

Demi's Leather Corp. and Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC.
Cases 3-CA-17081, 3-CA-17149, 3-CA-17350, 3-CA-17789, and 3-RC-9861

August 21, 1996

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On April 12, 1994, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a motion to strike an exhibit attached to the Respondent's brief, and the Respondent filed an opposition to the General Counsel's motion to strike and a cross-motion to reopen the record.

On March 13, 1995, the Board issued an Order Remanding the proceeding to the judge.¹ On May 9, 1995, the judge issued the attached supplemental decision.² The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified⁴ and set forth in full below.

I. We agree with the judge's finding that the Respondent violated Section 8(f)(1) of the National Labor Relations Act by permanently laying off employees Alan McArthur and Gregory Handy because they engaged in union activities and because they had testified in the unfair labor practice hearing. The judge provided a reinstatement remedy for them. We observe that McArthur and Handy were on temporary layoff status when they were per-

¹ Because our Order Remanding was not printed in the bound volumes of the NLRB Decisions, it is attached hereto as Appendix B.

² We disavow the judge's gratuitous and unfounded remarks concerning the Board and its staff.

³ 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 (fMdBUFF*ERR17*fMDNMF1950) fMdBUFF*ERR17*fMDNMF, enf. 188 (F.2d 362 (fMdBUFF*ERR17*fMDNMF1950) 3d Cir. 1951) fMdBUFF*ERR17*fMDNMF. We have carefully reviewed the record and find no basis for reversing the findings. The Respondent also argues that the judge's supplemental decision should be reversed because it is infected with bias against the Respondent. We find this exception without merit.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (fMdBUFF*ERR17*fMDNMF1996) fMdBUFF*ERR17*fMDNMF.

manently laid off. There is no contention that their temporary layoffs violated the Act. We shall modify the judge's recommended Order to require that McArthur and Handy be restored to the status that they would have enjoyed absent the Respondent's discrimination and be made whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them.⁵

2. The Respondent has excepted to the judge's finding that Freddy Beman was a supervisor and therefore his ballot should not be counted. Although the Respondent is correct that the judge relied on some events that occurred after the election, contrary to the Respondent's contention, the judge also relied on events that occurred before and during the critical pe-

⁵ Chairman Gould would extend restoration and make-whole relief to other individuals similarly situated to McArthur and Handy. The Respondent accomplished its discrimination against McArthur and Handy by changing its layoff policy to eliminate employee recall rights. The record indicates, the administrative law judge found (fMdBUFF*ERR17*fMDNMF1ALJD 41-42) fMdBUFF*ERR17*fMDNMF, and even the Respondent's brief (fMdBUFF*ERR17*fMDNMFp. 31-32) fMdBUFF*ERR17*fMDNMF specifically names 11 other employees who "were also laid off by the [new] policy" and states that "[a]dditional letters were sent to other employees on layoff as and when their respective layoffs became permanent under the policy." The fact that counsel for the General Counsel stated (fMdBUFF*ERR17*fMDNMFTr. 10, emphasis added) fMdBUFF*ERR17*fMDNMF June 29, 1993, that "[t]he practical effect of this policy to date has really applied only to Mr. McArthur and Mr. Handy" does not, of course, mean that it has not subsequently applied to the other similarly situated employees. In sum, other individuals "caught up in the web" of the Respondent's discrimination against McArthur and Handy were therefore also victims of discrimination. *Hedison Mfg. Co.*, 249 NLRB 791, 794 fn. 13 (fMdBUFF*ERR17*fMDNMF1980) fMdBUFF*ERR17*fMDNMF. We have carefully reviewed the record and find no basis for reversing the findings. The Respondent also argues that the judge's supplemental decision should be reversed because it is infected with bias against the Respondent. We find this exception without merit.

Member Browning does not agree with the Chairman's interpretation of the counsel for the General Counsel's opening remarks at the hearing on June 29, 1993, about the practical effect of the Respondent's change in layoff policy. Rather, she believes that when the counsel for the General Counsel stated that the practical effect of the change extended only to McArthur and Handy, he was conceding that there had been no impact on the other employees who had received similar letters about the change in policy before the hearing. Thus, although Member Browning agrees with the Chairman that the Board has the authority to extend the remedy to all those "caught up in the web" of the Respondent's discrimination, even in the absence of a complaint allegation or exceptions by the General Counsel, she would nevertheless not do so in the particular circumstances of this case. *Reynolds Electrical*, fMdBUFF*ERR17*fMDNMF, enf. 188 (F.2d 897 (fMdBUFF*ERR17*fMDNMF9th Cir. 1991) fMdBUFF*ERR17*fMDNMF. We have carefully reviewed the record and find no basis for reversing the findings. The Respondent also argues that the judge's supplemental decision should be reversed because it is infected with bias against the Respondent. We find this exception without merit.

amended on May 4, 1993. Complaint issued May 6, 1993, and the General Counsel, on May 7, 1993, filed a motion to reopen hearing, consolidate cases and adduce additional evidence. On May 24, 1993, the motion was granted. On June 29, a hearing on the allegations contained in Case 3-CA-17789 was held.

