at Greenmount, which includes Saturdays, he could not arrive at the harbor until about 6:40 p.m.; that notwithstanding this, his March availability sheet shows him being available all evenings except Sundays; that he was available for moonlight cruises, which do not go out until 10 p.m. or other special cruises that go out at 8 p.m. or later; that since he did not work at Greenmount on Thursdays he could be at the harbor at 5 p.m.; that at times he had been told that if he could be in by 7 p.m. when the cruise leaves, his bar would be ready for him; that his availability to work in March was greatly reduced from his availability to work in February because of his job at Greenmount, which he started on February 19; that the individual who he got a job with Respondent, Michael Gaskill, had a full-time job but otherwise Gudaitis did not know Gaskill's availability for March 1994; that he was told of his April 1994 schedule at the very end of March, after the March 30 meeting, by his mother; that at about 9:15 a.m.

²⁰ Wancowicz testified that he left one message on an answering machine about missing the March 30 meeting and about the April 2 schedule; and that on the following day he telephoned and again left a message on the answering machine to find out if Gudaitis was coming to work.

²¹ Regarding the one time that she testified that she was sure of, earlier Jelenko had described this 1993 situation in terms of being scheduled to work and finding a replacement so that she could go to Maine. She went on to testify that at the time employees were allowed to find someone to work their shifts for them and then inform management in writing or they could go directly to management and management would find someone. With respect to putting it in writing, Jelenko testified that no one ever did it. Graham testified that three or four times in 1993 he was scheduled to work when he was not available; that normally he tried to find a replacement and when he was not able to he would telephone the office and tell management that he could not make it. Also Graham testified that in 1993 many times people were scheduled for shifts when they had previously indicated that they were not available.

²² The schedule shows that he was available every Saturday in February during the day and evening.

²³ He discussed this with Bona who told him to speak to Wancowicz. He telephoned Wancowicz twice in March but was unable to contact him. According to Michael Gudaitis' testimony, his

roommate, who he had obtained a job for at Harbor Cruises, was getting cruises in March when Gudaitis was not.

on April 2 he telephoned Respondent's office and one of its boats to indicate that he could not work that day but no one answered; that coworker Bender and his mother told him that he may have been fired;²⁴ that he never saw Respondent's Exhibit 1, his June 30, 1993, writeup before the hearing herein; that at the time Wancowicz did not tell him why he was getting a writeup; and that he did not know that he received a writeup for the time that his car broke down. On redirect Michael Gudaitis testified that on February 14 he had the conversation about arriving late because of his other job with either Wancowicz or one of the other managers, "Kenny," apparently referring to Thomas; and that he was told "[g]et in here by 6:30 or so, your bar will be ready for you." Strader testified that another of Respondent's employees, Richard Siskowitz, had two writeups and asked to be able to miss work due to family matters; that his friend Siskowitz was told Respondent was short staffed, he could not have the time off and if he took the time off he would be fired; and that his friend did take the time off and was not fired. Monica Gudaitis testified that she was told by Mary Tricario, a boat manager, that she understood that Matt and Mark Potter, Derrenberger, and Graham were all fired;²⁵ that she contacted her son; that she told her son to contact someone at Respondent because it was her understanding that he was no longer employed there; that after her son told her that he was fired, she, as noted above, telephoned Bona who, after reviewing Gudaitis' son's availability sheet for March and seeing that he was not available on Saturday mornings, told Gudaitis that her son could "come in and talk to John about getting his job back"; that she told her son what Bona said; that her son did not subsequently talk to Wancowicz; that her son told her that he was fired unjustly and he did not need to speak to Wancowicz about that; and that her son said that the only John he needed to speak to was John Singleton, the attorney for the Union. Bona testified that Monica Gudaitis telephoned her on the day that her son Michael was terminated; that on his March schedule that she was looking at he was available for the involved Saturday cruise; that she could not find an April schedule for Michael; that when Monica said that her son was not available for the involved cruise, she, Bona, said "fine . . . [t]ell Michael to call John, come in and sit down and we'll talk about it";²⁶ that Michael was terminated for missing a Saturday

²⁴ His mother testified that she heard that he had been fired for not reporting for work on April 2, and on Monday or Tuesday, April 4 or 5, respectively, she told him that he had to check his job status. Subsequently her son telephoned her to tell her that he had been fired. On Wednesday, April 6, she telephoned Bona and asked her to check her son's availability sheet for April. Bona could not find Michael Gudaitis' April availability sheet but rather referred to his March sheet. When his mother pointed out to Bona that even his March sheet showed him as unavailable for the involved cruise, Bona told her to have her son come in and talk to Wancowicz about getting his job back.

²⁵ Tricario testified that she did not know what happened to Graham, only that she just did not see him anymore; and that Wancowicz did not say anything about this.

²⁶ Bona testified that she was not going to overrule the decision without a conversation with Wancowicz and Michael; that she subsequently told Monica to tell Michael to come in and talk to John, "[t]his situation can be changed," when Monica told her that Michael only wanted some late hours or some moonlight cruises; and

morning cruise and the office is open from 9 a.m. to 5 p.m. on Saturday; and that there are reservationists who sell tickets out of that office on Saturdays and they would answer the telephone if someone was calling in to indicate that they were having a problem getting in. Tomaino, who handled discipline in 1992 and 1993, testified that the policy was if an employee received more than three writeups they were terminated; that she had given employees in this situation another chance; and that it was not her practice to have employees sign warnings but she indicated to the employees verbally that they had a warning.²⁷ When he was recalled, Wancowicz testified that he telephoned Michael Gudaitis at the number he had given Respondent; that he left a message on the answering machine; that in the past when he left messages on that answering machine he was able to contact Gudaitis; that Michael Gudaitis did not give him a different telephone number for March; and that he never received an April availability sheet for Michael Gudaitis. Wancowicz testified that when he mistakenly put Richard Osikowicz on the schedule when he had previously indicated that he would not be available, Wancowicz took care of it without requiring this employee to ask for forgiveness and he did not give this employee a warning; and that this employee and Michael Gudaitis were in the same situation, namely that they were scheduled when they were not available.²⁸ Further Wancowicz testified that he had Michael Gudaitis' daytime work phone number at the pawn shop in his Rolodex.

On April 9 Monica Gudaitis asked Wancowicz for a copy of her April availability sheet. He could not find her son's April sheet. According to her testimony, later that day on the Lady Baltimore she overheard Wancowicz tell Tricario, "I fired her son, I just haven't gotten her yet" when Tricario asked him why Monica was upset. On cross-examination Monica Gudaitis testified that when Wancowicz could not find her son's April availability sheet she asked him how he could have lost it and he said that he did not know. Wancowicz testified that when Tricario asked him why Monica was upset he merely said that "I just fired her son so she is upset"; and that he did not say that he was going to fire Monica also.²⁹

On April 20 Milowicki submitted his May availability sheet, General Counsel's Exhibit 17. On it he indicated that he would not be available on May 8 and May 25-31.

that Respondent has given employees their jobs back when they ask for this indicating that they will remedy their ways.

²⁷ Tomaino sponsored R. Exhs. 23(a)-(r) and R. Exhs. 25(a) and (b), which are records of discipline issued to a number of different employees. Some involve employees who were terminated after receiving three writeups for not showing up for shifts, not showing up on time or not showing up for a mandatory meeting or rehearsals. The last two above-described exhibits are warning sheets to Bender and Strader, respectively, where Wancowicz in April signed above the area designated "SIGNATURE OF EMPLOYEE."

²⁸ Wancowicz pointed out that Osikowicz did specifically tell him that he would not be available and to determine Michael Gudaitis' availability, he, Wancowicz, had to look at his March availability sheet.

²⁹ Tricario corroborated this, adding that she never heard Wancowicz make any reference to any employment plans that he had for Monica Gudaitis. Tricario voted in the election pursuant to a stipulation by the parties that she is a "Bartender/Substitute Manager."

According to her testimony, Monica Gudaitis, sometime between the middle and the end of April or even the beginning of May, found another job in a restaurant. She testified that she took the job at the restaurant before she saw her May schedule at Respondent. Gregory Hanna, the owner of The Middleboro Inn in Essex, Maryland, testified that, as shown by Respondent's Exhibit 34, Monica Gudaitis worked for him in April, May, and June; that she applied for the position on or about April 13, and she began her training on April 20; that she told him that she was leaving Harbor Cruises and she wanted to work full time for him; that throughout her employment with him she continued to work for Harbor Cruises, indicating that her lawyer told her that she had to continue to work for that Company because she was involved in litigation with it; that she told him that she wanted to leave Harbor Cruises because that Company changed from tips to an hourly rate; that she never worked full-time shifts for him; and that when his schedule for her conflicted with Harbor Cruises' she would work for the latter. On rebuttal, Monica Gudaitis testified that she looked for this job because "[o]n April 2 six people are fired out of the old people."³⁰ Also, she testified that before she went to The Middleboro Inn, Pie told her that Pie had been told that "in May, they're going to get the rest of the people out by their availabilities. They're going to schedule when they're not available."³¹

Between the middle of April and April 25 Wancowicz telephoned Roberts, who lived near Annapolis, Maryland, to ask if later that month she could go to Annapolis, meet one of Respondent's boats, and work a wedding. Regarding this approximately 45-minute conversation, Roberts testified that she told Wancowicz that she was going to another wedding that day and she could not take the shift; that Wancowicz asked her if she could work during the week and she told him that she could not; that she had a 6-year-old child who was in kindergarten; that Wancowicz said that he had to let Graham go because he did not show up for work; that Wancowicz said that he was going to have to let Bender go because she kept calling in ill; and that Wancowicz brought up the Union and he made the following statement:

[T]hat Judy Jelenko had taped a meeting, and that was illegal. The union had filed charges against the company, and there was going to be another election, but there would be new employees, and they wouldn't vote a union in.³²

According to her testimony, after this conversation she telephoned Monica Gudaitis and told her that Graham had been fired and that Bender was going to be fired. Also she telephoned Graham and left a message for him to call her. About 1 week later Graham telephoned her and she told him what she heard. She was given a single cruise on each of the four Saturdays in April that she was available for double

³⁰She specified "Matt, Mark, Sarah, Mike, Walt Graham . . . [and] Tina Bender."

