

Hilton's Environmental, Inc. and Teamsters Local Union No. 992, affiliated with International Brotherhood of Teamsters, AFL-CIO. Cases 5-CA-23065 and 5-CA-23512

December 22, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On March 31, 1994 Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Respondent and the General Counsel filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² as modified and to adopt the recommended Order as modified and set forth in full below.³

1. The judge found that the Respondent violated Section 8(a)(5) by, inter alia, unilaterally changing the method by which employees bid on schedule changes, repudiating the contractual grievance procedure, discontinuing contributions to health, welfare, and pension funds, and by repudiating the contractual seniority

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have also reviewed the record and find no merit to the Respondent's allegations of bias and prejudice on the part of the judge.

² In adopting the judge's finding that the Respondent's ban on discussing job-related matters outside the Respondent's facility violated Sec. 8(a)(1), we disavow the judge's speculations concerning the possible legality of a such a ban if it had been limited to conversations by employees with soldiers and note that this issue is not presented in this case.

³ We shall include a new Order and notice that conform to the Board's usual remedial provisions and more closely reflect the unfair labor practices found. We deny the Charging Party's request that the Respondent be ordered to pay the costs and attorneys' fees incurred by the Charging Party and the General Counsel as such an order would not effectuate the purposes of the Act. See *Frontier Hotel & Casino*, 318 NLRB 857 (1995) (award of litigation expenses appropriate only in cases involving frivolous defenses and cases involving the most serious unfair labor practices).

Member Cohen does not rely on *Frontier*. He agrees with his colleagues, however, that attorneys' fees and costs should not be awarded here.

The Respondent's request for oral argument is denied as the issues presented in this case are adequately presented in the briefs, exceptions, and record.

provisions. We affirm the judge's findings for the following reasons only.

As more fully set forth in the judge's decision, the Respondent provides food services at Fort Ritchie, Maryland, pursuant to a contract with the United States Army that commenced October 1, 1992. Prior to that date food services at the Fort Ritchie Dining Hall had been provided by Son's Quality Food. Both Son's and its predecessor at the site had a collective-bargaining agreement with the Union covering their mess attendants employed at Fort Ritchie. In December 1991, prior to submitting a bid, the Respondent solicited from all unit employees letters of intent that provided that the employee agreed to work for the Respondent if it was awarded the food service contract, which expired on September 30, 1992. The letters were revised at the Union's insistence to provide, in pertinent part, that the Respondent would pay employees "in accordance with wages as outlined in the agreement by the General Teamsters and Allied Workers, Local Union No. 992."⁴

The Army awarded the Fort Ritchie contract to the Respondent in the spring of 1992,⁵ and the Respondent's officials visited the facility on several occasions in the ensuing months in preparation for assuming the contract on October 1. On July 28, 1992,⁶ the Respondent's president, Beverly Ashburn, was handed a copy of the collective-bargaining agreement by Union Business Agent Ted Viands. On August 13, Son's manager, Sue Wade, gave Ashburn a copy of the seniority list for the Son's employees. Also in August, Ashburn and Viands met at the facility to discuss the contractual bidding procedure, with Ashburn indicating that she wanted to change the seniority-based job bidding procedure to one based largely on management prerogative.

On September 8, the Respondent solicited applications for employment from all Son's employees. All

⁴ The judge found that the letters of intent further provided that the employees would "perform my duties as required by Contract specifications and according to the Collective Bargaining Agreement" The Respondent asserts that the judge erred in so finding because this language is contained in only one of the two versions of the letters of intent introduced as exhibits and the record does not show that the version containing this language was actually executed by the employees or submitted to the Respondent. We find it unnecessary to resolve this issue as we have found that the letters of intent and the other factors cited below demonstrate the Respondent's successor status even without regard to the disputed language.

⁵ At that time, the Army took the position that the contract was not governed by the Service Contract Act, 41 U.S.C. § 351 et seq., which generally provides for the compliance by successor contractors with a predecessor's collectively bargained wages and benefits with respect to service contracts of this type. Following a protest by the Union, the Army indicated in a letter to the Union dated August 31, 1992, that it would modify the Respondent's contract "to incorporate the current collective bargaining agreement dated November 7, 1991"

⁶ All dates hereafter are in 1992 unless otherwise noted.

employees also were briefly interviewed by the Respondent's management team. The following day, the Respondent met with the employees and stated that it intended to hire all Son's employees unless some problem arose as a result of information disclosed on their job application forms.⁷ Ashburn also told employees at that meeting that there would be no changes in schedules for the first 30 days but that she could not guarantee that there would be no changes thereafter and that employees should report at their normal duty hours on October 1, the date the Respondent's contract commenced. Ashburn also stated that employees would begin with a clean slate as far as prior discipline imposed by Son's was concerned, but that employees would have to begin complying with certain work rules mandated by the Army. The Respondent met with the employees again later that month to discuss the contractual bidding procedure. At that meeting, Ashburn told Viands that she would begin negotiations for a new contract after October 1.

The Respondent admits that it was a successor employer to Son's at least as of September 28 but asserts that it was nevertheless free to set initial terms and conditions of employment. We disagree. It is well settled that

[a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

NLRB v. Burns Security Services, 406 U.S. 272, 294–295 (1972). In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board stated that the Burns “perfectly clear” caveat should

be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Also, see generally *Canteen Co.*, 317 NLRB 1052 (1995).

Applying these principles to the facts of this case, we find that the “perfectly clear” caveat is applicable

⁷ Thus, Union Business Agent Ted Viands testified that Ashburn promised to “hire all the employees unless there was some problem . . . in the interview process or the job application.” The judge credited this testimony.

in this case. Thus, as discussed above, the Respondent had solicited applications from the employees on September 8, and had assured them the following day that all would be hired unless some problem arose as a result of information disclosed on their applications or in the interview process.⁸ Contrary to the Respondent, there was no clear announcement at this time that it intended to establish new terms and conditions of employment. See *Fremont Ford*, 289 NLRB 1290 (1988) (employer told union it had doubts about retention of only a few unit employees; employer's stated desire to change seniority and institute a flat rate insufficient to indicate intent to establish new employment conditions).⁹

To the contrary, the Respondent's entire course of dealing with the employees, including accepting the December 1991 letters of intent that stated that the employees would work for the Respondent at the contractual wage rate, and the Army's having advised the Union, prior to the September 8 solicitation of applications, that the Respondent's contract with the Army was subject to the Service Contract Act and that the Son's collective-bargaining agreement would therefore be incorporated into the contract, all indicated that the Respondent did not intend to establish new terms and conditions of employment. See *Canteen Co.*, above; *Weco Cleaning*, above; *Fremont Ford*, above. Accordingly, we find that the Respondent violated Section 8(a)(5) by unilaterally changing existing terms and conditions of employment.¹⁰

2. The judge also found that the Respondent violated Section 8(a)(5) by failing to hire employees Emory and Manahan. We disagree. As set forth above, the credited testimony reveals that the Respondent agreed at meetings with employees that it would hire all employees; however, it is undisputed that this promise was conditioned on the application and interview process. Even assuming arguendo that a promise of this nature is enforceable through Section 8(a)(5) of the Act, we find that the Respondent's failure to hire these two employees was consistent with its conditional undertaking

⁸ Moreover, these assurances were given against the background of the Respondent previously having solicited letters of intent from the employees in connection with its bid for the Ft. Ritchie contract, and the past practice of the Respondent's two predecessors of hiring the incumbent employees.

⁹ Although the Board has subsequently clarified that it is not necessary to determine whether an employer made a lawful *Spruce Up* announcement when, as was the case in *Fremont Ford*, the employer engaged in discriminatory hiring practices, the Board has affirmed that *Fremont Ford* accurately interpreted the *Spruce Up* test. See *Canteen Co.*, 317 NLRB at 1054 fn. 6. We therefore find that the analysis in *Fremont Ford* supports our conclusion that the Respondent is a “perfectly clear” successor based on the similar factual circumstances present here.

¹⁰ In light of our finding above, we find it unnecessary to pass on the judge's alternative finding that the Respondent had agreed to assume the Son's collective-bargaining agreement.

set forth above inasmuch as the Respondent presented uncontradicted evidence that it chose not to hire Manahan and Emory based on their having worked part-time schedules for Son's and indications during their interviews that they were either unable or unwilling to work longer hours as the Respondent desired. Accordingly, we dismiss this allegation.¹¹

3. In light of the judge's finding, which we adopt, that the Respondent violated Section 8(a)(5) by reclassifying the AFMIS clerical position as a "nonunit" job, we find it unnecessary to pass on the judge's finding that the Respondent's unilateral removal of the position from the unit also violated Section 8(a)(3) as this finding would not materially affect the remedy.¹²

4. The judge found that the Respondent lawfully imposed a new 60-day probationary period on its employees after it began operating the cafeteria on October 1, 1992. Thus, the judge noted that the expired collective-bargaining agreement between the Union and Son's called for a 60-day probationary period for new or rehired employees.¹³ Based on his finding that the Respondent had adopted the Son's collective-bargaining agreement, the judge concluded that a probationary period was an established condition of employment for unit employees. The judge further found that the Respondent effectively hired or rehired these employees when it commenced operations. Under these circumstances, the judge concluded that the Respondent's imposition of a probationary period when it assumed operations did not constitute a unilateral change in terms and conditions of employment.

We disagree. As set forth above, we have found that the Respondent was a successor employer to Son's based on its announcement that it would retain virtually all of the unit employees without changes in terms and conditions of employment. In this regard, we particularly note that the Respondent made no announcement that a probationary period would be imposed until 6 or 7 days after it commenced oper-

ations.¹⁴ Contrary to the judge, the imposition of a probationary period on existing unit employees constituted a unilateral change in terms and conditions of employment under the circumstances of this case. Thus, the Respondent imposed this condition of employment on existing unit employees, many of them with years of service with the various contractors at this facility, without regard to whether the individual had previously completed their probationary period with Son's pursuant to the collective-bargaining agreement. The imposition of an additional probationary period was, therefore, inconsistent with the established past practice of Son's and was not authorized by the collective-bargaining agreement. To allow the Respondent to rely on its status as a successor employer to justify this action would be inconsistent with established successorship principles, especially in light of our finding, above, that the Respondent is a *Burns* "perfectly clear" successor. See generally *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987)(successorship finding rests on, inter alia, "continuity of the employing industry.'). See also *Kirby's Restaurant*, 295 NLRB 897, 901 (1989) (failure to give credit for seniority accrued with predecessor unlawful).¹⁵

AMENDED REMEDY

The judge's recommended remedy inadvertently failed to include a general make-whole provision for any losses suffered by employees as a result of the Respondent's unilateral changes in terms and conditions of employment. In this regard, although the judge did include a provision requiring the Respondent to remedy its unlawful discontinuance of fringe-benefit contributions by making payments to the specified fringe-benefit trust funds, the judge neglected to include the additional requirement that the Respondent make whole employees for any expenses that they may have incurred as a result of the Respondent's failure to make the required contributions in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

All payments to employees shall be made in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

¹⁴ Moreover, its belated announcement in this regard was tied to its unlawful announcement that it would not recognize the employees' seniority in assigning work schedules.

¹⁵ As noted in his dissent, Member Cohen concludes that the Respondent was free to set initial terms on the first day of operations, October 1. The change in the probationary period, however, was not announced or implemented until 1 week later. Accordingly, the Respondent was under an obligation to bargain as to that matter.

¹¹ *Double A Coal*, 307 NLRB 689 fn. 2 (1992), enfd. 17 F.3d 1434 (4th Cir. 1994), cited by the judge, is distinguishable as the employer there was found to have violated Sec. 8(a)(5) by failing to recognize "panel rights" of a predecessor employer's employees established by the National Bituminous Coal Wage Agreement after it had agreed to do so in negotiations with the union. No undertaking of this character was shown to have been made in this case.

¹² In adopting the judge's finding that the removal of the AFMIS clerk position from the unit violated Sec. 8(a)(5), we find that the Respondent unilaterally transferred unit work outside the unit. By unilaterally changing the assignment of work to unit employees, a mandatory subject of bargaining, the Respondent violated Sec. 8(a)(5) of the Act as alleged. Accordingly, we find it unnecessary to pass on the judge's alternative finding that the Respondent's actions in this regard constituted an unlawful unilateral change in the scope of the unit.