The issues in these consolidated cases are as follows:

CASE 3-RC-9861

The Challenges

Terry Belden, Fred Beman, and Sheldon Jacobson

In his second amended report on objections and challenges, dated October 30, 1992, the Regional Director found that the ballots of the above-named individuals were challenged by the Union on the ground that they are supervisors within the meaning of Section 2(f) of the Act. He found further, that the Employer contends that they are not supervisors within the meaning of Section 2(f) of the Act and that they are eligible voters.

The Regional Director concluded that the challenges to the ballots of Belden, Beman, and Jacobson raise substantial and material issues which could best be resolved by a formal hearing.

Anthony Valovic III and Thomas Varin

In the same report, the Regional Director found that the ballots of Valovic and Varin were challenged by the Board agent conducting the hearing on the ground that their names did not appear on the eligibility list. He found further that the Employer contends that Valovic and Varin had been terminated prior to the election and were, therefore, ineligible to vote while the Union contends that they are eligible voters.

The Regional Director concluded that inasmuch as Valovic and Varin had been alleged in the second amended consolidated complaint of October 27, 1992, as having been discharged in violation of Section 8(b)(1) of the Act, the determination of the eligibility of these two individuals must be reserved, pending the disposition of the unfair labor practice charges through a formal hearing.⁴

The Objections

The objections filed by the Union on May 4, 1992, read as follows:

The Employer, by and through its officers, Supervisors and/or Agents, during the critical period between the filing of the Election Petition and the Election of April 27, 1992:

(1) threatened employees with loss of employment if workers voted for ACTWU;

(2) promised future benefits to employees who would cease their Union activities and to encourage them to vote against the Union;

⁴The Union contends further, that apart from the disposition of the alleged unfair labor practices, a question concerning Valovic's eligibility would still exist because he was in layoff status with a reasonable expectancy of recall. This issue, the Regional Director found, could also best be resolved by a formal hearing.

(3) threatened employees with loss of employment if they voted against the Union; and

(4) submitted false information to the Regional Director and improper in a substantial and material way.

In his report of October 30, 1992, the Regional Director noted that in the second consolidated complaint, issued on October 27, Objections 1, 2, and 3 had been alleged as unfair labor practices and, citing case law,⁵ observed that unfair labor practices may be considered in determining whether an election should be set aside. He concluded that as certain of the conduct described in paragraphs VI(f) and VII of the second amended consolidated complaint is alleged to have occurred on dates between the filing of the petition in Case 3-RC-9861 and the election, such allegations and the investigation thereof, raise substantial and material questions of fact that could best be resolved by a formal hearing. The Regional Director reached a similar conclusion.

In his second amended report on objections and challenges, the Regional Director noted that during the course of the investigation of the objections, discussed therein, and the related unfair labor practices, evidence was adduced that during the critical period between the filing of the petition and the date of the election, the Employer discriminatorily terminated Thomas Varin and Gregory Handy. Citing cases,⁶ the Regional Director determined that he was not limited to the specific issues raised by the objections. On the contrary, he concluded that he lacked discretion to ignore evidence uncovered during the investigation of the objections, which might indicate that the election might have been tainted, and that to do so, would constitute reversible error.⁷

The Regional Director noted that the discriminatory terminations of Varin and Handy had been alleged in paragraphs VII and VIII of the second amended consolidated complaint as unfair labor practices in violation of Section 8(b)(1) of the Act. Aggravated inasmuch as conduct alleged as unfair labor practices may be considered in determining whether an election should be set aside and the conduct described in paragraphs VII and VIII of the second amended consolidated complaint is alleged to have occurred on dates between the filing of the petition and the election, such allegations and the investigation thereof raise substantial and material questions of fact that can best be resolved by a formal hearing.