³¹This was not offered nor was it received for the truth of the matter asserted.

³²Albeit she referred to this telephone conversation with Wancowicz in her May 21 affidavit to the Board, Wancowicz' alleged statement about Jelenko recording the meeting was not included in the affidavit.

shifts. As noted above, Wancowicz denied that he told Roberts that he fired Graham for missing shifts. Wancowicz also denied making the statement about the objections, another election and how new employees would vote, and he denied that he told Roberts that he might have to discharge Bender and that he was aware that Jelenko had taped the February 24 meeting.

A staff meeting was held on April 27. The General Counsel introduced a notice that indicates the meeting was mandatory, General Counsel's Exhibit 35. Wancowicz testified that he never sent the notice out, the meeting was not mandatory and no one was disciplined for not attending the meeting.

Raychella Smith was hired by Respondent on April 28. She worked on 15 cruises in May. Charging Party's Exhibit 8. Smith had indicated to Respondent that she was 100 percent available.

When she discovered that she was being scheduled for weekday evenings on the May schedule notwithstanding the fact that she had indicated on her permanent availability sheet that she was only available for double shifts, Roberts spoke to Wancowicz, explaining that she had a child-care problem and it was almost impossible for her to get to work during the week. According to her testimony, Wancowicz did not give her a response and she complained to him on two other occasions. She recalled that she worked Monday evening May 9 with quite a bit of difficulty but she was not able to recall whether she worked on other scheduled weekday evenings in May. She worked on three Saturdays in May with one of them being a double shift.

In May Milowicki was scheduled for three cruises. Wancowicz told him that he "screwed up again" and he was having a problem scheduling a month in advance.

Bethaney Galloway's May availability sheet, the bottom half of General Counsel's Exhibit 19, shows that she was available for evening cruises May 1-6, 8-12, and 16-18.³³ Also she was available during the day on Sunday May 1 and 8. She was unavailable for (1) the third Sunday in the month, (2) all Saturdays in the month, and (3) the remainder of the month because she was on her honeymoon. Additionally, Galloway gave Wancowicz a note, Respondent's Exhibit 10, on which she indicated "I can't . . . work from Thursday May 19th-June 9th. Do not schedule me any Wednesday nights or any days M-F also I can't work til 5:00 on Saturdays." According to Galloway's testimony, the last sentence in the note quoted above referred to her availability in June. Galloway testified that Respondent scheduled her for four cruises in May but she was not available for one that was scheduled during her honeymoon. Galloway also testified that as far as tips are concerned evening cruises are better than day cruises and that weekend evening cruises are generally the best; that, as indicated on General Counsel's Exhibit 19, she was available for, among others, evening cruises on May 2, 3, 4, 6, 8, and 11 but she was not scheduled for any of these cruises; that the wait staff was made up of all new hires on the May 2-4, 6, and 8 cruises described above; and that similarly in April she was available for specified evening cruises but she was not scheduled for these cruises,

³³She was hired by Respondent in 1992. Galloway went to union meetings and apparently signed a union authorization card. Galloway testified that she believed that the Company had no idea as to her opinion concerning the Union.

which were manned in part by new hires on the wait staff. Galloway also testified that she did not believe that it was possible that Respondent mistakenly listed her as unavailable on the schedule for the Wednesdays of May 4 and 11 because of her above-described note that states, in part, “[d]o not schedule me any Wednesday nights”; and that she told Wancowicz to schedule her on as many cruises as possible so she would have money to go away for her honeymoon. Tricario testified that she heard Galloway express a preference to work on the deck where a dinner was being served instead of a deck where a prom was being held because of the chance for gratuities on the former.

Monica Gudaitis thought that she first saw her May schedule in the first week of May. According to her testimony, since she did not have a cruise scheduled that week, she did not focus on the schedule until the next week. She testified that every other prior year she worked 15 to 22 cruises in the month of May;³⁴ that for May 1994 she was scheduled for 10 cruises and she was not available for 7 of them; that while she had experienced scheduling mishaps before, it never reached 7 out of 10 cruises in 1 month;³⁵ that she only had 3 cruises in May; that when she telephoned Bona to complain about this Bona said, “Well, I assume that you won’t be in for the rest of the month”; and that the next day

³⁴ Initially she testified that in May 1993 she was available for 45 of a possible (if there was a cruise for every slot) 62 cruises or in other words, about 73 percent of the time. Subsequently she testified that she was out of school by May 14, 1993. Her May 1994 availability, G.C. Exh. 20, which is the permanent availability sheet she submitted in April, shows a 38-percent availability for May 1994. By note dated April 26, Monica Gudaitis advised Wancowicz that she needed May 1 and 7 off. As demonstrated by R. Exh. 12, on May 9 Gudaitis “went home.” She testified that the boat was overstaffed so she and another waitress went home; and that this occurred when fewer people than anticipated showed up. R. Exh. 14 is a note from Monica Gudaitis to “John” indicating “Tuesday through Friday nights [.] If needed for lunch [.] I can be there at 11:30 AM [.] Saturday—lunch & dinner available [.] Sunday either lunch or dinner not both unless you have no one else. Mondays off.” Gudaitis could not recall when she submitted this note. Also while she did not draft one of the three notes included in R. Exh. 13, namely, “Mon–Fri no morning [.] no on Monday night [.] Tue–Fri yes evening [.] Sat Double [.] Sun—Lunch or Dinner but not Both [.] Monica G.” she believed that she telephoned this information in the beginning of September or the end of August 1994 after she had started school. Gudaitis did not write nor did she recall the circumstances of the two other notes on the exhibit, namely, “Thur night Sat morning.” and “Monica No Mon [.] Tue [.] Wed[.]” She believed that the latter referred to September 1994. Gudaitis conceded that she let management know that she did not like to work wedding cruises but she did not believe that she told management that she did not want to work “kids” cruises. Bona testified that employees working kids’ cruises received minimum wage, they received \$2.12 an hour and a pre-tip for lunch cruises, \$2.12 an hour plus pre-tip and cash tips for dinner cruises, and minimum wage plus shift pay for weddings; and that some employees have expressed a preference not to work weddings or kids’ cruises. Tomaino testified that Monica Gudaitis indicated that she disliked weddings, kids days, and proms; that Milowicki, who is a professional singer, did not like working kids days; and that Galloway, who is a very good entertainer, asked not to be scheduled for kids days or weddings.

³⁵ She estimated that it occurred with her a total of five times in 5 years.

she sent the following letter, General Counsel’ Exhibit 24, to Respondent:

May 12, 1994

Attention: Harbor Cruises,

I’am [sic] just writing this letter to inform Harbor Cruises that due to my schedule or lack of . . . I have been forced to find employment elsewhere. In five years of being employed with Harbor Cruises, scheduling and availability has never been a problem before. In April, as requested, I gave a permanent availability. My availability states that I can’t work Tuesday’s Thursday’s or Saturday and Sunday mornings. As a result, I have been scheduled for ten shifts for the month of May, in which, seven shifts I’am [sic] not available. On top of all that, in the past years of employment at Harbor Cruises I have never had less than 18 to 22 cruises for the months’ of April and May. Consequently, I can’t financially survive on this amount of work. Therefore, I have found a new job. This letter is to inform Harbor Cruises that I’am [sic] not quitting my job; however; my availability has changed to Saturday and Sunday day times (DAVID TOURS ONLY.) Also, I’am [sic] available Monday thought [sic] Friday evening.

In conclusion, I have been informed by Kitty Boma [sic] that I have been a model employee for the past five years. Therefore, this only leads me to believe that Harbor Cruises wants to get rid of me as a direct result of UNION ACTIVITY. After the election, I was lead to believe Kitty wanted me to remain as an employee on a positive note. Obviously, your standards and ethics aren’t what you portray or you are oblivious to the problems at hand.

Subsequently, Monica Gudaitis contacted the Union to have an unfair labor practice charge filed. The charge, General Counsel’s Exhibit 1(c), was filed on May 19. Bona testified that Wancowicz scheduled other employees to work cruises in May when they were not available and the May schedule was a “mess”; that May was the first busy month that Wancowicz scheduled by himself; that after she spoke to him in May about the fact that the schedule did not reflect who was coming in, Wancowicz made fewer mistakes because he commenced using a computer program and a 2-week schedule; and that she received the above-described letter from Monica before she had her May telephone conversation with Monica and, therefore, there was not anything that she could give Monica because she had already indicated in the letter that she could not work anything other than David Tours on the weekend. Wancowicz testified that Bona spoke to him about the way he was doing the schedule in that it was not clear to her, in looking at the schedule, who was going to show up for a cruise; that Monica Gudaitis did not speak to him before writing the above-described letter to Bona; that he did not review the schedule to see if there had been a mistake concerning her scheduling and her availability; that he would have looked at her April availability, General Counsel’s Exhibit 20, to work up her May schedule but said availability does not match with the schedule; that he could not explain why; that he also scheduled Diana Smith in May

when she was not available;³⁶ that he begins the scheduling process with the employees who have indicated 100-percent availability but he does not give them all of the cruises; that he tries to honor preferences that employees have expressed; that employees have complained that they are not getting enough cruises; that Respondent's Exhibit 33(b) and (e), respectively, show which May cruises Monica Gudaitis and Smith were available for and which cruises they were scheduled for;³⁷ and that Monica Gudaitis asked him if she could go home after showing up for the May 9 cruise.³⁸ On rebuttal Monica Gudaitis testified that she had the same availability since February and Respondent did not have any problem with not scheduling her Tuesdays and Thursdays until she was scheduled every Tuesday and Thursday in May.