¹³ Art. V, sec. A of the Son's collective-bargaining agreement provides that "every new or rehired employee shall be on probation for the first sixty (60) days of employment or re-employment."

We agree with the judge that striking employees are entitled to the rights and privileges of unfair labor practice strikers and we have included the appropriate remedial provision in our Order.¹⁶

ORDER

The National Labor Relations Board orders that the Respondent, Hilton's Environmental, Inc., Fort Ritchie, Maryland, its officers, agents, successors, and assigns, shall take the following actions necessary to effectuate the purposes of the Act.

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Teamsters Local Union No. 992, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the following appropriate unit:

All food service employees and AFMIS clerks employed by the Respondent at its Fort Ritchie, Maryland facility, excluding cooks and supervisors as defined in the Act.

(b) Failing and refusing to bargain in good faith by insisting on bargaining to impasse over the issue of withdrawing unfair labor practices as a condition of reaching an agreement.

(c) Unilaterally modifying wages, hours, and other terms and conditions of employment for unit employees.

(d) Unilaterally discontinuing payments to health, welfare, and pension funds as required by the expired collective-bargaining agreement between the Union and Son's Quality Foods.

(e) Unilaterally repudiating the grievance procedure established by an expired collective-bargaining agreement between the Union and Son's Quality Foods.

(f) Unilaterally reassigning bargaining unit work to nonunit employees.

(g) Promulgating or enforcing rules prohibiting employees from discussing matters relating to wages, hours, or terms and conditions of employment outside the dining hall or with individuals other than employees of the Respondent.

(h) Denying unit employees requested union representation at or during investigatory interviews.

(i) Discouraging membership in the Union or any other labor organization by failing and refusing to reinstate unfair labor practice striker Ann Wilkes on her unconditional request to return to work.

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

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

(a) On request, bargain with the Union as the exclusive representative of employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, rescind the above unilateral changes until such time as the Respondent negotiates in good faith with the Union to agreement or to impasse and make its employees whole for all losses suffered as a result of its unlawful unilateral changes in the manner set forth in the amended remedy section of this decision.

(c) Pay to the Union's health, welfare, and pension funds all amounts of money due and owing, in the manner set forth in the remedy section of the judge's decision.

(d) On request of the Union, reinstate the grievance procedure established by the expired collective-bargaining agreement between the Union and Son's Quality Foods and process all pending grievances pursuant to that procedure.

(e) On request by the Union, reassign the AFMIS clerical work unit work to bargaining unit employees; and in the event of such reassignment make Linda Florentine whole, with interest, for any losses she may have suffered as a result of this change in the manner set forth in the amended remedy section of this decision.

(f) Rescind its unlawful rules prohibiting employees from discussing matters relating to wages, hours, or terms and conditions of employment outside the dining hall or with individuals other than employees of the Respondent.

(g) Offer Ann Wilkes immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(h) Remove from its files any reference to the unlawful discharge of Ann Wilkes and notify her in writing that this has been done and that the discharge will not be used against her in any way.

(i) Accord all striking employees from the strike that started on October 14, 1992, the rights and privileges of unfair labor practice strikers, including, on their unconditional application, offering strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make whole for loss of earnings strikers

¹⁶We leave to compliance the issue concerning the amount of backpay for any strikers whom the Respondent, in the future, unlawfully fails to reinstate.

who have made themselves available for employment on an unconditional basis but who were refused reinstatement.

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

(k) Post at its Fort Ritchie, Maryland facility copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, 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.

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

MEMBER COHEN, dissenting in part.

In my view, it was not "perfectly clear" that the Respondent, prior to the start of operations on October 1, 1992, planned to retain all of the predecessor's employees. Although the Respondent solicited applications from all of those employees, it made it clear to them that their employment would depend on whether they survived their interviews and a scrutiny of their job applications.¹ Thus, there was no firm offer of employment to all of the employees, or indeed to any of the employees. Consequently, the Respondent was free to unilaterally set its own initial terms and conditions of employment on October 1.²

¹⁷If 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."

¹Consistent with this view, the Respondent did not hire employees Emory and Manahan. My colleagues correctly dismiss an 8(a)(5) allegation as to these two employees.

²I need not reach the second part of the "plans to retain all" test, i.e., whether the Respondent led employees to believe that employment conditions would remain the same. See my dissenting opinion, joined by former Member Stephens, in *Canteen Co.*, 317 NLRB 1052, 1055 (1995).

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail and refuse to bargain in good faith with Teamsters Local Union No. 992, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All food service employees and AFMIS clerks employed by us at our Fort Ritchie, Maryland facility, excluding cooks and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain in good faith by insisting on bargaining to impasse over the issue of withdrawing unfair labor practices as a condition of reaching an agreement with the Union.

WE WILL NOT unilaterally modify wages, hours, and terms and conditions of employment for unit employees.

WE WILL NOT unilaterally discontinue payments to health, welfare, and pension funds as required by an expired contract between the Union and Son's Quality Foods.

WE WILL NOT unilaterally repudiate the grievance procedure established by an expired contract between the Union and Son's Quality Foods.

WE WILL NOT unilaterally reassign bargaining unit work to nonunit employees.

WE WILL NOT promulgate or enforce rules prohibiting employees from discussing matters relating to wages, hours, or terms and conditions of employment outside the dining hall or with individuals other than our employees.

WE WILL NOT deny unit employees requested union representation at or during investigatory interviews.

WE WILL NOT discourage membership in the Union or any other labor organization by failing and refusing to reinstate unfair labor practice striker Ann Wilkes on her unconditional request to return to work.

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

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, rescind the above unilateral changes until such time as we negotiate in good faith with the Union to agreement or to impasse and WE WILL make whole our employees for all losses suffered as a result of the unilateral changes, with interest.

WE WILL pay to the Union's health, welfare, and pension funds all amounts of money due and owing, with interest.

WE WILL, on request of the Union, reinstate the grievance procedure established by an expired contract between the Union and Son's Quality Foods and process all pending grievances pursuant to that procedure.

WE WILL reassign the AFMIS clerical work unit work to bargaining unit employees; and, in the event of such reassignment, WE WILL make whole Linda Florentine, with interest, for all losses she may have suffered as a result of the assignment of this work to nonunit employees.

WE WILL rescind our unlawful rules prohibiting employees from discussing matters relating to wages, hours, or terms and conditions of employment outside the dining hall or with individuals other than our employees.

WE WILL offer Ann Wilkes immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL remove from our files any reference to the unlawful discharge of Ann Wilkes and notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL accord all striking employees from the strike that started on October 14, 1992, the rights and privileges of unfair labor practice strikers, including, on their unconditional application, offering strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make whole for loss of

earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

HILTON'S ENVIRONMENTAL, INC.

Brenda V. Harris, Esq., for the General Counsel.

Douglas M. Topolski, Esq. and *Gerard D. St. Ours, Esq.*, for the Respondent.

Hugh J. Beins, Esq., of Washington, D.C., for the Charging Party.

DECISION

FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on consolidated unfair labor practice complaint,¹ issued by the Regional Director for Region 5, which alleges that Respondent Hilton's Environmental, Inc.,² violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the consolidated complaint alleges that the Respondent, a successor contractor for food services at an Army base, violated Section 8(a)(1) of the Act by promulgating and maintaining a rule which forbade employees from discussing with anyone, including other employees, any activities or events occurring at the Respondent's facility and by renouncing the grievance procedure contained in a collective-bargaining agreement. The consolidated complaint further alleges that the Respondent violated Section 8(a)(3) of the Act by refusing to reinstate striking employee Ann Wilkes to her former position at the conclusion of a strike

¹ Respondent admits, and I find, that it is a Virginia corporation that maintains a place of business at Fort Ritchie, Maryland, where it has a contract with the United States Army to provide food service to military personnel. During the preceding year, Respondent provided food service to the United States Army valued in excess of \$50,000 and services outside the State of Maryland valued in excess of \$50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Teamsters Local Union No. 992, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Sec. 2(5) of the Act.

² The principal docket entries are as follows:

Charge was filed in Case 5-CA-23065 by the Union against the Respondent on October 15, 1992; complaint was issued against the Respondent by the Regional Director for Region 5, on March 31, 1993; Respondent's answer was filed on April 4, 1993; charge was filed in Case 5-CA-23512 by the Union against the Respondent on May 3, 1993, and amended on the same day; consolidated complaint in both cases was issued by the Regional Director for Region 5, against the Respondent on July 9, 1993, and amended on August 5, 1993; Respondent's answer was filed on August 18, 1993; the hearing was held by me at Hagerstown, Maryland, on November 16-18; and briefs were filed with me on or before January 18, 1994.

that was (and still is) in progress. It also alleges that the Respondent violated Section 8(a)(5) of the Act by ceasing to make health and welfare payments on behalf of employees to the Hagerstown Motor Carriers and Teamsters Health and Welfare Fund, unilaterally removing the position of clerk or keypunch operator from the bargaining unit, unilaterally changing certain terms and conditions of employment, viz, work scheduling, abolishing seniority, and placing employees on 60-day probation, and by insisting to impasse during negotiations that the Union withdraw pending unfair labor practice charges as a condition of reaching an agreement. It alleges that the Respondent breached a legal duty to hire two of its predecessor's employees, Annamarie Manahan and Wendy Emory, and alleges a violation of Section 8(a)(5) of the Act on the part of the Respondent by denying employee Barbara Varner union assistance and representation during a disciplinary interview in violation of the *Weingarten* rule.³ Although acknowledging its status as a successor to a previous government contractor and its duty to bargain with the Charging Party, the Respondent denies any commitment to retain the specific benefits and practices at issue, denies repudiating a duty to grieve, denies making any other unilateral changes, and denies bargaining to impasse over the question of withdrawing unfair labor practices. It contends that Varner consented to the interview in question and that the interview at issue was not disciplinary in character. It also asserts that Wilkes forfeited her right of reinstatement by egregious misconduct in spreading false rumors that the Respondent food service was poisoning soldiers. The Respondent also denies any commitment to hire Manahan and Wilkes. On these contentions, the issues here were drawn.⁴

B. *The Unfair Labor Practices Alleged*

Respondent is a government contractor owned by its president, Beverly Ashburn. She is also the operating chief of the facility in question in this case. Her husband, Dilton Ashburn, the vice president of the organization, manages the performance of their government contract at Ft. Eustis, Virginia.⁵ The Respondent maintains its office and place of business in Newport News, Virginia, where it also has a few private janitorial and maintenance contracts. The Respondent has been certified by the Small Business Administration as a minority-owned business. It bid the food service contract at Ft. Ritchie under the auspices of a Federal program designed to assist minority-owned businesses.

The U.S. Army Garrison at Ft. Ritchie, Maryland, is the headquarters of the 7th Signal Command. It is located near the Pennsylvania state line just north of Hagerstown. Its on-post mess facilities have long been operated by civilian contractors who typically have held 3-year contracts with the Government that are awarded on the basis of sheltered market competitive bids. The mess facility, called the High Rise Garden Dining Hall, can accommodate slightly more than 100 patrons at any given meal, although it does not always

enjoy such patronage at each meal. The mess hall serves 21 meals per week. It is limited to soldiers and others who normally pay either by separate ration cards issued by military commanders or at fixed rates that are established by the Army. Previous contracts were performed by a combination of government-employed cooks and contractor-employed mess attendants. The privately employed bargaining unit was composed chiefly of mess attendants who served the food and cleaned up the cafeteria. It numbered between 12 and 14 employees. When the Respondent took over on October 1, 1992, it had been awarded a full service contract, meaning that it was required to employ cooks on its own payroll. In order to do so, it hired two cooks who had formerly worked for the Army.

The Union had represented employees in the Fort Ritchie dining facility under two contractors, Mann, Huntley, and Hendricks and the contractor who immediately preceded the Respondent, Son's Quality Food Company of Washington, D.C. On November 7, 1991, it concluded a contract with Son's, effective retroactively to October 1, 1991. The contract was for 1-year duration, with provisions for automatic renewal unless either party gave timely notice of a desire for revision.