Roberts testified that on May 9 there were not enough passengers for all of the wait staff that was scheduled and Galloway and Monica Gudaitis went home.

Sometime in late May or early June, according to the testimony of Roberts, Tomaino told her that Wancowicz was ranting and raving because Roberts was not working the shifts that he was giving her and Tomaino told Wancowicz, "John schedule her doubles on Saturdays. That's when she could work. She has problems with child care if you schedule her during the week."

According to her testimony, Galloway came back from her honeymoon the second week of June and while she was available for 21 shifts in June beginning with June 10, she worked only about 7 cruises. She was available during the day Sunday, and every evening except Wednesday. As shown by Joint Exhibit 2 Galloway was scheduled on a cruise on June 10, two on June 11, one on June 12, one on June 13, one on June 17, one on June 18, one on June 19, one on June 21, and one on June 24. Also she was scheduled for cruises on June 20, 26, and 27, but these are circled and Galloway was not sure if this meant that she was originally scheduled for the cruise but for some reason someone else took the cruise. Galloway testified that on several occasions in June Wancowicz telephoned her and told her that she was being canceled from the cruise because they did not need her to work.

Milowicki testified that since June 1994 the number of cruises he received was at least 50 percent off his previous years.³⁹ On cross-examination Milowicki testified that he may have been scheduled for 13 cruises in June. He also estimated when he testified herein that while in 1993 he earned a gross of about \$6000 working for Respondent, in 1994 he would only gross about \$3000.

³⁶ Wancowicz testified that he could not explain why he scheduled Smith at times she indicated on her application, R. Exh. 31, that she was not available; that according to her note to him dated "4-29-94," C.P. Exh. 6, she was available to work except on Monday through Friday from 7 a.m. to 3 p.m.; and that in light of this note, the indications on R. Exh. 33(e) that she was unavailable for certain May cruises are incorrect. Wancowicz pointed out that when he prepared the May schedule he did not yet have the above-described note.

³⁷ R. Exh. 33(b) includes unavailability based on an expressed preference. R. Exh. 33(c) covers the availability and scheduling regarding employee Andre Gwynn.

³⁸ R. Exh. 12 shows that Galloway also "went home."

³⁹ He estimated that in 1993 he averaged 12 dinner cruises a month in July, August, and September.

Monica Gudaitis testified that her June scheduling was not too bad; and that, after having the above-described Board charge filed, she received "a few decent schedules compared to what . . . [she believed] everybody got."

On June 20 Roberts started working at Kiddie Academy International. Her hours are from 8:30 a.m. to 6 p.m., Monday through Friday. She interviewed for the job the week before. Roberts testified that after she pays for day care, her weekly net pay on that job equals what she could almost earn in 1 day working for Respondent.

General Counsel's Exhibit 40, which is a payroll status change form of Respondent with the date "6/24/94" on it, indicates that Roberts was discharged and that Wancowicz, who signed the form, included on it "would not rehire." Earlier Wancowicz testified that he could not remember if he had discharged Roberts. Subsequently, he testified that he had problems with her attendance before he prepared her discharge. Although documents introduced herein indicate that Roberts did not go on some of her scheduled cruises in June, Wancowicz did not know whether her absences were excused. Regarding Saturday shifts in June, Roberts was scheduled for a double shift on June 4, a double shift on June 11, a single shift on June 18, and a single shift on June 25. Roberts testified that the June 11 double shifts were canceled; that she was sick on June 18 and did not take the shift; that she asked Wancowicz if she could work the evening shift on June 25 so she could have a double shift, indicating that he had all the new people scheduled on doubles; and that she probably did not work the June 25 shift because after paying for parking and gas it was not worth it to go in and work a single shift.

An employee meeting was held on June 25. The General Counsel introduced two lists of employees and an agenda for the meeting, General Counsel's Exhibit 35. Wancowicz testified that he did not recall any employee being disciplined for failing to attend this meeting.

After June Roberts did not work for Respondent. She testified that she was not scheduled anymore; that Respondent was mailing the schedules and she no longer received one; and that she worked double shifts on Saturdays for the entire 1993 season. Roberts also testified that she did not contact Respondent when she did not receive a schedule because she "got tired of fighting about it."⁴⁰

In July employees began to receive schedules which only showed their own schedule and not the schedule for all of the wait staff. Milowicki and Strader pointed out that this precluded them from determining whether anyone else was receiving preferential treatment. Strader also pointed out that this approach made it difficult to determine whether someone else might be able to work for him. Bona testified that before 1993 employees received just their individual schedules.⁴¹ Wancowicz testified that he began using the printout format

⁴⁰ Additionally Roberts testified that she did not like Wancowicz' attitude; the way he treated her when she did work. More specifically, Roberts testified that Wancowicz was rude and nasty to the people who were working at Respondent; and that although he knew that she was a hard worker, he would single her out to do things.

⁴¹ Apparently Tomaino changed this in 1993 and she allowed the employees to switch their schedules with other employees. Tomaino testified that in 1992 she gave each employee their individual 1-week schedule; and that she discontinued this practice and went to a 1-month schedule.

for scheduling in July after he was shown a computer program that met his needs.⁴² Milowicki was off on July 4 in 1994 but not in 1993.

According to Galloway's testimony, in July she asked for a leave of absence for the entire month because she hurt her shoulder. During this period she continued to work during the day for Galloway Pool Service, a family business, doing bookkeeping and billing.⁴³ Also she started working Monday and Saturday evenings for that company beginning the first week in July.⁴⁴

In July, according to her testimony, Monica Gudaitis had two or three cruises a week, which she described as "pretty decent cruises." Respondent's Exhibit 35 was offered to show the number of cruises in July and August and the number of times Monica Gudaitis was unavailable. According to Wancowicz, Monica Gudaitis was not available for Monday through Friday day cruises in July and August.⁴⁵

Strader testified that in mid- or late July he became concerned about not being scheduled. He spoke to Bona and Tomaino about this. Also Strader testified that he obtained a job with Respondent for one of his friend's, James Johnson; that he trained Johnson; and that although he was making \$1.50 more an hour than Johnson, Johnson was earning more money at Respondent than he was. On cross-examination Strader conceded that Johnson, who was hired after the third month in 1994, was able to work days while he was not.

On July 22 Derrenberger, according to a payroll status change,⁴⁶ was "taken off schedule would not put back on

⁴² See, for example, R. Exh. 36. He put two sheets covering 2 weeks with the paychecks. Assertedly the entire schedule was not given to the employees "[b]ecause it would be mass confusion, they wouldn't understand it." Subsequently, he testified that it was not his belief that it would cause mass confusion; and that one employee Sherry Phillips was totally confused about the one part of the print-out that she received.

⁴³ She began working for that company in April 1994 and at the time she worked Monday through Friday, 9 a.m. to 5 p.m.

⁴⁴ That company's evening hours cease at the end of October.

⁴⁵ Citing R. Exh. 35, Wancowicz pointed out that Smith, who was available 100 percent, received 12 shifts in July while Monica Gudaitis received 17; that employee Melanie Rose, who was unavailable for about the same number of shifts as Gudaitis, received 12 cruises versus 17 for Gudaitis in July; and that employee Marie Davis, who was available 100 percent of the time, had 13 cruises.

⁴⁶ G.C. Exh. 37. The exhibit contains nine warnings and a July 18 letter that reads as follows:

Dear Sarah,

I would like to take this opportunity to wish you luck in your new job. Due to your limited availability now, and conflict in work hours, I am taking you off of my schedule. The last two shifts you were scheduled, no one showed and management was not aware.

Thank You,
John Wancowicz
Vessel Manager

Wancowicz testified that one of the warnings was for not attending the March 30 mandatory meeting; that another of the warnings was for not showing up for her scheduled shift on April 2, which is the same day Michael Gudaitis did not show up, and at this point in time she had five writeups; and that he treated her differently than Michael Gudaitis because she "fought for her job" and he did not. Also, Wancowicz pointed out that he took into consideration the fact

schedule." Wancowicz testified that this did not mean that she was terminated.

Monica Gudaitis testified that in July and August she worked some Saturday mornings after she mentioned to Bona that although Gudaitis was available Wancowicz was not scheduling her. Gudaitis also testified that like July in August she received pretty decent cruises. As noted above, Respondent's Exhibit 35 was offered to show the number of cruises in July and August, and the number of times Monica Gudaitis was unavailable. As noted above, it is also used for the purpose of comparing the number of cruises Gudaitis received vis-a-vis other employees in terms of their unavailability.⁴⁷

In August, according to her testimony, Galloway was only available on the evenings of Tuesday, Thursday, and Friday and she was not scheduled for any cruises.⁴⁸ At the time of the hearing this continued to be Galloway's availability. She estimated that whereas she earned about \$3000 at Respondent in 1993,⁴⁹ she was only going to earn about \$1000 in 1994.

By letter dated August 5, General Counsel's Exhibit 8, Bona advised Kimberly Suerth,⁵⁰ who is Monica Gudaitis' sister, as follows:

Dear Kim,

I am writing to confirm whether you have any interest in employment with Harbor Cruises.

that Derrenberger had two children and her ex-husband did not support them.

⁴⁷ For example, in August Rose was unavailable for 24 cruises versus 23 for Gudaitis, and Rose received 14 cruises while Gudaitis received 11 cruises. Davis, who was available 100 percent of the time on August received 13 cruises in August.

⁴⁸ In her "7/29/94" note to Wancowicz, the top half of G.C. Exh. 19, Galloway, after indicating that she could only work Tuesdays, Thursdays, and Fridays, writes "[b]efore I took my leave my scheduling wasn't alway[s] consistent so I had to take extra hours at my day job which will start Aug. 1st." Galloway testified that "which will start Aug. 1st" refers to Tuesdays, Thursdays, and Fridays since she added the extra hours to her day job starting July 1.

⁴⁹ Galloway estimated that in 1993 she had an average of 3 cruises a week in April, 4 or more a week in May, 6 a week in June, and 8-10 a week during the peak season which Galloway indicated is June, July, and August. Jt. Exh. 1 shows that she was scheduled for a total of 10 cruises from May 10, 1993, to the end of that month, 11 in all of June 1993, and 13 for the entire month of July 1993. Galloway pointed out that the Exhibit indicates that "this may increase" and, therefore, there may have been cruises added and she may have worked on these added cruises. With regard to her availability in 1993, Galloway testified that she may have been available from May 19 to June 9; that she was available for the month of July; and that she was available a lot more than just Tuesday, Thursday, and Friday evenings in August.

⁵⁰ This same letter, dated August 5, R. Exh. 8, was sent to Graham, except that the second paragraph in the body of his letter reads as follows:

When you failed to report for your scheduled shifts the week of March 28, 1994, and we had no contact from you (despite our efforts to contact you), I assumed you no longer had any interest in employment with Harbor Cruises and, as a consequence, you were no longer carried on the schedule.

Graham worked three cruises in October but when he went to work for another company, McCann-Erickson, his availability to work for Respondent after October became zero.

When you failed to report for Harbor Cruises mandatory pre-season staff meeting on March 30, [19]94 and we had no contact from you (despite our efforts to contact you), I assumed you no longer had any interest in employment with Harbor Cruises and, as a consequence, you were no longer carried on the schedule.

If you are interested in returning to work, please contact me. I am making this an unconditional offer to you. If you choose to return, your rate of pay will be the same as when you last worked, in addition, you will be scheduled for work on the same basis as every other employee in your department. We will also need an availability from you so we can match it against our cruise schedule.

I would appreciate hearing from you within seven (7) days of your receipt [sic] of this letter if you are interested in returning or have any other questions concerning this matter. If we do not hear from you, we will assume you have no interest in returning to Harbor Cruises at this time.

Bona testified that Suerth was a cheerleader for a professional football team, she traveled, and she would go for months without working for Respondent; and that the reason that she wrote to Suerth (and Graham) was because the Board included her (and him) in its letter indicating which employees had been terminated. Tomaino testified that in November 1993 Suerth told her that she was going out of town and that she would get in touch with Tomaino when she returned so that she could be put back on the schedule; that she told Suerth to call her when she came back to town; and that she never heard from Suerth. Wancowicz testified that he did not schedule Suerth for April; that he did not receive an April availability sheet for her; that he did not terminate Suerth; that he was told in March by her sister, Monica Gudaitis, that Suerth, who is a model, was on a "shoot" in Japan for a couple of weeks and when she came back, she had other things to do; and that Suerth never contacted him to say that she wanted to be placed on the schedule or ask him why she was not on the schedule. On rebuttal Monica Gudaitis testified that she did not have a conversation with Wancowicz in the spring of 1994 regarding Suerth; that she did not advise him that Suerth was going to Japan; that Suerth did go to Thailand in October; that she did have a conversation with him about that; and that she was sure that in April she did not discuss Suerth with him.

Milowicki testified that he always takes off his birthday, August 10; and that notwithstanding the fact that he had indicated that he is not available on his birthday he has been scheduled in the past and has had to find someone to work his shift. Also he was on vacation from August 29 until September 9 or 10. Wancowicz sponsored Respondent's Exhibit 38, which is a copy of four notes regarding Milowicki's availability. Two of the notes speak to availability in August and July.

In September Monica Gudaitis returned to school. She advised Wancowicz that she was available on Friday evening and Saturday evening.

On September 13 Suerth forwarded the following letter, General Counsel's Exhibit 8, to Bona:

Dear Kitty:

I received your letter concerning my employment with Harbor Cruises.

I was never notified about the mandatory meeting, as you implied and I did give my availability to Monica to turn in with hers and I was not put on the schedule. Also, I was never notified, that I was no longer employed by Harbor Cruises. I was told, when I called, by another employee that my name had been taken off the schedule.

I appreciate your unconditional offer, but, I will need to talk to you about future availability.

According to Strader's testimony, Wancowicz said in November that he was sent to Respondent to get rid of the old blood. Wancowicz testified that he told Strader that Wancowicz wanted "to get rid of the dead wood that's on here, I want people on here who want to work, who don't just want to come in and get a paycheck and goof off."

Analysis

Paragraphs 5(a), (b), and (e) of the complaint, as amended, allege as follows:

5. Respondent, by Kitty Bona:

(a) On or about February 22, 1994, at a restaurant on Belair Road in the Fullerton area of Baltimore County, Maryland, coerced employees by telling them that, even if the Union won an impending Board election, the Respondent did not have to sign a contract, that the Union would put employees on strike, causing them to be replaced, and that Respondent's owner would go to any lengths to frustrate the Union's attempt to win employee support and/or thereafter to bargain on their behalf.

(b) By the remarks above in subparagraph (a), also stressed the futility of employees attempting to bargain collectively through the Union.

(e) On a number of occasions, the exact dates and locations being unknown to the undersigned, informed employees that if they selected the Union, the Respondent would only be able to communicate with employees through a steward, thereby indicating that employees would not be permitted to approach the Respondent directly, but rather would have to come to the Respondent through the Union.

Counsel for General Counsel contends, on brief, that the credibility of Bona is completely undermined by that portion of her testimony concerning the February 24 meeting which testimony was given before the tape recording of the meeting was introduced in this proceeding; that Bona's February 22 meeting with Monica Gudaitis and Pie appears to have been a practice run for Bona's address to unit employees a few days later; that Bona painted an overall picture of futility; that the effect of Bona's numerous unlawful remarks, topped with the veiled threat of unspecified retaliation for Gudaitis' union activity would likely erode the confidence of the most adamant union supporter; that by repeating many of the same coercive statements on February 24, Bona reinforced for Monica Gudaitis and Pie what was said at their private meet-

ing; and that under the totality of these circumstances, it must be found that Bona's conduct on February 22 would tend to coerce employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a), (b), and (e) of the complaint, as amended. Respondent, on brief, argues that the Company did not initiate this meeting; that what was said at this meeting is in dispute; that General Counsel failed to establish exactly what Bona said; that the Company distributes literature to its employees which accurately set forth the parties' respective rights and obligations; and that there is no evidence that Bona's remarks were disseminated by Gudaitis. Bona did not contradict Monica Gudaitis' testimony about what was said at this meeting. For the reasons stated below, I did not find Bona to be a credible witness. None of her challenged testimony, except that which is corroborated by a credible witness, will be credited. On the other hand, I found Monica Gudaitis to be a credible witness. She may have been mistaken at times but, unlike Bona, I do not believe that she ever intentionally attempted to deceive. Monica Gudaitis' uncontradicted testimony about what was said by Bona at this meeting is credited. Although Pie initiated this meeting, Bona set the tone of the meeting. The tone was not informative. It was not a discussion of the possibilities. Rather, it was coercive. Bona did not deny that during this meeting she told the two employees present that the owner of the Company, Stappler, when he found out that Bona was going to this meeting said that Monica Gudaitis was heading up the union activity; and that Monica Gudaitis' job was salvageable but Stappler plays hardball and he will do whatever he has to do. Albeit Bona said that the Union "could" (she did not say "would" but considering the fact that it would not be the prerogative of the Respondent it is understandable why she did not use the latter term) put the employees out on strike, this statement followed her assertion that the Company could tear up proposed agreements. In other words, it was Bona's position that the Union would have no alternative. Bona was not just discussing the possibilities. Bona was telling these two employees that Respondent would be in control of the situation, it would frustrate the negotiating process and the only thing the Union could do about it would be to take the employees out on strike, which could have dire consequences for the employees. Bona stressed the futility of employees attempting to bargain collectively through the Union. Because Respondent did not truly have an open-door policy before the organizing campaign, Bona's statement that with a shop steward the employees would not be able to communicate with the office people anymore also was unlawful.⁵¹ Bona's February 22 remarks were unlawful

⁵¹ As Bona conceded numerous times during her February 24 statement, those who were in the office did not in the past listen to complaints from employees about the way things were being done. They might have listened to Jelenko tell them about her personal problems but listening to employee complaints about the involved operation was quite something else. When one employee attempted to complain about tips he was disciplined assertedly for the manner in which he presented his complaint. When Galloway, who was acting as a spokesperson for employees in November 1993 at the behest of Respondent, attempted to convey some concerns of the employees, she was told by Supervisor Tomaino that Bona wanted to fire her over the matter. Galloway was, however, able to convince Tomaino that none of the complaints that the employees signed off

and they violated the Act as alleged in the amended complaint, as set forth above.