Although food service contractors at the High Rise Gardens came and went, a fairly regular and stable complement of employees remained in place. There were two employees, who were hired by the Respondent in October 1992, that had worked at the dining hall since the 1970s and several others who started in the early 1980s. The Son's shop steward, Victoria Florentine, who started as a mess attendant in 1977, testified credibly that in December 1991, nearly a year before the Respondent took over the food service contract, a company representative, in anticipation of submitting a bid, visited the Fort Ritchie facility and asked Son's employees to sign letters of intent indicating that they would come to work for the Respondent if it became the successful bidder. Such letters of intent are an important part of a bid submission in that they support a finding by the Army that the Respondent would be able to staff the facility if it were awarded the contract.

The letter presented by the Respondent to Son's employees was a form it had composed stating that the employee's "rate of pay shall be in accordance with government wage determinations as included in the above-mentioned [bid] solicitation." Several employees questioned this language, as did Florentine, so she phoned Ted W. Viands, the Union's business agent, and reported the matter to him. Viands instructed her to tell other employees not to sign the letters of intent as presently worded. Viands then consulted Union Lawyer Hugh J. Beins and then phoned Ashburn to ask her to revise the letters of intent to reflect a rate of pay in accordance with the current Teamsters' contract. Ashburn agreed and forwarded to the dining facility revised forms that were then executed by Son's employees in mid-December 1991. The revised letters of intent, printed on Hilton's letterhead, read:

Should Hilton's Environmental, Inc. be awarded the Food Service Contract identified as Solicitation DAEAO-91-R-0009 by the Department of the Army at Fort Ritchie, Maryland, for the next contract period, I [name of employee printed] agree to work for Hilton's

³ *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

⁴ The General Counsel moved to make certain corrections in the transcript. Her motion was unopposed and is granted. Errors in the transcript have been noted and corrected.

⁵ The Fort Ritchie contract is the only food service contract that the Respondent is servicing. Its other contracts are for janitorial and maintenance services.

Environmental, Inc., in the capacity of [job classification]. The rate of pay for my employment shall be in accordance with wages as outlined in the agreement by the General Teamsters and Allied Workers, Local Union No. 992. I also agree to perform my duties as required by the Contract specifications and according to the Collective Bargaining Agreement with General Teamsters and Allied Workers Local 992.

These letters of intent were signed by all employees, turned over to Sue Wade, Son's manager on the premises, and forwarded by her to the Respondent.

Respondent was awarded the Ft. Ritchie contract in the spring of 1992. On July 28, Ashburn visited the dining hall in the company of her husband. Florentine and Viands were present.⁶ I credit Viands' corroborated testimony that he presented Ashburn on this occasion with a copy of the Union's contract with Son, together with a list of changes that he was seeking in that contract.⁷ Ashburn told Viands that she had not come to Ft. Ritchie prepared to negotiate a contract at that time and would set up a meeting with Viands for purposes of negotiation when she visited the premises again in August.

On August 13, Ashburn again visited the dining hall and, in the course of her visit, spoke with Sue Wade, Son's manager. She asked Wade to place an ad in the local paper for cooks, a job classification that Son did not employ. Wade agreed to do so.⁸ Ashburn then asked Wade if the present employees would be interested in voting on whether or not to have a union. Wade replied that most of the current em-

ployees would go for a union. She added that one employee had not yet joined but she probably would. Ashburn then told Wade that the Government had told her that she could get rid of the Union and that it would supply her with a lawyer to help her do so. I credit Wade's testimony that, on this occasion, she made a copy of the Son's employee list⁹—a list showing dates of hire of all employees which Wade used as a seniority list—and gave it to Ashburn.¹⁰

Sometime in August, when Ashburn again came to the facility, Viands received a call from the shop steward to the effect that Ashburn wanted to talk with him. Viands went to the dining hall and met with Ashburn, her future Manager Chung (Connie) Chiado, and her future Assistant Manager Martin Jackson. Viands brought Florentine into the conversation. Since she was the steward, Ashburn told Viands that all she wanted to talk about on that occasion was the contract bidding procedure.

The Union contract with Son provided that job assignments should be made on the basis of seniority.¹¹ The procedure that had been followed was that, twice a year, bid meetings were held. Son management made up work schedules (i.e., job slots) and offered them to employees in order of seniority. Each employee then selected his or her preferred time slot for the ensuing 6 months and until another bid meeting might take place. Ashburn told Viands that she wanted to do away with this procedure. She preferred to have only three classifications under the contract—salad maker, rations driver, and mess attendants. Under her proposal there would be only one salad maker and one rations driver that paid slightly higher rates than mess attendant. She proposed to offer those positions to the most senior employees and to assign all the other jobs to mess attendants on the basis of management prerogative. Viands replied that her proposal was entirely unacceptable. He pointed out that the job-bidding procedure in the collective-bargaining agreement had been in place for years and had worked well. He argued that it was a very important procedure as most employees at the dining hall had other jobs or had children to care for and

⁶ Ashburn testified that it seemed to her that every time she showed up at the dining hall, Viands showed up as well.

⁷ Ashburn testified that she never received a copy of the Son contract with the Union until after the Respondent took over the dining facility on October 1, 1992, because the contract in question was not a part of the bid solicitation package given to her by the Government. Although the contract in question was not part of the bid solicitation package, Ashburn was well aware of its existence as early as December 1991, when she received from Son employees letters of intent referencing that contract. She later admitted that she had received a copy of the union contract from the Government but not as part of the bid solicitation package. Viands furnished her another copy of the contract on July 28, 1992, along with proposed revisions that referenced the contract. In mid-August 1992, Ashburn made a proposal to Viands aimed at modifying the Son contract relative to job bidding and seniority. These events are totally at variance with any contention that she did not have a copy of the contract or was unaware of its contents. Moreover, on September 8, Florentine gave her several copies of the Son's contract.

⁸ In evidence is a want-ad, appearing in the August 19, 1992 issue of the Waynesboro (Penna.) *Herald-Gazette* which stated:

Positions Available

Project manager, Assistant Manager, Cooks, Mess Attendants
Clerk. Apply in person Thurs. Fri. Sat. & Mon, August 20, 21,
22, & 24 from 10 am til 3 pm at

The Jackson Suite

Holiday Inn

900 Dual Highway, Hagerstown

The record is unclear whether or not this is the ad that Wade placed but it is admitted that the ad was placed by the Respondent.

⁹ Ashburn also testified that she did not receive a copy of Son's seniority list until early in November when her attorney, who had procured such a list from the Army contracting officer, gave one to her. I also discredit this testimony. As noted above, Wade gave her such a list on September 8; Florentine, at Ashburn's request, also provided her with a handwritten list of Son employees together with dates of hire. While doing so, she also discussed with Ashburn certain aspects of the list that were not apparent from its text. Indeed, there is testimony from the Respondent, which I discredit *infra*, to the effect that Chiado asked Florentine on September 28 to make up the employee assignments for opening day by assigning employees to the list of job duties prepared by the Respondent in order of seniority. When a dispute over seniority arose early during the Respondent's regime, Ashburn complained that the list furnished her by Florentine was not "official" although it was identical to other seniority lists in evidence in this case.

¹⁰ In this proceeding, both Ashburn and Chiado, testified at length on behalf of the Respondent. Both gave argumentative testimony that was sometimes at a variance with admitted documents, sometimes at a variance with each other, and often in conflict with corroborated testimony presented by the General Counsel. I discredit both of them and would not rely on the testimony of either of them as to any disputed factual issue.

¹¹ The other purpose served by seniority ranking was the selection of vacations.

job bidding enabled them to plan their days accordingly. Nothing was resolved on this issue.

During the month of August, other problems between the Union and the Respondent arose, notwithstanding the fact that the Respondent had not yet taken over the performance of the dining room contract. When Ashburn's remarks to Wade, i.e., that she had been told by the Government that she did not have to have a union, were reported to Viands, he phoned Attorney Beins in Washington and relayed these remarks to him. Beins then phoned Wayne E. Hoffman, the Army's contracting officer at Ft. Ritchie, and challenged him about the remarks. Hoffman denied making them but, in the course of the conversation, told Beins that the service contract did not apply to the Respondent's contract.¹² On hearing this statement, Beins phoned government officials in the Department of Labor and the Pentagon to protest. He also wrote Hoffman a letter, dated August 14, insisting that the addition of three to five cooks to the bargaining unit did not remove the Respondent's contract from coverage by the Service Contract Act. He threatened both legal and strike action and filed a formal protest against the award of the contract to the Respondent on the basis that it violated the labor standards in the Service Contract Act.

Hoffman replied to Beins' letter on August 31. In his letter, Hoffman denied the protest of the award. He stated, however:

Upon further review of the Service Contract Act, I intend to modify Contract DAEA08-92-C-0016 to incorporate the current collective bargaining agreement dated November 7, 1991 from the Mess Attendant Contract, DAEA08-89-V-0037 issued to Son's Quality Food Service via the Small Business Administration. This agreement will apply only to those positions under the new contract that provide substantially the same services as provided by the previous bargaining unit.¹³

He subsequently did so.

On or about September 8, Ashburn and her management team again came to the dining facility. On this occasion they asked Son's employees to fill out applications for employment with the Respondent. The four-page application form that the Respondent presented to each applicant contained the statement:

I hereby understand and acknowledge that, unless otherwise defined by applicable law, any employment relationship with this organization is of an "at will" na-

ture, which means that the Employee may resign at any time and the Employer may discharge an Employee at any time with or without cause. It is further understood that this "at will" employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by an authorized executive of this organization.

One employee complained to Florentine, her shop steward, about the "discharge for cause" provision in the application. Florentine told her not to sign the application until she had spoken with Viands about the matter. She called Viands, relayed the complaint, and was told by Viands to instruct employees not to complete the application forms. He later phoned Florentine and told her that he had made an agreement with Ashburn that the discipline and discharge procedures of the Son contract would govern terminations of the Respondent's employees. Having received these instructions, Florentine then told employees it would be alright to complete the forms.¹⁴

Among the employees who completed and filed application forms were Annamarie Manahan, who worked for Son only on weekends, and Wendy Emory, who worked for Son on a fill-in basis when other employees were out sick or on vacation. Emory worked an average of 20 hours a week. All employees were interviewed briefly by the Respondent's entire management team. Manahan was told that the Respondent was trying to get away from the idea of weekend work. Manahan replied that the weekend shifts were her shifts and that these were the shifts for which she had been hired by Son.¹⁵ They also discussed the fact that Manahan was pregnant and had a November 22 due date. She was asked if she wanted to work until her due date. She replied that she did. During Emory's interview, she was asked if she would be willing to work more than 20 hours a week. She said that she would be glad to have more hours if she could get them. No Son employee, including Manahan and Emory, was told by the interviewers on this occasion whether or not they would be hired when the Respondent took over the management of the facility.

During the summer of 1992, Florentine, who had been employed by Son and its predecessors since 1977 as a mess attendant, was given 40 hours of training by the Department of the Army in the operation of a computerized food inventory control and ordering system called AFMIS.¹⁶ From July

¹² A relevant provision of the Service Contract Act reads:

No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract.

¹³ The parties both agree that, at present, cooks should be excluded from the mess attendant bargaining unit. However, in later negotiations, discussed infra, the parties agreed that cooks would be included in the unit if a majority of them signed union designation cards.

¹⁴ Over an objection based on the hearsay rule, I permitted Florentine to testify to these matters for the limited purpose of showing her understanding and the understanding of Son employees in filling out the Respondent's job application form but not for the purpose of establishing an agreement had been concluded between Ashburn and Viands concerning the purported amendment to the form. The General Counsel never established this agreement through any other evidence and Ashburn denied agreeing to a revision. Accordingly, I do not find an agreement between the parties to amending the terms of the disputed section but find that Son employees continued to fill out job applications under the belief that they were protected by the provisions of their current contract respecting discharge.

¹⁵ Manahan held a full-time job at a hospital in Waynesboro during the regular workweek.