Paragraphs 5(c)(1) through (5) and paragraphs 6 and 7 of the amended complaint allege as follows:

5. Respondent by Kitty Bona:

. . . .
 (c) At a captive-audience meeting of Respondent's employees convened by Kitty Bona, on or about February 24, 1994, aboard Respondent's vessel stated to the assembled employees:

(1) That the granting of health and vacation benefits through collective bargaining would put the Respondent out of business.

(2) That, if employees were represented by the Union, the Employer could bargain up to a year without reaching agreement and so oblige the Union to call a strike, during which employees could be lawfully replaced and be reinstated only if and as openings occurred, and thereby Respondent stressed the futility of employees attempting to bargain collectively through the Union.

(3) That, if employees chose to be represented by the Union, the Union would constitute a mediator between employees and the Respondent, thereby implying that employees would not be permitted to approach the Respondent directly but rather would have to come to the Employer only through the Union.

(4) That the Respondent knew of employees who had attended meetings conducted by the Union, and thereby Respondent threatened and coerced its employees by suggesting that their concerted protected activities were subject to surveillance by the Respondent.

(5) That the Respondent would grant unspecified improvements in wages, hours, and/or working conditions, impliedly on condition that employees would withhold their support from the Union in the upcoming Board election.

. . . .
 6. Respondent, by Theresa Tomaino at the captive-audience meeting referred to in paragraph 5(c) above, impliedly promised unspecified improvements in wages, hours, and/or working conditions if employees would withhold support from the Union in the upcoming Board election.

7. Respondent, by Martis Read at the captive audience meeting referred to in paragraph 5(c) above, impliedly promised unspecified improvements in wages, hours, and/or working conditions if employees would

on even applied to her, Galloway. At the time he testified herein Strader believed that his title was still bar manager, a title he was given by Bona in the summer of 1993, notwithstanding the fact that he was eligible to vote in the election. As noted in R. Exh. 15, Strader met with Bona as "bar manager." Monica Gudaitis' testimony that Bona did not make any changes recommended by the grievance committee Respondent established was not refuted. Since there was no real open-door policy, Bona was not telling the employees about a change in such policy. Rather she was threatening to deprive them of their right under Sec. 9(a) of the Act. *FGI Fibers*, 280 NLRB 473 (1986), does not apply to the situation at hand.

withhold support from the Union in the upcoming Board election.

On brief, counsel for the General Counsel contends that the remarks of Respondent's officials on February 24 overstepped the bounds of statutory protection and constitute violations of the Act; that Bona's remarks contrasting Respondent to General Motors and Bethlehem Steel and indicating that health benefits and vacations were the kind of thing would put "this business right out of business" were not phrased as to what might happen but rather it was a statement of what would happen, it was not linked to any specific objective financial data, the context in which it was made gave it a coercive resonance conveying to employees the futility of unionization and, therefore, the remarks violated the Act as alleged in paragraph 5(c)(1) of the amended complaint, *Matheson Fast Freight, Inc.*, 297 NLRB 63 (1989); that the remarks of Bona and Tomaino gave no objective basis for asserting that there would be a strike after bargaining went on for a year without progress and the implication of Respondent's remarks, when considered in their entirety, is that Respondent (1) would reject any and all union proposals regardless of their character, and (2) intended not to bargain in good faith, making a strike inevitable, and, therefore, Respondent violated the Act as alleged in paragraph 5(c)(2) of the amended complaint in that it unlawfully stressed the futility of employees attempting to bargain collectively through the Union, *Forrest City Grocery Co.*, 306 NLRB 723 (1992); and *Evans Brothers Barber & Beauty Salons*, 256 NLRB 121 (1981); that Bona's misstatement of the law that employees would have to go through a shop steward to speak to her gave the employees the false impression that union representation would deprive them of the important right to communicate directly with their employer, would tend to dissuade employees from supporting the Union and, therefore, violates the Act as alleged in paragraph 5(c)(3) of the amended complaint; that by informing employees that she knew that some of them went to union meetings, Bona created the impression of surveillance of employees' union activity and thereby, especially in the context in which the remarks were made here, violated the Act as alleged in paragraph 5(c)(4) of the amended complaint, *Honeycomb Plastics Corp.*, 288 NLRB 413 (1988); that a prominent theme of Respondent's presentation was its willingness to truly listen to employee complaints and work with employees to remedy their grievances without the addition of a union; that when Bona said, "[O]ne way or the other with or without we are going to all have to get together and meet on some terms with or without a union [and] I'm hoping its going to be without" Respondent violated the Act as alleged in paragraph 5(c)(5) of the amended complaint; that when Tomaino said, "We are working on new policies, we are working on putting everything together for this year just like we did last year at the beginning of the year we introduced the new tip policy and you know you all say that we don't listen to you but we do listen." Respondent violated the Act as alleged in paragraph 6 of the amended complaint; and that when Galley Supervisor Redd indicated that in the galley department he was working to make "everyone feel needed or wanted within the job family," that he was talking, apparently with Bona, about conditions in the galley department, and that employees could talk to him and he would "listen

to them," Respondent violated the Act as alleged in paragraph 7 of the amended complaint. Respondent, on brief, argues that Bona's remarks regarding health and vacation benefits putting the Company out of business were no more than an expression of what the Company's bargaining position would be on a particular contract demand; that Bona merely informed the employees that the Company had a legal right to reject any proposal that it did not agree with, and she emphasized that the Union had the same right; that it was clearly stated that a strike was the employees' option; that there was no threat of a lockout; that any coercive effect that may otherwise be ascribed to the Company's statements regarding the collective-bargaining process was negated by the fact that there was an opportunity for employees to reply and for employees to make an independent evaluation; that during the campaign the employees were provided by the Company with written communication describing the collective-bargaining process and the rights of the respective parties in that process; that in *FGI Fibers*, 280 NLRB 473 (1986), the Board held that an employer's statement that employees would be required to deal with the employer through shop stewards in the event the union won the election was not objectionable conduct; that with respect to Bona's comment that she was aware the some employees supported the Union, there was no suggestion that this knowledge was obtained through surveillance; that the Company has for years maintained an "open door" policy, and the Board has long held that where an employer has an established practice of soliciting and resolving employee grievances the employer may continue that activity during organizing activity; that for a violation of the Act there must be a promise of a particular change; that the Company indicated that the implementation of its unspecified plans was going to occur with or without the Union; and that Bona's statements regarding upcoming changes for the 1994 season was consistent with the Company's established practice of announcing policy changes and revisions in a group meeting at the outset of each new season.

At the outset of the hearing counsel for the General Counsel called Bona, Tomaino, and Wancowicz and had them testify about what occurred at the February 24 meeting. Either these witnesses did not know that a tape recording was made of what was said at this meeting or they were mistakenly under the impression that such tape was not admissible.⁵² All three of these witnesses testified that Bona read from a script, deviating only to answer the questions the employees asked. The tape recording demonstrates that this was not the case. Counsel for the General Counsel succeeded in undermining the credibility of all three of these witnesses at the outset of the hearing.

As there is a tape recording of the February 24 meeting it is not necessary to rely on testimony regarding what was said. In my opinion, for the reasons given by counsel for the General Counsel on brief, as set forth above, Respondent violated the Act as alleged in paragraphs 5(c)(1) through (5) and 6 and 7. Bona did not say that Respondent "could" go out of business over health and vacation benefits. Bona said that Respondent "would" go out of business. No specific financial data was provided to the employees.

⁵² Recordings, such as the one involved herein are admissible. *Wellstream Corp.*, 313 NLRB 698 (1994).

The implication of Bona’s remarks about bargaining and a strike was that Respondent would not bargain in good faith and that the only option that the Union would have would be to go out on a strike. Bona was telling the employees that it would be futile for them to select the Union.

As noted above, Respondent never really had an open-door policy. Therefore, Bona’s remarks about when there is a shop steward management and the employees can no longer talk to each other is a violation of the Act. Bona was not telling the employees of a change. Rather she was telling them that if the Union won the employees’ right under Section 9(a) of the Act would be denied.

On brief, as noted above, Respondent argues that when Bona said that she was aware that some employees supported the Union she did not suggest that this knowledge was obtained through surveillance. The problem with this argument lies in the fact that Bona did not say that she was aware that some employees supported the Union. Obviously because a petition had already been filed, some employees did support the Union. And that conclusion could have been reached without suggesting surveillance. What Bona said, however, was ‘I know there are several people who have gone to union meetings, that have attended things, and that’s your priority.’ This is quite a different statement. Although Bona may have been referring to what she was told by Monica Gudaitis on February 22, Bona did not qualify her statement to indicate that this was the case. Respondent did not show that the employees who were listening to Bona on February 24 understood where Bona obtained the information. As Bona’s statement suggests surveillance it violated the Act.

Respondent did not have an established practice of conducting meetings such as the one it conducted on February 24. Monica Gudaitis’ testimony that this was the first time that Respondent had given her a meal was not refuted. This was not the normal beginning of the season meeting. Employees were intentionally left by management with the impression that their terms and conditions of employment would improve and that this should occur without the presence of the Union. Respondent violated the Act as alleged in paragraphs 5(c)(5) and 6 and 7 of the amended complaint.