¹⁶ AFMIS stands for army food management information system. As evidence of her completion of the course, Florentine received a large certificate that she displayed in Son's office at the dining hall.

until the Respondent assumed the management of the dining hall, Florentine was assigned on a full-time basis to operate the computer in Son's office and to maintain the AFMIS inventory control over the food that was being ordered and served. During her job interview with the Respondent's management team, Ashburn told Florentine that the clerk's position could not be unionized because the job involved close cooperation with management and a conflict of interest would arise, in her opinion, if a union member were to hold the position. She added that there would be an even larger conflict of interest if the clerk's position were to be held by a shop steward. Florentine replied that if, in the course of a business day, members of management wanted to hold a private discussion in the office she could simply leave the room. Ashburn then asked Florentine if she would consider leaving the Union. Florentine replied that she could not do so because she had children to support and needed to retain union insurance and vacation benefits.

When the Respondent took over on October 1, Florentine was assigned to a mess attendant position while different members of the management team assumed the responsibility for the AFMIS program. They were later given a course of instruction in the program so that they could operate it. In July 1993, the Respondent hired a computer operator, Deborah Gordon, to fill this position. She now works an 8-hour week on the job.¹⁷

On September 9, Ashburn held a meeting with Son's employees at the dining room. All were present except Emory and Manahan. Viands also attended this meeting. I credit the testimony of several employees to the effect that, on this date, Ashburn promised to hire all of Son's employees who had filled out job applications.¹⁸ She also stated that there would be no changes in employee schedules for the first 30 days but she could not assure anyone that there would be no changes thereafter. The management team wanted to observe the operation in progress and this observation might well bring about some changes. Employee Ann Wilkes asked if employees would be given advance notice in the event of changes; Ashburn replied that there would be ample notice. Florentine broke into the discussion to state that many employees had small children and had to make adjustments in child care arrangements before they could work different hours. Ashburn repeated that they would get plenty of notice. Ashburn admitted in her testimony that she told employees they should report for work on October 1 at their normal duty hours.

Employee Max DuPont questioned her about the effect of prior disciplinary actions. Ashburn told him that all employees would start with the Respondent with a clean slate. She then went on to outline certain job requirements and restrictions that would be put in place when the Respondent took

over.¹⁹ Employees would not be allowed to bring drinks from home into the cafeteria and would not be allowed to purchase soft drinks independently of the purchase of an entire meal. The employer would furnish uniforms but employees were not to wear hairnets or jewelry, other than wedding rings. Employees also would not be allowed to leave the premises during breaks. They would also have to wear shoes similar to the ones worn by nurses in hospitals; tennis shoes were no longer permissible. Florentine asked if employees could use the phone to call home. Chiado appeared hostile to this suggestion but Ashburn said that it would be a matter of management discretion. Employee Tina Donnelly asked if she could leave her shift early to put her child on the school bus and was told that this was no longer permissible. Employee Barbara Varner asked if the Company would supply employees with a written list of company rules and regulations. Ashburn said that it would be done before October. Chong Callahan, a Korean employee, inquired whether there might be any problems since she and Chiado would be the only Koreans working for the Respondent and others might suggest favoritism. Ashburn said that she did not anticipate favoritism by one Korean to another any more than she would anticipate favoritism toward black employees by herself. She noted that the employees had worked under white managers when the establishment was operated by white contractors. Florentine interjected to say that the establishment had never been operated by a white contractor. Employees were told that they should not socialize with the soldier customers of the dining hall nor should they socialize with the Respondent's management, who should be addressed as "Mr." or "Mrs." and not by their first names.

Later in the month, another employee meeting occurred that was attended by Viands.²⁰ The purpose of this meeting, from the Union's standpoint, was to explain the contract bidding procedure for filling jobs by seniority and to insist that this be done when the Respondent took over.²¹ During this meeting, Ashburn said that there were things in the Son contract she had never seen in any other union contract. Viands challenged her on this point, asking her what other union had she ever dealt with. Ashburn took offense at this question. They immediately left the employee gathering and spoke privately. Ashburn objected to Viands that he was calling her a liar in front of her work force. She demanded a written apology. No written apology was made by Viands. He said something, however, to employees on their return to the main meeting to calm the situation. There is an immaterial

¹⁷At that time, the Respondent's contract with the Army was revised to give the Respondent a \$19,000 additional annual payment to cover the cost of employing an AFMIS computer operator. Son had financed the wages and benefits of its AFMIS clerk, Florentine, out of its basic fee.

¹⁸I credit Viands' testimony that, on this date, Ashburn told him that she would hire all of Son's employees unless some problem arose as a result of information disclosed on their job application forms.

¹⁹There is every indication in this record that several duty requirements imposed on food service contractors by Army regulations were honored more in the breach than in the observance by Son. The changes announced by Ashburn on September 9 were an irritant to employees who were accustomed to a more easygoing operation. As the General Counsel did not allege, however, that this tightening up of on-the-job conduct to comply with military regulations constituted unilateral conduct in derogation of the Respondent's duty to bargain, I will not dwell on it in any length.

²⁰Union witnesses place this meeting on September 23 while the Respondent insists that it took place on September 14. The choice between these two dates is immaterial so I will make none.

²¹Ashburn stated that she told employees on this occasion that it was the Respondent's practice to observe seniority. At the hearing, however, she insisted that she had not promised to observe Son's seniority. When asked what she meant by seniority, she replied that to her it meant whoever had been there the longest.

dispute in the record as to whether his remarks constituted an apology. Sometime during this meeting, Ashburn told Viands that she would begin negotiations for a new contract after October 1.

On September 23, 1992, Viands wrote a certified letter to Ashburn and addressed it to the Respondent's office in Newport News. The letter read, in pertinent part:

In accordance with our conversation, I wish to confirm our agreement concerning the food service employees at Ft. Ritchie, Maryland. You have agreed as follows:

- 1) To hire the employees of the predecessor employer effective October 1, 1992.
- 2) To recognize Local 992 as the exclusive bargaining representative of the employees.
- 3) To begin negotiations with the Union on or after October 1, 1992.

It is understood that you shall keep the wages, hours, and work conditions in effect pending the outcome of these negotiations or until there has been an impasse in negotiations.

We look forward to cooperating with you in a mutually beneficial relationship. I am sure that you can understand that there has been a good deal of trauma among the employees because the Service Contract Act was violated. Now that we have straightened out that problem it is in our mutual interest to have a peaceful and stable collective bargaining relationship. If we can avoid litigation and concentrate on problem solving, everyone will benefit.

At this point in time, Ashburn was not represented by legal counsel. At a time not specified in the record but very probably in late October, she retained the services of John M. Maciejczyk of the firm of Miles and Stockbridge to represent her. On November 9, she replied to Viands' letter as follows:

My attorney has provided me with a copy of the letter dated September 23, 1992, by you to me at my address in Newport News, Virginia. I fail to understand why you mailed the letter to me in Newport News when I was at the job site at Ft. Ritchie from September 8, 1992 to October 14, 1992. Furthermore, I have terminated the secretary whose name is signed in the signature block on the return receipt. I cannot verify her signature on the return receipt, however, I can verify that I did not see this letter prior to being provided it by my attorney.

I respond to your letter as follows:

1. I did not agree to hire all employees of the predecessor employer effective October 1, 1992, as you state. That was never my intention and I never expressed that to be my intention.
2. I recognized Local 992 as the bargaining representative for only the union members that I hired, and not for any other employees.
3. I agreed to begin negotiations with the Union as soon as possible after October 1, 1992, however, you disrupted the first intended session by accusing me of being a liar, and refused to begin the next session when

I insisted on tape recording the session in order to protect myself against any further accusations of lying.

4. I did not agree to keep the wages, hours, and working conditions in effect pending the outcome of negotiations. I believe that I made it clear that I would change the schedules and hours of any employees from the outset.²²

When the Respondent took over on Thursday, October 1, employees scheduled to work reported in accordance with their regular Thursday shift times.²³ Some were assigned to different duties than they had performed previously. Florentine was no longer assigned to the AFMIS program but was given mess attendant duties to perform. There were a few new employees on the Respondent's payroll. Cooks, who had formerly been employed by the Army, were now contractor employees. In addition, the Respondent had hired Lois Martin, a supervisor for Son, as a mess attendant.²⁴

During the morning shift, Chiado held a meeting with approximately seven employees who were present for that shift. She went over rules and policies contained in a detailed manual entitled "Commercial Activities Program, Full Food Services, Performance Work Statement," which the Army gave the Respondent and that controlled the most minuscule details of the food services operation. She told employees not to wear hairnets or jewelry, not to come to work drunk or smelling of alcohol, and warned them that the latter conduct would bring about immediate discharge. She told them that they would be disciplined for eating a meal without paying for it and notified them that the Company was going to bring in instructional video tapes to show them how to clean bathrooms and perform other chores.

At the conclusion of the afternoon shift on October 1, Ashburn and Chiado also had a meeting with the employees who worked the afternoon shift. Wilkes was among them. Ashburn stated that she felt that things had gone well the first day despite the efforts of the previous management to sabotage her. She said she wanted to go over a few matters

²² Since a return receipt of the certified letter was mailed back to Viands rather than the letter itself, I conclude that the Respondent received the September 23 letter on September 28, as indicated on the receipt. Ashburn attempted to excuse or justify her delay in challenging statements in Viands' letter for 5 weeks on the basis that she did not obtain possession of the letter until her attorney gave it to her. She did not explain, either in the above letter or at the hearing, how or when her attorney came into possession of this letter. Maciejczyk is no longer associated with the firm of Miles and Stockbridge and is practicing law in Texas. He was not summoned to enlighten the record on this or other points at issue in this case.

²³ Chiado testified that, on September 28, in anticipation of the first day of work for the Respondent, she furnished Florentine, the shop steward, with a list of jobs that had to be filled on the first day and asked her to assign the work to employees in order of seniority. She also assertedly asked Florentine to contact each employee to tell them when to report. This testimony is contrary to what Ashburn testified, contrary to what any employee testified, and contrary to what in fact occurred on October 1, when employees reported. In short, her testimony was a complete and unvarnished fabrication.

²⁴ Under normal seniority rules, Martin, a nonunion employee under Son, would not have been on the Son seniority list and, as a new unit employee under the Respondent, would have gone to the bottom of the seniority roster. Apparently this did not occur and, because it did not occur, grievances were immediately filed.

with the employees who were at hand. She told them that she knew that the Respondent was not supposed to change things but she had to in order to make things run smoothly. She stated that, when employees arrived at work the following day, they would be given slips of paper to outline their duties. There would no longer be regular assignment slots with stated duties, such as pot person, dish person, or clipper room person, because this arrangement was not effective. Instead, she wanted everyone to learn every mess attendant duty. She mentioned that soldiers had complained because the Company had apparently instituted a policy of portion control and would not permit its customers to have second helpings as they had in the past. She told employees that she did not want employees to become involved in soldier complaints and they should not encourage such complaints. If any employee did so, she would be fired. Any customer complaints should be directed to the Respondent's management.

She also mentioned rules against wearing hairnets, insisted that employees use "wet floor" signs while mopping, and mentioned the subject of uniforms. Tennis shoes would no longer be allowed and employees would have 30 days to purchase white shoes such as those used by nurses. She insisted that employees pay attention to details and insisted that they not speak to soldiers who come to the dining hall because the Company was not paying them to converse with soldiers. Any one caught conversing with a soldier would be fired, adding that a soldier would not risk his job by talking to a mess attendant at his duty post so a mess attendant should not risk her job by doing so at the dining hall.

Ashburn went on to say that employees would not be permitted to discuss among themselves anything that occurred at the dining hall. Anything that occurred at the dining hall would have to remain at the dining hall and employees were not free to mention job-related problems or activities with anyone else, including each other. If they did and she found out about it, the employee in question would be fired. She reiterated that employees would not be permitted to buy cokes from the coke dispenser, that a coke could be purchased only with the purchase of an entire meal, and that an employee would have to have advance permission from management to buy a meal.²⁵

Thereafter, when employees reported to work each day, a list of individual assignments were written out and posted on the window of the Respondent's office. In addition to posting assignments, a three-page list of job duties, detailing both daily duties and weekly, biweekly, or monthly duties, was posted. Next to each duty item was a parenthesis. The employee assigned to that duty was required to place her initials in the parenthesis on completing her assignment.

Annamarie Manahan had worked for about 5 years for Son and its predecessor. Her regular hours were on Saturday from 7:30 a.m. until 1:30 p.m. and on Sunday from 10:30 a.m. until 6 p.m. On Saturday morning, October 3, she appeared for work at the dining facility at the start of her normal shift time. Chiado was in charge of the facility that morning and was approached by Manahan to find out her job assignment. Chiado appeared to be puzzled at her appearance at the dining hall and inquired of Manahan if the Company had asked her for a uniform size. Manahan replied that it had not be-

cause she was pregnant and was not able to fit into a uniform. After seeking out Jackson and conferring privately with him, Chiado informed Manahan that she was not needed. Manahan asked her if this meant that she was fired, to which question Chiado replied that it was Son, not the Respondent, who had fired her. Manahan asked her for something in writing indicating that she had been fired. Chiado refused, repeating that it was Son who had fired her. In fact, no one from Son had said anything to this effect to her. Shortly thereafter, Manahan filed a grievance with the shop steward.

On the following day, Sunday, October 4, Emory reported for work at 1:30 p.m. Her regular Sunday hours were 1:30 until 6 p.m. She worked as needed throughout the rest of the week. She went into the office and asked Chiado if she were still employed at the dining hall, noting she had heard from one of the other employees that she had been fired. Chiado said that her information was correct. Emory then asked for a written discharge. Chiado refused, saying that she should obtain a written statement from Sue Wade, Son's supervisor, because it was Son, not the Respondent, who had terminated her. In fact, no one from Son had said anything to this effect to Emory. Like Manahan, she filed a grievance with Florentine.²⁶

Almost immediately employees began filing written grievances with their shop steward. Most of those grievances dealt with reductions in hours or shift transfers and many cited the fact that Lois Martin, a new hire, former Son supervisor, and a nonunion employee was being given more hours than employees above her on the seniority roster. (As noted previously, Martin was necessarily at the bottom of the roster since she was not in the Son bargaining unit.) At the end of the first day, Varner was threatened with a written reprimand by Chiado for not finishing her assigned tasks. She objected, saying that there was not enough time during the shift to do all the work because the employee meeting lasted so long. Ashburn told Chiado to forget about the reprimand. Florentine was reprimanded on her first day of work with the Respondent for the manner in which she had placed pastries on the cold line and for the manner in which she had washed the tables after the customers left. Toward the end of her shift on October 2, which was normally 2 p.m., Florentine was told to leave thereafter at 1:30 p.m. because she was not needed any later. The net effect of this revised schedule was to cost Florentine 2-1/2 hours of work per week. Max Dupont grieved because his work hours were cut on October 2 by being released from work at 12:30 p.m. rather than 1:30 p.m. Florentine estimated that she turned in approximately 25 grievances on various subjects to Chiado on October 7.

On the afternoon of that day, a meeting was held between Ashburn and Chiado and those employees who happened to be present at the dining hall. Included in this meeting was Florentine. Ashburn began by saying that she could have just shoved the grievances into a drawer but she chose not to do so because she wanted to keep lines of communication with

²⁵ The total price of a standard meal is \$1.90.

²⁶ Wade, Son's supervisor, testified that Son had not fired either Manahan or Emory. The names of these two employees appeared on the final Son's seniority roster, along with the other employees who were carried over by the Respondent, without any indication of discharge. I conclude that, in fact, neither was specifically removed by Son, although technically, all of Son's employees had been discharged because Son's contract had come to an end.

employees open. She reminded employees that there was no union and then corrected herself by saying that there was a union but there was no union agreement. She noted that the union contract was with Son, not the Respondent, and she told employees to stop pressuring the Respondent to conform to Son's contract. Wilkes spoke up and said that she thought that wages and benefits were supposed to stay in place until a new contract had been concluded. Ashburn disagreed, saying that she was not bound by Son's contract in any way. Ashburn went on to say that the nub of most of the grievances was that Lois Martin had been given an established slot with more hours in preference to seven union members. Ashburn addressed Martin by saying, "I'm sorry, Lois. They seem to be picking on you."

Ashburn went on to berate the Union at some length. She expressed the opinion that some of the junior employees really did not understand their rights as they pertained to the Union, asserting that a "closed shop" was no longer in existence at the dining hall. She thought it was disgusting that a union could force a company into requiring their employees to join and expressed the view that she would not work for a company like that. She completed her disparagement of the Union by stating that unions were just in business to make money but they were unnecessary at the dining hall because employees were paying them for something she was already providing. She also said that there was no seniority because she had not received a seniority list and added that all of the employees were serving a 60-day probation period.

On the following morning, another employee meeting was conducted by Respondent's management for employees working the morning shift. Florentine was also present. Like the meeting that took place the previous afternoon, the major topic of this meeting was a discussion of grievances over preferential assignment of work to Martin that had resulted in a loss of hours for other employees. Max DuPont complained about his hours being cut because seniority had not been observed in making his job assignment. On one occasion, Jackson had reduced the hours of DuPont's shift by sending him home early. On another occasion, DuPont showed up for work at his normal 6 a.m. reporting time, only to be told not to come to work until 8 a.m. because his schedule had been revised. Ashburn replied that there was no seniority because she had no official seniority list and she could not proceed on the basis of what she had received because it was not a legal document. She stated that new schedules would be in effect on November 1 and would be posted on October 31. She also told employees that soldiers had been telling her that employees had been complaining about their working conditions, adding that if she found out the names of any employees who were complaining she would have an investigation and would discharge anyone found guilty.

After the general meeting was over, Ashburn, Chiado, and individual grievants discussed specific grievances together with Florentine. In no case was a grievance adjusted so as to satisfy an employee complaint.

On October 9, about 7:30 a.m., an incident occurred that caused considerable excitement at the dining facility. Max DuPont was assigned to clean pots and pans at the work sink and was using stainless steel spray polish. He turned on the floor fans next to the sink and a fan blew some of the spray into his eyes. To use his expression, his eyes felt "heavy"

so he reported the incident to Jackson.²⁷ At first, Jackson said he was busy and told DuPont to go fill out an accident report. Later, Dupont persisted with his complaint so Jackson told him to go to the bathroom and flush out his eyes with water. Not long thereafter, Don Neimeyer, the Department of the Army contractor representative who had daily hands-on supervisory responsibility for the dining hall, arrived at the dining hall with Lorraine McAfee, the Post's safety technician. McAfee had heard about the incident by virtue of a call she had received from the OSHA office in Washington, D.C. McAfee asked to see DuPont and informed him of his right to seek medical attention. DuPont then left the Post a went to the emergency room at the hospital in Waynesboro. After receiving an examination and minor treatment, he was released to return to work and did so.

Following the visit to the premises by Neimeyer and McAfee, the Respondent began a thoroughgoing investigation of the incident. The Respondent insists that the purpose of the investigation was to enable it to fill out OSHA and workers' compensation forms. I discredit this explanation. Among those subjected to repeated questioning was Varner. I credit her testimony that, following her break at 10:30 a.m., she was called to the office and was questioned by all three managers with the door closed. Chiado sat at a desk taking notes during the inquiry. At the outset, Jackson told her that they wanted to talk with her about Max's eyes. Varner asked to be accompanied by her union representative, Florentine, but the latter was not at the dining hall at the time. Chiado responded that "all we want to talk about is Max's eyes." Varner asked again for union representation. Ashburn then replied, "Barbara, you know what we said at the meeting yesterday about the Union." Chiado again said that they were just going to talk about Max's eyes. Chiado asked Varner twice whether she had told anyone about "Max's eyes"; Varner replied twice that she had not done so. Chiado then stated that word of the incident "got outside" somehow. Varner's response was that she only went outside to her car to take her break. Ashburn then began to ask her what she had done during her break, whom she talked to, whether she had been sitting in her car throughout her break, and whether the window of her car was rolled down while she was sitting in it. Varner, in fact, took her break with her mother, Betty Nicholas, who is also an employee at the dining hall. Ashburn asked Varner if she had sat in her car alone throughout her break and if she had given coffee to anyone. Varner replied that she was with her mother and had given her mother some coffee that she had brought from home. Ashburn then warned her, "Barbara, do you know what was said at the meeting yesterday about [what would happen] if you are caught talking about the Company." Varner replied that she was not talking about the Company but was talking about Max's eyes. Varner then went back to her duties and Nicholas was summoned to the office. During the course of the morning, the Respondent's management also interviewed employees Susan Wright and Chong Callahan concerning the incident. When DuPont returned from the hospital, he, too, was questioned by the Respondent's management, who went over the same questions with him several times. Most of the

²⁷ Jackson is no longer employed by the Respondent and was not summoned to testify.

questions were directed to the issue of whether he had spoken with anyone outside the facility concerning his injury.²⁸

On the afternoon of the DuPont incident, Viands, Florentine, and a union official identified as Woods came to the Lakeside Club for a negotiating meeting with Ashburn. The latter was by herself. When they began to talk, Ashburn pointed out that she had a tape recorder with her and wanted to tape the proceedings. Viands objected. Ashburn then proposed that a stenographic transcript of the negotiations be made and that each of the parties share the cost of the stenographer. Viands again objected, saying that Ashburn could take her own notes and he would take his. The meeting then broke up and another meeting was scheduled for October 13. The October 13 meeting was canceled because Ashburn was suddenly summoned home to Newport News to attend her grandmother's funeral. A third meeting was set for October 15 but it did not take place because of an intervening strike.

On October 13, the Respondent completed and posted the revised work schedule. Chiado testified that the decision to revise the work schedule arose out of criticisms made by Niemeyer when he made a surprise inspection of the operation on October 10. Although the writeup Niemeyer gave the Respondent was not specifically directed to work scheduling, he did criticize employee work performance and Chiado interpreted this criticism as requiring a schedule revision. There is no suggestion in the record that the contractual bidding procedure was followed except arguably in the case of Florentine. Chiado simply made up a new schedule and posted it. After Wilkes had reported for work on October 12, and had signed in, she was told by Ashburn and by Jackson that she would have new hours beginning the following day. She was told that she would be working Monday through Friday from 12:30 p.m. until 7:30 p.m. and on Sundays from 12:30 p.m. to 6:30 p.m. They asked her if the new hours were a problem and she said no. The revised new hours, however, were not the subject of any bidding on her part.

When Florentine reported for work on October 12, Ashburn informed her that there was going to be a new schedule and invited her to pick the shift that she preferred. The new assignments were to begin the following day. Most of the jobs were during the afternoon. Florentine, who had been working on the morning shift, was hard pressed to choose an afternoon shift because, with 1 day's notice, she could not make arrangements for the care of her children during afternoon hours. As a result, she picked the 6 a.m. to 12:30 p.m. shift, although it meant receiving fewer hours than she had been working. On the following day, she reported for work at 5:50 a.m. and was told to go home and not to return until 8 a.m. since her shift had just been changed to an 8 a.m. reporting hour.

²⁸ Varner is a nervous, high-strung individual who gave ample evidence of her condition as she testified. A trait such as this, however, has no necessary bearing on credibility. Following the interview that she had on October 9 with the Respondent's management, she became so upset that she went directly from work to Florentine's house to register a complaint about what had happened. She was in such a state of anxiety that she was taken to the hospital in Waynesboro. There she was diagnosed as having high stress arising out of her employment and was given sedatives to calm her down. The mere recitation on the witness stand of what occurred at the dining hall was sufficient to cause this condition to arise again at the hearing.

On the evening of October 13, the Union held a meeting at the Sportsmen's Club, a tavern in nearby Blue Ridge, Pennsylvania. Viands and all but one or two of the bargaining unit members were present. The employees voiced a series of complaints against the new management. They complained about being harassed on the job and about not having enough help to scrub the bathrooms. Nicholas and Varner complained about the interrogations they underwent on October 9 in connection with the DuPont incident. Both Manahan and Emory complained about not being hired. Employee Sandra Wantz complained that she felt she had to do the work of four people on Sundays because others had been given the day off. She also complained about work assignments being made without regard to seniority. Florentine complained about the cut in hours she received and about the fact that she had been sent home when she arrived at work when her starting hour had suddenly been changed without notice. A secret ballot was taken and the employees voted 12-0 to go on strike. Viands asked them to delay the starting time of the strike and defer the actual calling of the strike to him. They agreed.