Paragraphs 5(d)(1), (2), and (3) of the amended complaint allege as follows:

5. Respondent by Kitty Bona

. . . .
(d) At a meeting in her office at the Respondent’s facility, on a Sunday before the election in Case 5–RC–13990, the exact date being unknown to the undersigned, conveyed to employees:

- (1) An implied threat of job loss if the employees selected the Union;
- (2) That, if employees selected the Union, the Respondent would go out of business;
- (3) That, if employees selected the Union, the Respondent did not have to sign a contract, thereby conveying the futility of employees attempting to bargain collectively through the Union.

The General Counsel, on brief, contends that by repeating the same unlawful statements made on February 24 in her meeting with Jelenko, Bona again coerced an employee in the exercise of Section 7 rights. On brief, Respondent argues

that in her testimony, Jelenko admitted that Bona’s alleged statement concerning the effect on the Company of having to provide paid vacation and insurance benefits was phrased as a possibility, i.e., that the expenses associated with such benefits ‘‘could’’ put the Company out of business; and that Bona is not alleged to have stated that such a result was ‘‘likely’’ or even ‘‘probable.’’ On a Sunday, 6 days before the election Jelenko was summoned to meet with Bona. Jelenko was not working that day. Just the two of them were present in Bona’s office. In my opinion, Respondent violated the Act as alleged in the amended complaint, except that the evidence of record shows that on the involved day Bona only spoke to Jelenko and not to ‘‘employees.’’ Although subparagraph (2) of 5(d) alleges that Bona conveyed ‘‘[t]hat, if employees selected the Union, the Respondent would go out of business’’ (emphasis added), Jelenko testified that Bona said ‘‘could.’’ This alone, however, in my opinion, does not make the statement lawful. The statement must be viewed in the context in which it was made and it must be viewed in light of the fact that again Bona did not refer to any objective data which would support this assertion or demonstrate that the situation would be beyond Respondent’s control.

Paragraph 8 of the amended complaint alleges as follows:

8. (a) Respondent, by John Wancowicz in one or more telephone conversations with employees on or about April 15, 1994, stated he, Wancowicz, had been told by Kitty Bona that, with respect to finding work for an influx of newly hired employees, experienced employees could be expected to quit if given little work, adding that this scheduling of employees was the way Bona wanted it.

(b) By Wancowicz’ remarks stated in subparagraph 8(a), above, Respondent coerced and threatened employee to cause them to abandon support for the Union.

As there is no evidence in this record that supports this allegation, it will be dismissed.

Paragraphs 9 and, as here pertinent, 11 of the amended complaint allege that the following conduct was unlawful:

9. The Respondent, by John Wancowicz:

- (a) On or about April 1, 1994, terminated employee Michael Gudaitis.
- (b) On or about April 1, 1994, eliminated work-assignments to its employee Kimberlee Suerth.
- (c) On or about April 8, 1994, terminated employee Walter Graham.

. . . .
11. The Respondent engaged in the conduct described above in paragraph 9 and its subparagraphs . . . because the employees referred to therein joined and assisted the Union and/or because of Respondent’s belief that they had done so, and in order to discourage employees from supporting the Union or engaging in other concerted activities protected by the Act.

The General Counsel, on brief, contends that when the enforcement of a disciplinary rule is discretionary with the employer, it must demonstrate, to meet its *Wright Line*⁵³ bur-

⁵³ 251 NLRB 1083 (1980).

den, that the discipline under the rule was uniformly imposed, *Associated Milk Producers, Inc.*, 259 NLRB 1033 (1982); that the record contains numerous incidents establishing that Respondent harbored antiunion animus that continued after the March 26 union election; that Respondent's postelection conduct was timed to rid Respondent's operation of union supporters, cast a chilling effect on those who remained, and insure the Union's defeat in a rerun election; that the record leaves no doubt that Respondent knew that Monica Gudaitis and Walt Graham supported the Union and that the core of the union support came exclusively from the bartenders and wait staff held over from the 1993 season; that given Wancowicz' remark to Strader revealing the discriminatory motive for his actions against the experienced wait staff, which he referred to as "old blood," it is unnecessary for the General Counsel, in proving a prima facie case, to prove the employer's knowledge of a specific employee's union sympathies or activities, *American Warehousing & Distributing Services*, 311 NLRB 371 (1993); that under *Wright Line*, supra, the General Counsel has made a prima facie case and Respondent had failed to persuade by a preponderance of the evidence that it would have taken these same actions even in the absence of the employees' protected concerted and union activity; that Monica Gudaitis' son, Michael, was disciplined for missing the March 30 meeting even though Wancowicz knew in advance of the meeting that Michael Gudaitis had a former obligation that day; that Wancowicz was unable to give any meaningful explanation for the disparity in his treatment of Michael Gudaitis and Osikowicz; that Wancowicz did not write up Graham for missing shifts on April 2 and 4 and Wancowicz did not give any meaningful explanation for this; that the disciplinary warnings of March 30 and April 2 were a pretext, designed to justify Michael Gudaitis' discharge for discriminatory reasons; that Wancowicz failed to adequately explain the disparate treatment of Derrenberger who had more warnings than Michael Gudaitis on April 4 and many more thereafter but she was never discharged; that Respondent had failed to establish by a preponderance of the evidence that it would have disciplined and discharged Michael Gudaitis regardless of his union activity or the fact that the leading union adherent was his mother; that Bona knew that Graham was a union sympathizer before the election; that Respondent planned Graham's discharge well in advance of his April 2 absence; that Respondent failed to notify Graham of the mandatory March 30 meeting; that when Graham telephoned Respondent's facility twice during the week of March 28 he was told that the April schedule was not available; that when the schedule for the entire month did come out Graham's name was not on it; that Roberts credibly testified that in April Wancowicz told her that Graham was discharged for missing a shift; that Respondent failed to present any evidence to refute Graham's claim that at Carpet Care he was an independent contractor, and as such he could adjust his Carpet Care schedule around that of Respondent; and that Respondent has failed to establish by a preponderance of the evidence that it would have discharged Graham even absent his union activity and a long time association with Monica Gudaitis. Respondent, on brief, argues that the General Counsel must first establish that the employees in question engaged in union activity and that the employer had knowledge of the employees' union activity; that assuming the

General Counsel can make this showing, antiunion animus as a motivating factor must also be established; that there is no evidence that the Company was aware of the identities of the employees who supported the Union, except Monica Gudaitis; that there is un rebutted testimony that the Company encouraged Michael Gudaitis, through his mother to talk to Wancowicz about the matter with the expectation that he could likely get his job back, as others had before him; that Suerth had no interest in working for the Company after the union election, "as evidenced by her lack of response to the Company's letter of August 5, 1994, offering her unconditional reinstatement"; that Graham was also taken off the wait staff schedule due to his apparent disinterest in working for the Company; that Graham's name was removed when the April schedule was revised in mid-April to reflect the fact that he had failed to report for any of the shifts he had been scheduled for during the first 2 weeks of the month; that Graham never telephoned Wancowicz back but rather chose to rely on what he was told by Monica Gudaitis and Roberts; that Graham attached no importance to his job at Respondent because in March he had secured full-time employment elsewhere; and that Graham knew before the election that he might be taking another full-time job after the election but he remained employed with the Respondent long enough to vote in March 26 and then he never came back.

Michael Gudaitis should not have received a writeup for not attending the March 30 meeting. On March 28 Wancowicz asked Monica Gudaitis if her son could attend the Wednesday March 30 meeting. She had already told Wancowicz that her son worked days on Wednesday, among other days. Michael's mother placed Wancowicz on notice that her son probably would not be able to attend the meeting and he, Wancowicz, should get in touch with him. She gave Wancowicz her son's daytime work telephone number. Although Wancowicz testified that Michael Gudaitis did not give him a different telephone number for March, Wancowicz conceded that he had Michael Gudaitis' daytime work telephone number of the pawnshop in Wancowicz' Rolodex. There is a conflict in the evidence as to whether the meeting began at 4 p.m. (Wancowicz) or at 6 p.m. (Bona). But Wancowicz specifically conceded that the availability sheet of Michael Gudaitis, which Wancowicz had in his possession at the time, showed that Gudaitis was not available during the day. Monica Gudaitis had advised Wancowicz that her son could not get to the harbor on, as here pertinent, Wednesdays until about 6:40 p.m. Wancowicz knew in advance of the meeting that Michael Gudaitis could not attend it. On the one hand, Wancowicz did not discipline other employees who advised him verbally that they could not attend the mandatory meeting. On the other hand, he did discipline Michael Gudaitis for not attending the meeting even though he, Wancowicz, knew in advance of the meeting that Michael Gudaitis could not attend. Michael Gudaitis was treated disparately.