Employees reported to work as usual on October 14. Viands appeared at the dining hall just before lunch and called a strike. Nearly all of the work force walked out. He phoned Newport News to inform Dilton Ashburn of the strike. Pickets were set up just outside the gate of the garrison carrying picket signs that read: "Hilton Environmental Unfair—On Strike—Teamsters Local 992." People entering and leaving the post were offered leaflets on Local 992 stationery reading:

BOYCOTT—BOYCOTT

Hilton Environmental Food Services

This Company is UNFAIR and ON STRIKE. It is a union busting company. It refused to obey the law or respect the *rights* of its employees, many of whom have worked for years at the *Ft. Ritchie Dining Room*. It has stated that it would never sign a contract with the Union. It has refused to hire two employees. It has refused to bargain in good faith with the Union.

Since it took over the Dining Room October 1, 1992, Hilton has been trying to force the employees to quit. It has violated the law by changing the employees' hours and working conditions. The NLRB and OSHA are investigating these violations of the law.

**PLEASE HELP US
BOYCOTT HILTON ENVIRONMENTAL**

Teamsters Local Union No. 992

Both the strike and picketing have continued to date.

A bargaining session scheduled for October 30 was canceled. Beginning in November, Maciejczyk began to handle the Respondent's negotiations with the Union. In evidence are lists or charts of company proposals and union responses dated November 9 and December 14, 1992, and a company letter to the Union, dated March 30, 1993, containing a copy of the old Son contract with revisions noted thereon that constituted company proposals as of that date. The aforementioned charts contain indications of union acceptance or rejection of company proposals proffered on November 12 and

25. It is unclear, however, whether these union responses were the result of face-to-face negotiations or the result merely of written communications. There were face-to-face negotiations on January 12 or 13, 1993, and again on March 19 but only a few matters were resolved on those occasions.

Noteworthy among the Respondent's various bargaining positions throughout this period of time was a continuing proposal that the Union should withdraw unfair labor practice charges filed against the Respondent October 15. Another significant continuing proposal was that the contract should be of 1 year's duration, beginning October 1, 1992, the date that the Respondent began its operations at Ft. Ritchie, and ending on September 30, 1993. Over a period of time, union representation changed. Florentine resigned as shop steward on or about December 19 and was replaced by Wilkes. Following a union election in late 1992, Viands was replaced by a new secretary-treasurer, Linden Heavner, and a new business agent, Ron Mercurio.

On April 16, the parties met for a lengthy bargaining session in Frederick, Maryland, at the branch office of Maciejczyk's law firm. For the first time the Union was represented in negotiations by an attorney, as Beins joined other union negotiators and became their lead spokesman. A number of items that had previously been in dispute were agreed on. Others remained in contention. Maciejczyk had offered the Union a 1-year contract, beginning October 1, 1992. The effect of this offer was a 5-1/2-month contract as more than half the proposed 1-year contract term had already expired. Beins claimed that such an offer was illegal. The Union offered the Company a contract of 3 years' duration, to which Maciejczyk countered that there would be no contract at all unless the Union withdrew its pending unfair labor practice charge. Maciejczyk then offered the Union a 2-year contract if it would withdraw its charge. Beins objected, saying that the Company's insistence on withdrawing charges was illegal. Maciejczyk replied that "I can insist on anything I want." He also said that the inclusion of the computer operator or clerk was not a bargainable issue because the Company was going to assign the work to management officials.²⁹ Beins objected, saying that "you can't just on your own take the clerk out of the unit." Maciejczyk replied that the Respondent had already done so and this was how it was going to be. The Union also requested the reinstatement of all strikers if a contract was concluded. The Respondent agreed to this proposal with one exception. It was at this point, Maciejczyk asked Beins to step out of the room for a private conversation.

At a sidebar meeting between Beins, Maciejczyk, and Gerald St. Ours, the Respondent's other attorney, Maciejczyk told Beins that the Company would not agree to reinstate Wilkes, the current shop steward. According to Maciejczyk, she had urged soldiers to boycott the dining hall because the food was poisoned. Beins pressed Maciejczyk for details of the allegation—when was the statement made, to whom was it made, and whether Maciejczyk had affidavits supporting his allegation. Maciejczyk replied that the Company was going to find out and let Beins know. He also mentioned that Wilkes had been convicted of theft but that the conviction

was nothing new. Beins then inquired why Maciejczyk was bringing it up if it was nothing new. He accused Maciejczyk of trying to destroy the Union by eliminating its shop steward and chief employee negotiator.

During the afternoon session, Wilkes was confronted with the food poisoning statement and denied making it. The parties proceeded to discuss about seven remaining contract issues, resolving some and failing to resolve others. Beins finally agreed to recommend to the Union's membership during a contract ratification meeting that the unfair labor practice charge be withdrawn if that was what it took to get a contract. Maciejczyk said he wanted more than a recommendation; he wanted a commitment from union negotiators then and there that the charge would be withdrawn. No commitment was made. At some time during these negotiations, the Respondent offered a 1-year agreement without any reference to withdrawal of the charge if the 1-year term dated from October 1, 1994. That offer was not accepted.

With regard to Wilkes, the Union offered during this session to arbitrate the question of her reinstatement apart from any question of agreeing to a contract if she could return to work pending the arbitration. Maciejczyk refused the offer, stating that Wilkes was not coming back to work for the Respondent. The bargaining session ended without an agreement. Another session took place on July 23. At that time, Maciejczyk had withdrawn from the case and from the firm that represented the Respondent. The only thing of note that occurred at the July 23 meeting was that St. Ours, who took over as lead negotiator for the Respondent, offered the Union a 2-year contract with no strings attached relating to withdrawal of charges. By this time, a second unfair labor practice charge had been filed by the Union against the Respondent. St. Ours' offer was not enough to bring about an agreement.

In August, the Union made an offer on behalf of the strikers to return to work. For reasons that are obscure in the record, the offer was either not accepted or not satisfactorily accepted so the strike remained in effect.

C. Analysis and Conclusions

1. The Respondent's duty to bargain with the Union

Respondent concedes that it is a successor to Son, as indeed it must, since it hired a majority of Son's employees to perform the identical duties, at the same location, with the same equipment, providing the same services to the same general contractor. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). There is an issue as to when it became a successor but the Respondent further concedes that this status arose before it took over the dining hall operation and no later than September 28, 1992, when, according to its version of the facts, it agreed to hire a majority of Son's employees. Because, on and after the first day of its operation of the Ft. Ritchie dining hall, the Respondent was Son's successor, it was under a duty to bargain collectively with the Union over the wages, hours, and terms and conditions of its bargaining unit employees. *Fall River Dyeing Co. v. NLRB*, 482 U.S. 27 (1987). From time to time, it honored this duty but only after its fashion.

According to the credited version of the facts in this case, the Respondent agreed to hire all of its predecessor's employees on or about September 8, 1992. It did so in a private

²⁹ The Respondent receded from this position at the hearing in this case and indicated to the Union that it would bargain over the inclusion of the clerk's position in the unit.

conversation between Viands and Ashburn and it also did so by virtue of a public announcement made by Ashburn to all employees after they had assembled in the dining hall to fill out employee application forms. It may also be argued that the Respondent recognized the Union before that date as the collective-bargaining representative of its employees as it agreed to meet and negotiate with Viands as early as July 28, when Ashburn made a pretakeover visit to the premises, and again in August when she recognized and negotiated with the Union by discussing with Viands a proposed amendment to the Son's contract respecting bidding procedures and job classifications. No conclusion need be reached concerning the import of these instances of union recognition in order to resolve the specific issues in this case.

The General Counsel and the Union argue that the Respondent was obligated to bargain with the Union over the initial terms and conditions of employment because of an exception set forth in *Burns*,³⁰ the seminal Supreme Court case that explicates the duties of a new employer in a successorship situation vis-a-vis an incumbent union. According to *Burns*,

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' collective bargaining representative before he fixes terms.

Their argument in this regard is well taken. However, there are other facts in this record that fixed this obligation on the Respondent even more firmly.

As early as December 1991, the Respondent here began its relationship with the employees whom it later hired. This relationship was inaugurated by soliciting letters of intent in which employees signified in writing to the Respondent their intention of working for the Respondent should it take over the dining hall contract on October 1, 1992. All Son's unit employees who came to work on October 1 revised the proposed letters of intent proffered to them by the Respondent to indicate in the clearest way possible that they would work only under the wages, benefits, and conditions provided in the existing Son's contract with the Union, viz:

The rate of pay for my employment shall be in accordance with wages as outlined in the agreement by the General Teamsters and Allied Workers, Local Union No. 992. I also agree to perform my duties as required by the contract specifications and according to the Collective Bargaining Agreement with General Teamsters and Allied Workers, Local 992.

By hiring these employees on or about September 9, the Respondent was necessarily incorporating the Son's-Teamsters contract into its relationship with them.

Moreover, in response to Beins' protest, the Army contracting officer specifically and in writing stated on August 30, 1992, a month before the Respondent's contract was to begin, that it was going to incorporate Son's union contract into its own agreement with the Respondent. Thus, it is

abundantly clear that, on taking over the facility on October 1, the Respondent stood in para materia with Son and was obligated and restricted by Son's contract just as Son would have been had it been the successful bidder and had continued in place after September 30.³¹

2. The impact of the Son's contract on the Respondent

The Son's contract with the Union expired by its terms on September 30, 1992, the same date on which Son's contract with the Army expired. This fact did not mean that either Son's or its successor was free to change the wages, hours, and terms and conditions of bargaining unit employees unilaterally. The seminal case on this point is *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, an employer was held to have violated its duty to bargain in good faith under Section 8(a)(5) of the Act by unilaterally changing an existing term or condition of employment, without first bargaining with the Union in good faith to impasse. The *Katz* doctrine includes situations when a collective-bargaining agreement has expired and negotiations for a new agreement have not yet produced one. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). There are exceptions to the *Katz* rule. Terms and conditions of employment that are so rooted in a contract that they cannot exist outside the framework of an existing agreement do not survive the expiration of a contract. Such terms include union-security clauses, checkoff, no-strike provisions, and the arbitration of postexpiration disputes (as distinguished from the duty to grieve over such disputes up to the point of arbitration). See *Litton Financial Printing Division, v. NLRB*, 498 U.S. 966 (1990), 111 S.Ct. (1990), 501 U.S. 190 (1991).

3. Unilateral changes in wages, hours, and working conditions

The Respondent concedes that it has not made any payments to the Teamsters' health and welfare fund on behalf of bargaining unit employees since taking over the dining hall contract on October 1, 1992. Its failure to do so is not only a unilateral change in the terms and conditions of unit employees that was not bargained to impasse, it is also a violation of its direct contract of employment with employees that arose out of the submission of their letters of intent agreeing to work for contract wages and contract benefits and their acceptance by the Respondent as employees on or about September 9, 1992. It is frivolous to contend that the duty to continue making fringe-benefit payments would impose on the Respondent a duty to finance a strike. All employees for whose benefit these payments were to be made worked at least 2 weeks for the Respondent during early October 1992, so the funds are certainly owed something for that period of employment. Fringe benefits under article XXI of the contract are geared to a sum of money (45 cents) due and owing the funds for each hour worked, so if employees are on strike, nothing is owed because no hours of work

³¹ It is quite true that neither the General Counsel nor the Union advanced this argument in support of their contentions in this case. In deciding a case, however, I am not limited by the contentions or theories of a case advanced by any party and am free to resolve any issue that may be framed by the complaint and answer on an alternative theory so long as the theory is factually supported by the record.

³⁰ *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

have accrued. In any event, the quantum of fringe benefit payments due and owing is not a matter to be determined here but in a supplementary proceeding. By unilaterally discontinuing to make fringe-benefit payments to the Union's health and welfare trust funds on behalf of its bargaining unit employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

Immediately after taking charge of the dining facility, the Respondent made wholesale changes in work schedules. It did so on October 2 and again on October 12, thereby precipitating a strike. These changes, in many instances, had the effect of reducing hours and earnings of unit employees. The changes that were made not only affected the daily routines of these employees, however, but were made without even token observance of the job bidding and seniority provisions in article XIX of the expired contract. This provision had governed schedule revisions in the past. Moreover, the Respondent had made a commitment not to make any such changes during the first 30 days of its tenure as dining facility contractor. By making work schedule changes without bargaining to impasse over both the manner of making changes and the individual changes themselves, the Respondent violated Section 8(a)(1) and (5) of the Act.