Again on April 2 even though Wancowicz knew in advance that Michael Gudaitis could not work a Saturday day shift Wancowicz scheduled Gudaitis to be at the harbor when Wancowicz knew that Gudaitis could not be there. Again Wancowicz treated Michael Gudaitis disparately for when another employee, Oscikwocz, was scheduled when he was not available, he was not disciplined. Michael Gudaitis

should not have been disciplined for March 30 or April 2.⁵⁴ As argued by the General Counsel, the warnings were a pretext designed to justify Michael Gudaitis' discharge for discriminatory reasons. Michael Gudaitis signed a union authorization card and he attended union meetings. As noted above, Bona, at the February 24 meeting said that she knew of employees "who have gone to union meetings." Strader and Roberts are credited with respect to what Wancowicz told them regarding Respondent's intent. Respondent set out to get rid of the older employees (those who worked for the Company in 1993) who it knew supported the Union (Monica Gudaitis told Bona that all but two employees among the bartenders and wait staff were asked to sign a union authorization card and they did) either by terminating them or by reducing their hours thereby causing them to look for employment elsewhere. Respondent knew that it had violated the Act. Respondent knew that there was going to be another election. It expects that the new employees will not vote for the Union. The record made herein contains numerous instances of Respondent's union animus. When, as here, the Employer unlawfully targets a group of employees, viz., the employees among the bartenders and wait staff who returned to Respondent after the 1993 season, it is not necessary to show that Respondent was aware of the union activity of each of the individual employees in this targeted group. *Davis Supermarkets*, 306 NLRB 426 (1992).⁵⁵

Suerth was unlawfully eliminated from the schedule on or about April 1. As noted above, I do not find Wancowicz to be a credible witness. The reason that he gave for taking Suerth off the schedule was refuted by Monica Gudaitis.⁵⁶ Suerth was a member of the targeted group. Suerth also was the sister of Monica Gudaitis.

Wancowicz waited to the day of the scheduled cruise, April 2, before telephoning Graham. Roberts' testimony that Wancowicz told her that Graham was let go for not showing up for work is credited. Roberts, along with Monica Gudaitis, told Graham that he was fired. Graham, who had an alternative source of income at the time, did not inquire of Respondent why this action was taken.⁵⁷ Graham was

⁵⁴ And even if Michael Gudaitis deserved these warnings, which he did not, Wancowicz did not provide a sufficient justification for treating him disparately in the light of the treatment of Derrenberger.

⁵⁵ If this issue were decided under *Wright Line*, supra, the General Counsel has made a prima facie case and the Respondent has not shown that it would have terminated Michael Gudaitis absent its discriminatory motives.

⁵⁶ Even if Tomaino's testimony on this point was credited, and it is not, Wancowicz did not testify that he was relying on what Tomaino may or may not have known. Rather, Wancowicz testified that he was relying on what Monica Gudaitis told him. If this issue were decided under *Wright Line*, supra, the General Counsel has made a prima facie case and the Respondent has not shown that it would have eliminated Suerth from the work schedule in April absent its discriminatory motives.

⁵⁷ In the prior season Graham worked his schedule at Carpet Care around his schedule at Respondent. He intended to do the same in 1994. He could work any hours he chose at Carpet Care. At one point Graham testified, "Quite frankly, I'm 60 years old and cleaning carpets is not an easy job for a 60 year old. It's a hell of a lot easier working on board a ship. So I definitely would work my schedule with Carpet Care around anything that I could do on board the ship." Graham's testimony is credited. As he did in 1993, he would have preferred to work on the ship. Because he was in the

taken off the schedule. Wancowicz did not write a letter to Graham when this action was taken as Wancowicz did with Derrenberger. Instead Wancowicz let it be known among the employees that Graham had been fired. Graham was a member of the targeted group. Moreover, he told Bona that he had been a union member, he knew the benefits of a union and the Union could take the monkey off her back regarding scheduling. The fact that Graham chose not to telephone Wancowicz, as did Michael Gudaitis, does not change the legal ramifications. Just as there was no termination letter for Michael Gudaitis, so too there was no termination letter for Graham.⁵⁸ Respondent violated the Act as alleged in paragraphs 9 and 11 of the amended complaint.

Paragraphs 10 and, as here pertinent, 11 of the amended complaint allege as follows:

10. On or about May 1, 1994, the Respondent, by its agents Bona and Wancowicz, reduced the work assignments of the more experienced employees of its wait staff including, but not limited to, Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts, in favor of employees newly hired for the 1994 season without prior experience.

11. The Respondent engaged in the conduct described above in . . . paragraph 10 because the employees referred to therein joined and assisted the Union and/or because of Respondent' belief that they had done so, and in order to discourage employees from supporting the Union or engaging in other concerted activities protected by the Act.

The General Counsel, on brief, contends that after the union campaigning was well known to Respondent, Respondent hired more crew than it needed and then scheduled these new employees in preference to the more senior experienced staff who initiated the union drive; that in May numerous cruises went out with only new or inexperienced personnel; that the older employees seeing the writing on the wall with the discharges of Graham and Michael Gudaitis and watching the problems in scheduling getting worse, sought additional outside employment as a necessary safety net; that Wancowicz was brought in to rid Respondent of union supporters; that Monica Gudaitis, Milowicki, Galloway, and Roberts were very good employees; that Wancowicz used a combination of scheduling techniques to deprive the most seasoned employees the hours, cruises, and ultimately income they had received in the past; that when the older employees asked about the situation, they received made up excuses, such as they had failed to turn in their schedules, or inadequate explanations concerning Wancowicz' incompetence; that when the protests of the experienced employees intensified, and after the unfair labor practice charges concerning reduced hours were filed, Respondent simply went underground with the scheduling, limiting employee access to the schedules of others by providing employees only their own schedules; that

targeted group, however, Respondent unlawfully denied him the opportunity.

⁵⁸ If this issue were decided under *Wright Line*, supra, the General Counsel has made a prima facie case and the Respondent has not shown that it would have terminated Graham absent its discriminatory motives.

there is no evidence that past problems were in the degree or kind of those experienced by the experienced wait staff following their attempt to unionize; that Respondent's attempt to rely on Wancowicz' ineptitude to justify its discrimination against employees for engaging in protected concerted activity is equally transparent; that given the number of cruises added to the work assignments of new employees after the schedules were generated, Respondent's schedules are not a completely reliable indicator of the disparity in cruise assignments between the experienced and the new employees; and that Respondent has failed to meet its burden under *Wright Line*, supra, that the work assignments of the experienced wait staff would have been as they were during the 1994 season had it not been for their known or suspected union activity. Respondent argues that the Company's scheduling practice had been haphazard for years; that there is no evidence that in 1994 employees were intentionally treated in a disparate manner or that the scheduling practices were consciously misapplied to selected individuals; that Milowicki had a limited availability in 1994 and the number of cruises he received during the 1994 season was solely a function of that availability; that the allegations regarding the purported reductions in the work schedules given to Galloway, Monica Gudaitis, and Roberts commencing in May all involve situations when the purported reductions were preceded by the employee securing other employment; that Roberts was scheduled for all but one of the Saturdays during April, May, and June; and that the record reflects that Monica Gudaitis was fairly scheduled "from June" in 1994.

Regarding Monica Gudaitis, the amended complaint speaks to what happened to her scheduling in May and not "from June." By June the charge and the amended charge had been filed. Monica Gudaitis was not fairly scheduled in May. Respondent had previously requested that the employees submit permanent availabilities. Monica Gudaitis did this. Yet in May her availability sheet showed that she was not available for 7 of the 10 cruises Wancowicz scheduled her on. The situation Respondent created had nothing to do with her other employment. The owner of the Middleboro Inn indicated that when there was conflict between her schedule there and at Respondent the latter received preference.

Indicating that Roberts was scheduled for all but one of the Saturdays in April, May, and June falls far short of giving the full picture of what Respondent did to her. Respondent had the employees turn in a permanent availability sheet. Roberts did. On it she indicated that she was available for double shifts on Saturday. She had no trouble getting double shifts on Saturdays during the 1993 season. Yet in April and May 1994 she was only scheduled for a total of one double shift on a Saturday.⁵⁹

Milowicki's availability had nothing to do with what Respondent did to him in May when he was scheduled for only three cruises for the entire month. Wancowicz' repeated ex-

cuse to Milowicki, namely, that he "screwed up again" does nothing more than focus on the fact that not only was Wancowicz discriminating against the older employee but he was telling him to his face that Milowicki could do nothing about the scheduling when Wancowicz continued to offer the same obviously false excuse.

Galloway received only three cruises in May. The fact that she was leaving for her honeymoon on May 19 and did not return until June 9 obviously affected her availability in May. Nonetheless, she was available for a number of cruises, she had asked Wancowicz to schedule her on as many cruises as possible because she needed the money for her honeymoon, and a number of the May cruises were manned, as here pertinent, strictly by the new employees on the wait staff. Respondent, as alleged, unlawfully reduced the work assignments of the more experienced employees of its wait staff.

Paragraph 12 of the amended complaint alleges that Respondent violated the Act as follows:

12. On or about March 30, 1994, the Respondent, by issuing the "Harbor Cruises Handbook," promulgated and since then has maintained, the following rule:

"Gripping to other employees or outsiders is not considered professional or appropriate manner to resolve problems."

On brief the General Counsel contends as follows:

It is well settled that employee discussions of wages and other terms and conditions of employment are an important part of organizational and protected concerted activity and absent unusual circumstances, which do not exist here, cannot be muzzled. *Universal Fuels, Inc.*, 298 NLRB 254 (1990), *International Business Machines Corp.*, 265 NLRB 638 (1982).³⁰ In this case, Respondent's rule admonishing employees that "gripping to other employees or outsiders is not considered professional or appropriate manner to resolve problems," was distributed as part of an official Harbor Cruises Handbook, which employees were required to sign, at a mandatory meeting within a week of the Union election. The rule, particularly when viewed in this context, sends a clear message that employees are not to engage in protected and concerted activity.

Further, while the rule does not expressly state the consequence of violations, it is settled law that to the extent such a rule is ambiguous, the ambiguity must be construed against the employer who promulgated the document. *International Association of Fire Fighters*, 304 NLRB 401, 433 (1991). In this case, the same employee handbook containing the rule, states the following policy regarding termination of employment: "Involuntary termination of employee: 'Any employee can be terminated at the sole and absolute discretion of the company.'" Employees reading the no-gripping rule together with the termination policy, could reasonably believe that any violation of the no-gripe rule could subject them to discharge. *Fire Fighters*, supra. Such a rule interferes with employees' rights to engage in activity protected under Section 7 of the Act. Accordingly, both

⁵⁹ And while she indicated on her permanent availability sheet that she was not available during the week (because she had a child-care problem that she explained to Wancowicz), Wancowicz scheduled her for cruises during the week and then he was heard "ranting and raving" when she was not able to take them. Tomaino did not deny Roberts testimony on this point. And Wancowicz did not deny that Tomaino said that Roberts should be scheduled for doubles on Saturdays because she has a child-care problem during the week.

the promulgation and maintenance of the rule should be found unlawful.

³⁰ Respondent had not come forward with any probative evidence of misconduct or unprotected conduct which would make such a rule necessary.

Respondent argues on brief that there is no testimony that this section was discussed at the March 30 meeting or that any employee understood it to apply to employee organizational activities.

I agree with the contentions of the General Counsel on brief. Respondent is mistaken in arguing that it is necessary to determine the employees' understanding. The standard applied is an objective one, not a subjective one. In promulgating and maintaining this rule, Respondent violated the Act as alleged in the amended complaint.

III. OBJECTIONS

The Petitioner's objections are as follows:

Objection No. 1: Employees were told by Employer representatives that if the Union sought certain benefits such as health insurance or vacation dates, "that it wasn't going to work" and would put the company out of business.

Objection No. 2: The Employer, through its representative, indicated to employees that selecting the Union would be futile because the Employer would not agree to any proposals and that the Union's "only option" would be to strike thus allowing the Employer to replace employees.

During the course of the meeting, numerous statements were made by both Kitty Bona and other Employer representatives in which they told employees that they do not have to listen to the Union and that there is nothing the employees could do about that, and that the Employer had the choice never to sign a contract and that they only thing that would happen to employees is that a "limbo" would be created where there was constant bickering.

Objection No. 3: The Employer, by its representatives, indicated to employees that should the Union come in they would be prevented from directly talking to employees about any problems.

Objection No. 4: The Employer by its statements created the impression of surveillance by indicating that they knew there had [been] meetings and they knew who had attended the meetings.

Objection No. 5: The Employer, by its representatives, solicited employee grievances and implied that they, would remedy them and had the power to do so after this "election business was over with."

As noted by the Petitioner in its objections, they speak to what was said by Bona and other representatives of Respondent at the above-described February 24 meeting. In his Report on Objections, General Counsel's Exhibit 1(L), the Regional Director for Region 5 concluded that the objections raise issues of fact and law that are substantially identical to the allegations contained in paragraph 5(c) of the amended complaint. As noted above, in my opinion Respondent has

violated the Act as alleged in each one of the five numbered subparagraphs under paragraph 5(c) of the amended complaint. Respondent contends on brief that it made no statements that constitute objectionable conduct warranting that the election be set aside. I disagree. These violations, considering the circumstances of this case, also constitute objectionable conduct. All of the Petitioner's objections have merit and should be sustained.

Because the Petitioner's objections should be sustained, it is recommended that the results of the election held on March 26 be set aside and that Case 5-RC-13990 be remanded to the Regional Director for Region 5 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

As Respondent's conduct was designed to and succeeded in interfering with the employees' exercise of a free and reasoned choice in the March 26 election, it is recommended that the Regional Director include in the notice of election to be issued the following paragraph consistent with the Board's decisions in *Lufkin Rule Co.*, 147 NLRB 341 (1964), and *Bush Hog, Inc.*, 161 NLRB 1575 (1966):

Notice to All Voters

The election conducted on March 26, 1994, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

On the basis of the foregoing findings of fact and on the entire record in this proceeding, I make the following

CONCLUSIONS OF LAW

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

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

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) On or about February 22, 1994, at a restaurant on Belair Road in the Fullerton area of Baltimore County, Maryland, coercing employees by telling them that, even if the Union won an impending Board election, the Respondent did not have to sign a contract, that the Union would put employees on strike, causing them to be replaced, and that Respondent's owner would go to any lengths to frustrate the Union's attempt to win employee support and/or thereafter to bargain on their behalf.

(b) By the remarks alleged above in the next preceding paragraph, also stressed the futility of employees attempting to bargain collectively through the Union.

(c) At a captive-audience meeting of Respondent's employees convened by Kitty Bona, on or about February 24,

1994, aboard Respondent's vessel stating to the assembled employees:

(1) That the granting of health and vacation benefits through collective bargaining would put the Respondent out of business.

(2) That, if employees were represented by the Union, the Employer could bargain up to a year without reaching agreement and so oblige the Union to call a strike, during which employees could be lawfully replaced and be reinstated only if and as openings occurred, and thereby Respondent stressed the futility of employees attempting to bargain collectively through the Union.

(3) That, if employees chose to be represented by the Union, the Union would constitute a mediator between employees and the Respondent, thereby implying that employees would not be permitted to approach the Respondent directly but rather would have to come to the Employer only through the Union.

(4) That the Respondent knew of employees who had attended meetings conducted by the Union, and thereby Respondent threatened and coerced its employees by suggesting that their concerted protected activities were subject to surveillance by the Respondent.

(5) That the Respondent would grant unspecified improvements in wages, hours, and/or working conditions, impliedly on condition that employees would withhold their support from the Union in the upcoming Board election.

(d) At a meeting in her office at the Respondent's facility, on a Sunday shortly before the election in Case 5-RC-13990 conveying to an employee:

(1) An implied threat of job loss if the employees selected the Union.

(2) That, if employees selected the Union, the Respondent would go out of business.

(3) That, if employees selected the Union, the Respondent did not have to sign a contract, thereby conveying the futility of employees attempting to bargain collectively through the Union.

(e) Informing employees that if they selected the Union, the Respondent would only be able to communicate with employees through a steward, thereby indicating that employees would not be permitted to approach the Respondent directly, but rather would have to come to the Respondent through the Union.

(f) At the captive-audience meeting on February 24, 1994, impliedly promising through Theresa Tomaino and Martis Read unspecified improvements in wages, hours, and/or working conditions if employees would withhold support from the Union in the upcoming Board election.

(g) On or about March 30, 1994, issuing the "Harbor Cruises Handbook," promulgating and since then maintaining the following rule:

Gripping to other employees or outsiders is not considered professional or appropriate manner to resolve problems.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) On or about April 1, 1994, terminating employee Michael Gudaitis.

(b) On or about April 1, 1994, eliminating work assignments to its employee Kimberlee Suerth.

(c) On or about April 8, 1994, terminating employee Walter Graham.

(d) On or about May 1, 1994, reducing the work assignments of the more experienced employees of its wait staff including Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts, in favor of employees newly hired for the 1994 season without prior experience.

5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act in any other manner.

7. By the conduct cited by the Petitioner in its objections, Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on March 26, 1994, in Case 5-RC-13990.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent terminated the employment of Michael Gudaitis, eliminated the work assignments to Kimberlee Suerth, and terminated Walter Graham, because of the union support of the more experienced employees, I shall order Respondent to, to the extent that it has not already been done, offer to Michael Gudaitis, Kimberlee Suerth, and Walter Graham immediate and full reinstatement to their former positions of employment discharging, if necessary, any replacements hired to fill their positions or, if they no longer exist, offer them substantially equivalent positions without prejudice to their seniority and other rights, dismissing, if necessary, any persons hired as replacements by Respondent.

Having found that Respondent unlawfully reduced the work assignments of the more experienced employees of its wait staff including Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts, I shall order Respondent to restore the work assignments to the seasonal level that existed prior to the filing of the petition for election on January 19, 1994, for the more experienced employees of its wait staff including, but not limited to, Monica Gudaitis, Beth Galloway, Eugene Milowicki, and Sheila Roberts.

Respondent shall be ordered to make whole the employees described in the next two preceding paragraphs for all losses suffered by them as a result of the unlawful discrimination against them. For those of the above-described employees who were unlawfully terminated or unlawfully taken off the schedule by Respondent, the losses will be computed from the date of discrimination against them to the date Respondent offers them reinstatement less their net earnings during that period. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall order Respondent to remove from its records any reference to the unlawful actions against its employees Michael Gudaitis, Kimberlee Suerth, Walter Graham, and Sheila

Roberts⁶⁰ and in writing notify them that Respondent's unlawful conduct will not be used as a basis for further personnel action.

Counsel for the General Counsel requests that Respondent be directed to mail the notice to all unit employees who were part of Respondent's work force from January 19, 1994, to the date the notice is posted because simply posting a notice would not effectively notify all unit employees and would not fully and effectively dissipate the coercive impact of Respondent's unfair labor practices. Additionally, it is requested that Bona be required to read the notice at a mandatory meeting of assembled unit employees on Respondent's prem-

ises because of the nature and severity of the statutory violations committed before and after the union election directly by Bona, and the additional violations condoned by her. In the alternative, it is suggested that the notice be read to employees on Respondent's premises by counsel for the Charging Party. In the circumstances of this case, both of these requests are reasonable and Respondent will be ordered to do both.

Additionally, since the employees work on the boats operated by Respondent and not at Respondent's facility in Baltimore, Respondent will be ordered to also post the attached notice on its boats where employee notices are customarily posted.

[Recommended Order omitted from publication.]

⁶⁰ See fn. 62, *infra*.