The Respondent blew both hot and cold on the subject of seniority. It promised to observe seniority and was under a contractual duty to do so until bargaining to impasse over removal of the seniority provision found in article VII of the contract. It assertedly made initial job assignments through the shop steward on the basis of seniority. When grievances were filed that claimed violations of seniority rights, Ashburn bluntly stated that she could have thrown the grievances into a drawer because she was not bound by the terms and conditions of the Son's contract and its seniority requirements. She also remonstrated with her new employees, telling them to stop trying to pressure her into following the Son's contract. More to the point, she gave preferred work assignment treatment to Martin, whose name was at the bottom of the seniority list. Such actions amount to a repudiation of the seniority provisions of the expired contract, provisions that she was obligated to observe until they had been removed by consent of the Union or by bargaining to impasse in good faith. By unilaterally discontinuing to follow seniority, the Respondent violated Section 8(a)(1) and (5) of the Act.³²

Article V, section A of the Son's contract provided that "every new or re-hired employee shall be on probation for the first sixty (60) days of employment or re-employment." When the Respondent indicated to Viands and to the group of employees who had just completed applications to work for the Respondent that all of Son's employees would be hired, it made no reference to any period of probation. This news came in the form of an announcement by Chiado about 6 or 7 days after the Respondent had begun operations. While most of the bargaining unit employees had worked at the dining hall for several years and for a succession of contractors, they were new to the Respondent and to its method of doing business and, as a technical matter, were being ei-

³² It was also frivolous for Ashburn to assert that she had no duty to observe seniority because she had not received a seniority list and the list she had received was not "official." She had in fact received several seniority lists. In any event, she was under a duty to observe seniority, notwithstanding the excuse that she proffered to employees.

ther hired or rehired by the Respondent as of October 1, 1992. Accordingly, when the Respondent announced this requirement, it was not departing from the provisions of its predecessor's contract so no unilateral change in working conditions arose in this regard. For this reason I will recommend dismissal of so much of the consolidated complaint that alleges that the Respondent unilaterally imposed a new 60-day probationary period on its recently hired employees.

During the last months of the Son's contract, the position of AFMIS clerk or keypunch operator, however the job may be described, was held by an individual who was not only a member of the bargaining unit but its shop steward. She was given 40 hours of special training for this position and was employed on a full-time basis performing its functions. Ashburn was well aware of these facts. Although office clerical positions are normally regarded by the Board as outside the scope of a production and maintenance unit, there is no statutory reason why such a unit definition must occur in every case. When, as here, there is bargaining history to support a finding that the parties agreed to incorporate a clerical position in a food service unit, that history should be controlling.

The Respondent points out in its brief that the question of transferring of unit work outside the unit is a mandatory subject of bargaining while a relocation of unit positions outside the unit is not. Often the distinction is difficult to discern. See *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993). This distinction need not concern us here, however, since neither a transfer of bargaining unit work to nonunit employees nor the transfer of a unit position to nonunit status may be accomplished unilaterally by an employer. The Respondent here performed both acts and did so without bargaining, either to impasse or otherwise. The Respondent simply told Florentine, the AFMIS clerk, that her work was being given to management employees, thereby transferring unit work to nonunit personnel. Later, the Respondent's attorney refused to discuss the placement of the job with union negotiators, stating that the job was outside the bargaining unit and would continue to be outside the unit. When, in the summer of 1993, the Respondent hired a nonmanagement employee as a computer operator to perform the AFMIS work, she was employed as a nonunit employee. By these acts, the Respondent unilaterally transferred the job in question to nonunit status and transferred unit work to those employees. By performing each of these acts unilaterally, the Respondent violated Section 8(a)(1) and (5) of the Act.

The reasons that the Respondent advanced for transferring the AFMIS work to nonunit employees and for transferring the job out of the unit also bear scrutiny. Doubtless part of its reason was economic, in that it could eliminate a position and use management personnel to handle the task as part of their duties. Later, the Respondent was able to prevail on the Army to provide it with an extra \$19,000 to cover what is now an 8-hour-a-week job and pocket the difference. Ashburn's stated reason to Florentine is also cogent, however, and bears on her motivation. She told Florentine that she did not want a union member handling the job because she felt there might be a conflict of interest. The fact that Florentine was shop steward as well as a union member doubtlessly sharpened Ashburn's resolve. In the same conversation, she also asked Florentine if the latter would be

willing to withdraw from the Union, a clear suggestion to Florentine that her old job might still be hers if she would only abandon her current allegiance. Accordingly, I conclude that, by reclassifying the position of AFMIS clerk outside the bargaining unit and transferring unit work to the holder of that position for the reason asserted, the Respondent not only violated Section 8(a)(5) of the Act but Section 8(a)(3) as well.

4. Instructions to employees not to discuss job-related matters outside the dining hall

Since the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), unreasonable employer restrictions on employee communications with each other have been held to be a violation of Section 8(a)(1) of the Act, even though such communications might take place on company premises. Hence a restriction on solicitation during an employee's own time has been deemed to be presumptively invalid.³³ Certainly, any restriction on employee communications off company premises is a clear infringement of Section 7 rights. While a restriction on dining hall employees from socializing or discussing company matters with soldiers on dining hall premises might not be a violation of Section 8(a)(1) of the Act, since soldiers are not "employees" within the meaning of the Act, a blanket restriction on employees communicating with each other concerning company activities, either on or off company premises is a plain and obvious violation. Moreover, Section 7 of the Act protects the rights of employees, acting in concert, to bring complaints concerning wages, hours, and working conditions to the attention of a wide variety of public officials. See *Grandview Country Manor*, 267 NLRB 1046 (1983), and cases cited there at 1049, 1050.

In this case, Ashburn's instructions to employees about discussing company matters went far beyond talking with soldiers as they came through the cafeteria line to buy their meals. Employees were told by her that "what happens in the dining facility stays in the facility" and anyone caught discussing such matters with anyone, including each other, outside the facility, would be fired "and prosecuted." Moreover, as discussed *infra*, Ashburn and Chiado went about enforcing this rule with single-minded intensity not long after it was announced when they tried to find out who had complained to a government agency about how the Company was handling DuPont's work-related eye injury. These statements were an infringement of Section 7 rights and constituted a violation of Section 8(a)(1) of the Act. I so find and conclude.

5. Renouncing the contractual grievance procedure

Among the many provisions of a contract that survive the expiration date and that may not be unilaterally eliminated is contractual grievance machinery. With respect to pre-expiration grievances arising under the contract but which ripen after expiration, the duty to arbitrate survives. *Nolde Bros. v. Bakery Workers*, 430 U.S. 243 (1977). With respect to

³³These rules and refinements thereof, including how restrictive rules might be properly or improperly expressed, have been the subject of a long line of Board decisions reaching back over a great many years. See *Peyton Packing Co.*, 49 NLRB 828 (1943); *Essex International*, 211 NLRB 749 (1974); *TRW Bearings*, 257 NLRB 442 (1981); and *Our Way, Inc.*, 268 NLRB 394 (1984).

postexpiration grievances, the grievance machinery survives the expiration of the contract although the arbitration provisions may not. *Hilton-Davis Chemical Co.*, 185 NLRB 241 (1970); *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). As the Respondent's duty to observe the grievance machinery found in article IX of the Son's contract survived the expiration of that contract, the Respondent was not free under the *Katz* rule unilaterally to renounce its duty to grieve or the machinery established to resolve a grievance.

In this case, Ashburn told employees who had filed grievances about work scheduling and favoritism in shift assignments that she should have thrown away the grievances in a drawer because there was no union and no union agreement. Her only reason for engaging in any discussion was "to keep communications open." In doing so, she was unilaterally repudiating article IX of the expired contract that obligated her to discuss with union representatives any grievance that had been filed relating to "an interpretation or application of the agreement." Accordingly, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. The *Weingarten* violation

The Supreme Court's decision in *NLRB v. J. Weingarten*, *supra*, imposes on an employer a statutory duty to permit an employee to have union representation during a disciplinary interview or an interview that he or she reasonably believes will lead to discipline. Such representation must be requested in a timely manner. In this case, following the accidental injury to DuPont on October 9 and a visit to the premises by Neimeyer and McAfee, the Respondent's management conducted an inquiry during which several employees were called into the company office and interviewed behind a closed door by all three of the Respondent's management officials. One of those employees was Varner.

There is no dispute that, on this occasion, Varner asked for union representation and that she received none. Respondent claims that the interview was not disciplinary in character but was being conducted merely to provide Respondent's management with information to assist it in filling out OSHA and workers' compensation forms. Hence, it was not governed by the *Weingarten* rule. Respondent also argues that, after requesting union representation, Varner consented to proceed without it.

The thrust of the interviews in question was not to elicit information necessary to report an injury to public authority but to find out who in the work force had brought the matter to the attention of public authority in the first place. Over and over again Varner was peppered with questions concerning to whom she had spoken to regarding the incident, where she had taken her break, with whom she had taken her break, and even whether she had rolled down the window of her car when she was on break in her automobile with her mother. These questions had not the slightest relevance to how DuPont was injured or the nature of his injury. The manner in which the interview was conducted was hostile and demanding. Only a day or two earlier, Ashburn had threatened employees with discharge and prosecution if they discussed company matters with other employees or discussed such matters outside company premises. On October 9, within an hour or two of the incident in which DuPont was injured, the Army's contracting representative and the Post safety officer had become aware of the incident and had visited the dining

hall to find out what had happened. What Ashburn wanted to know was who had tipped them off. The interrogation of Varner was part of her investigation. Not only did Varner have reason to believe that the interview was disciplinary in character; it was disciplinary in its thrust and motivation.

There is nothing in the record to support the Respondent's claim that, having made a request for union representation, Varner then consented to proceed without her shop steward in the room. Varner made not one but three requests for her steward, none of which were granted because Florentine was not in the area at the time. These repeated requests on her part are totally inconsistent with any suggestion that she stayed in the office with three management officials voluntarily or that she consented to have them grill her in the manner in which they did. The fact that she became so nervous over this incident that she eventually had to go to the hospital and seek medical treatment for stress lays the Respondent's contention firmly to rest. By denying Varner union representation during a disciplinary interview after her timely requests, the Respondent here violated Section 8(a)(1) of the Act.

7. The refusal to hire Manahan and Emory

Normally speaking, a successor has no duty to hire the employees of its predecessor and is free to hire a brand new work force. It must hire its work force, however, for non-discriminatory reasons. See *Harvard Industries*, 294 NLRB 1102 (1989); *Weco Cleaning Specialists*, 308 NLRB 310 (1992). Its right to hire or not to hire its predecessor's employees is further circumscribed by one other consideration. If it makes a commitment prior to starting its new operation that it will hire its predecessor's employees, it must honor that commitment. *Double A Coal Co.*, 307 NLRB 689 (1992). In this case, the Respondent promised to hire all of Son's employees. Indeed, it made that promise twice. Moreover, the Respondent was under a duty to observe Son's seniority rankings, both because the Son's labor agreement had been incorporated by the Army into the Army's contract with the Respondent and because the Respondent had at least implicitly promised to do so.

Both employees whom it refused to hire were on the Son's seniority list. Contrary to the excuse proffered to each of them when they reported for work, Son's had not individually discharged either of them and their names were still on the seniority list. Although its reasons for not hiring Manahan and Emory may not have been discriminatory in character, Respondent had a duty to hire them, a duty that was imposed by Section 8(a)(5) of the Act as set forth in *Double A Coal Co.*, *supra*. By failing and refusing to hire Manahan and Emory, the Respondent here violated Section 8(a)(5) of the Act. I so find and conclude.

8. The strike on October 14, 1992

Before the commencement of the strike on October 14, 1992, the Respondent had, in a very short period of time, committed several egregious unfair labor practices noted above. It had promulgated an overly broad rule prohibiting employees from discussing job-related matters among themselves and presumably with anyone else. It had repudiated the existing grievance procedure and the seniority provisions in the expired contract. It had completely revamped, on a unilateral basis, the established method for making work as-

signments. It had denied Varner her *Weingarten* rights, and it had unilaterally transferred the AFMIS clerk position out of the bargaining unit and unilaterally transferred the AFMIS bargaining unit work to nonunit employees. It had also failed to hire two former Son's employees whom it had a duty to hire.

On the evening of October 13, before taking a strike vote, members of the bargaining unit held a meeting at the Sportsmen's Club where they discussed these matters and vented their anger at the manner in which their new employer had been treating them. Then they took a secret ballot and voted unanimously to go on strike. Their picket signs have, from the outset, carried the legend "Unfair" and the boycott leaflets that they distribute bear the same charge. There is no prudent doubt that the Respondent committed a series of unfair labor practices and that these violations of the Act were reasons why its employees decided to strike. Accordingly, I conclude that the strike in question was caused by the Respondent's unfair labor practices and is an unfair labor practice strike.

9. Bargaining to impasse over withdrawal of charges

It is well settled that a party to collective-bargaining negotiations may request the other party to withdraw pending unfair labor practice charges as part of an agreement to a contract package. It may not insist to impasse over the question of withdrawal, however, and condition any final agreement on withdrawal because the question of withdrawing charges is a nonmandatory subject of bargaining. See *Laredo Packing Co.*, 254 NLRB 1 (1981), and cases cited therein at 19 and in fn. 42. Respondent acknowledges, as it must, that Maciejczyk repeatedly proposed to the Union the withdrawal of an unfair unfair labor practice charge that the Union filed shortly after the strike began in October. It contends, however, that these requests were not pressed to impasse. I disagree.

The written proposals made to the Union on several occasions by Maciejczyk in the late fall of 1992 and early spring of 1993 to withdraw the pending charge were met with firm and repeated rejections. In and of itself, such a scenario might not support a finding of insistence to impasse. At the outset of the April 16 negotiations, however, Maciejczyk told Beins and other union negotiators in no uncertain terms that there would be no contract if the pending charge remained before the Board. When Beins capitulated to this demand, saying that he would recommend withdrawal to members of the bargaining unit during their contract ratification session, his retreat was still not enough. Maciejczyk wanted from union negotiators a commitment then and there to withdraw the charge. Such demands define an insistence to impasse. I have found that, by the end of the day, the Respondent had proposed a 5-1/2 month contract (i.e., 1 year, beginning October 1, 1992) without any strings attached relating to charges but such a contract term proposal is, in and of itself, a matter of questionable legality and is arguably just another indication of bad faith at the bargaining table on the part of the Respondent. The Respondent did not meaningfully move off of its insistence on a withdrawal of charges until a second charge had been filed, challenging, inter alia, its bargaining stance on April 16, and not until Maciejczyk had withdrawn from negotiations and St. Ours had assumed the role of the Company's lead negotiator. As the Board pointed out

in *Laredo Packing*, supra, such a change of heart is not a defense that excuses a previous violation of the Act. Accordingly, I conclude that, by insisting to impasse that the Union withdraw a pending unfair labor practice charge, the Respondent here violated Section 8(a)(1) and (5) of the Act.

On the foregoing findings of fact and on the entire record considered as a whole, and pursuant to Section 10(b) of the Act, I make the following

II. CONCLUSIONS OF LAW

1. Respondent Hilton's Environmental, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 992, affiliated with the International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All food service employees and AFMIS clerks employed by the Respondent at its Ft. Ritchie, Maryland facility, but excluding cooks, guards, and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and is the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By insisting to impasse on a nonmandatory subject of bargaining, i.e., the withdrawal of unfair labor practice charges; by unilaterally transferring the position of AFMIS clerk out of the bargaining unit and transferring bargaining unit work to her; by unilaterally discontinuing the existing method of scheduling employees on the basis of bidding; by announcing that the Respondent no longer had a duty to resolve grievances in accordance with existing grievance machinery; by unilaterally discontinuing to make fringe benefit payments to the Union's health, welfare, and pension trust funds; by repudiating the seniority provisions in an expired contract covering bargaining unit employees; and by denying to employees requested union representation during a disciplinary interview, the Respondent here violated Section 8(a)(5) of the Act.

6. By transferring the position of AFMIS clerk out of the bargaining unit in order to discriminate against employees on the basis of union membership and union activities, and by refusing to reinstate Ann Wilkes because of her membership in and activities on behalf of the Union, the Respondent here violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 5 and 6 and by instituting a rule requiring employees to refrain from discussing among themselves at any time and at any place matters arising in the Respondent's facility relating to wages, hours, and terms and conditions of employment or bringing complaints concerning working conditions to the attention of public authorities, the Respondent violated Section 8(a)(1) of the Act.

8. The strike that commenced at the Respondent's Ft. Ritchie, Maryland facility on or about October 14, 1992, was caused by the Respondent's unfair labor practices.

9. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. As the violations of the Act found here are serious and pervasive and evidence an attitude on the part of the Respondent of total disregard for its statutory obligations and the rights of its employees, I will recommend a so-called broad 8(a)(1) remedy designed to suppress all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will recommend inter alia that the Respondent cease and desist from making unilateral changes in wages, hours, and working conditions unless and until the Union has consented to those changes or the Respondent has bargained in good faith to impasse concerning them. I will also recommend that the Respondent be required to offer employment to Annamaria Manahan and Wendy Emory to their former or substantially equivalent positions and make them whole for any loss of earnings they may have sustained by reason of the Respondent's unlawful failure to hire them, in accordance with the *Woolworth* formula,³⁴ with interest thereon at the rate prescribed by the Tax Reform Act of 1986, *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I will recommend that the Respondent be required to reimburse union fringe benefit trust funds for all moneys that have been unlawfully withheld from those funds since October 1, 1992, with interest computed at the compliance stage of these proceedings. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

As unfair labor practice strikers, the employees are entitled to full reinstatement to their former positions within 5 days of making an unconditional offer to return to work. A special problem has arisen in this case concerning striker Ann Wilkes, who has served as the Union's shop steward since on or about December 19, 1992, when Florentine resigned.

In her position as shop steward, Wilkes had been present at three bargaining sessions as part of the Union's negotiating team and had assisted several strikers in pressing a claim for unemployment compensation that apparently the Respondent had contested. At the April 16, 1993 bargaining session the Respondent announced that Wilkes was persona non grata and would not be permitted to return to work even though it agreed that the other strikers would be reinstated in the event of a contract settlement. The basis for its objection was certain remarks that Wilkes was heard to make not long after the strike began.³⁵

³⁴ *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

³⁵ As something of a makeweight argument, the Respondent also claimed at the hearing that Wilkes should be denied reinstatement because, in the spring of 1993, a month or so after the April 16 session at which her status was first drawn into question, Wilkes made a phone call to a transient housing facility on the Post to inquire whether Ashburn was staying there at the time. During the course of this phone conversation with the manager, Wilkes referred to Ashburn as a "bitch." Such an epithet, used in the course of a private conversation with a third person, is not a basis for denying reinstatement under a claim of egregious and malicious strike misconduct. Indeed, a cognate expression to the term used by Wilkes was found not to be disqualifying conduct in *Emarco, Inc.*, 284 NLRB 832 (1987). Because of its timing, it could have had no bearing on the Respondent's April 16 refusal to reinstate Wilkes.

I credit the testimony of Sergeant William G. Johnson that, shortly after the strike began, Wilkes came to the headquarters building on the Post to see the garrison commander. While she was waiting, she spoke with Johnson. She told him that things were happening in the dining facility that were not right. Specifically, she complained that pots were being used for cooking purposes that had been cleaned on the inside with cleaning solution and that oven cleaner had been sprayed in the oven where cooking took place. She said she needed to talk to someone about these matters because otherwise somebody might get sick.

Johnson did not mention this conversation to anyone in the military chain of command but continued to eat at the dining hall. About 2 months later, he brought his conversation with Wilkes to Ashburn's attention in the course of a casual conversation. Sometime later, at Ashburn's request, he gave a statement to Respondent's attorney. On cross-examination, Johnson denied that Wilkes used the work "poison" in speaking to him or that he had told anyone that she had used that word.

On another occasion late in October or early in November, Wilkes came to the office of Sergeant-Major Findley Henderson to solicit his support for the boycott of the dining hall that was then in progress. Henderson said he could not because of Army regulations. Then he added jocularly that, before he could do so, Wilkes would have to pick him up at meal times, bring him to her house and feed him, and then drive him back to his office.

According to Henderson, she then told him that two soldiers had been poisoned at the dining facility and had been taken to the hospital. Wilkes flatly denies making the latter statement. Henderson said that he did not take her seriously and did not report her allegation to his commanding officer. Some weeks later he asked several soldiers if they had heard anything about the poisoning of soldiers who had eaten at the dining facilities and each replied that he had heard nothing. Toward the end of January, while he was going through the cafeteria line, Henderson met Ashburn, whom he had known socially, and jocularly said, "I hear you are poisoning soldiers." This remark led him to tell Ashburn the rest of his asserted conversation with Wilkes. Eventually, he, too, gave a written statement to Ashburn's attorney.³⁶

Strikers have wide latitude in the messages they convey to members of the public in support of their strike, whether orally or in writing, but they may not disseminate false, vicious, or malicious statements about their employer, its products, or its methods of production. If they do so, they lose the protection that the law give to strikers in bringing economic pressure against their employers in the course of a labor dispute. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 46 (1953). So long as the statements made by strikers are linked to the dispute in question, the fact that they may be biased or contain hyperbole do not render them unprotected. *Emarco, Inc.*,

³⁶ On cross-examination, Henderson said at first that during his conversation with Wilkes the latter had said nothing about the use of a cleaning solution being used at the mess hall to clean pots and pans. When confronted with a pretrial statement to this effect, he then changed his story and admitted that she had in fact mentioned this subject to him.

supra. The fact that such statements may turn out to be false or inaccurate does not mean that they are unprotected so long as they are not malicious in character. *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), and cases cited there at 1131. The burden is on the employer to establish that a striker's statements are false and malicious in order to justify denying the employee reinstatement. See *American Hospital Assn.*, 230 NLRB 54 (1977), and cases cited therein at 56.

The statements attributed to Wilkes by Johnson, namely, that the Company was using cleaning solution to clean the inside of cooking pots and someone might get sick, is an assertion of fact and opinion that may or may not be true. The Respondent did not establish the falsity of these claims and thereby cannot claim that they were uttered either wantonly or maliciously.³⁷ It is clear from the context of these remarks that Johnson did not take them seriously. He continued to eat at the dining hall and did not bring the matter to Ashburn's attention until months later.

The statement attributed to Wilkes by Henderson is more critical since it is a direct allegation of serious wrongdoing on the Respondent's part. I credit Wilkes' denial and believe that the statement she made to Henderson was along the same lines as those made to Johnson and that Henderson who was using hyperbole in recounting the conversation. Like Johnson, Henderson also did not take Wilkes' remarks seriously and he said so specifically during his testimony. He continued to eat at the dining hall, did not bring the matter to Ashburn's attention until months after the conversation took place and, when he did so, spoke of it in jest. There is no reason the Board should take it more seriously. Accordingly, I would conclude that the Respondent was not entitled to rely on these remarks as a basis for denying Wilkes reinstatement. When it did so on April 16, it was targeting the Union's leading in-house adherent but had delayed its complaint against her until it appeared that a strike settlement might actually be in the offing. In the event of a strike settlement, Respondent would have to take back a militant band of union adherents and discharge a more pliant group of strike replacements who had crossed their picket line and kept the dining hall functioning for a period of several months throughout the strike. Dropping a last-minute charge like this one at a member of the negotiating committee was an excellent ploy for avoiding an undesired strike settlement and it worked.

When Maciejczyk told Beins that Wilkes would not be allowed to return, the Respondent was in effect discharging her for union activities in violation of Section 8(a)(1) and (3) of the Act. At that moment she became a discriminatee, not merely a striker. Accordingly, I will recommend that the Board order the Respondent to offer her full and immediate reinstatement and that she be awarded backpay, with interest, in the same manner as Manahan and Emory. I will also require the Respondent to post the usual notices, advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

³⁷ In light of the DuPont incident, discussed above, it is entirely possible that cleaning sprays were used in the Respondent's kitchen and that they might have an injurious effect.