CONSOLIDATED AMENDED CASES 3-CA-17081, 3-CA-17149, and 3-CA-17350

The substantive allegations contained in the second amended consolidated complaint and later amendments there- to include: (1) threatened employees with loss of employment if they voted against the Union; (2) promised future benefits to employees who would cease their Union activities and to encourage them to vote against the Union; and the creation of the impression of surveillance and interrogation. Also included are (3) threatened employees with loss of employment if they voted against the Union; and (4) submitted false information to the Regional Director and improper in a substantial and material way.

⁵ *Intercontinental Mfg. Co.*, 167 NLRB 769 (fiMDBUfi*ERR17*fiMDNMfi1967)fiMDBUfi*ERR17*fiMDNMfi1970;
⁶ *American Safety Equipment Corp.*, 234 NLRB 501 (fiMDBUfi*ERR17*fiMDNMfi1978)fiMDBUfi*ERR17*fiMDNMfi1979;
ton Tire & Rubber Co., 234 NLRB 504 (fiMDBUfi*ERR17*fiMDNMfi1978)fiMDBUfi*ERR17*fiMDNMfi1979;
Lincoln Mercury, 288 NLRB 1133 (fiMDBUfi*ERR17*fiMDNMfi1988)fiMDBUfi*ERR17*fiMDNMfi1989;
⁷ *Van Camp Seafood Co.*, 243 NLRB 165 (fiMDBUfi*ERR17*fiMDNMfi1979)fiMDBUfi*ERR17*fiMDNMfi1980

CASE 3-RC-9861

The Challenges

1. The supervisory status of Belden, Beman, and Jacobson

Terry Belden

Terry Belden had worked at Independent Leather for 10 years and had moonlighted at Burton Leather for a few months before he was hired by Respondent. At Independent he worked in both the tanning department and in the maintenance department. He had taken a 4-year apprenticeship at GE which included training in maintenance work. He therefore had some expertise.

Belden was working at Burton repairing and maintaining machinery in mid-October 1991 when De Magistris asked him to come to work for Demi's Leather to do maintenance work. From working for Burton, Belden knew that the plant was in very poor condition, that the machinery was in disrepair or broken down, and that a lot of work would have to be done to put it in proper order. At a later meeting between the two, De Magistris offered Belden a straight salary of \$400 per week with an increase after 60 days. The increase turned out to be to \$450. De Magistris and Belden testified that Belden was paid a salary to avoid paying overtime. The rank-and-file employees at Demi's Leather are paid on an hourly basis. Both De Magistris and Greenough, Respondent's owners, are salaried.

Belden's first assignment was to go through the mill and determine what had to be done to put it in proper working order, what machinery and equipment was usable, and what was repairable and what was trash. Windows were broken and there were holes in the floor. Belden was charged with determining what was to be repaired, and in what order, to provide for a smoother running operation, so as to increase production. Belden, working by himself, completed this assignment in about a week.

Belden's second assignment was to follow through on his game plan. To this end, he reported to De Magistris what had to be done. He told him that the work of cleaning up the plant was extensive and that he would need help. He suggested that De Magistris hire Sean Belden, his brother, to help him with the cleaning operation. His brother had had an attendance problem at his last job and had been fired because of it. De Magistris agreed with Terry and hired Sean. Terry and Sean worked together for the next several weeks, gathering up pieces of junk to sell to a waste metal company, cleaning up the plant, and carrying out trash and unusable machinery. Also doing occasional maintenance work were employees Todd Christiano, Mike Lee, Mike Ficili, and several others.

When Terry Belden needed additional help, he would ask whoever was operating the forklift to help him. That individual would comply with his request, then return with the forklift to his production job. Belden might also ask De Magistris for someone from another department to help him. Additionally, if an employee should run out of work, De Magistris would tell him to help Terry and Sean pick up trash or ask Terry if he needed help with maintenance. For a 6-to 10-

week period, beginning in the fall of 1991,¹⁰ five or six employees were employed at cleanup duty. Two truck-long hoppers and over 100 smaller hoppers were filled with trash and taken out of the plant by these employees. According to Belden, De Magistris, not he, supervised their work.

De Magistris testified that no one was really in charge of cleanup and maintenance, that he gave the orders and Belden helped out. As an example, he pointed out that many of the wet drums were broken down, leaky, and had to be rebuilt. He stated that Belden performed that work but when he needed help, any of several other employees might be assigned to help him on a temporary basis. He testified that no employees were assigned to work for Belden on a permanent basis, but Sean was supervised by Terry for several months.

Respondent, after purchasing Burton, kept Burton's employees as a permanent core of employees who were expected to be retained throughout the year. They were to be given as much work as possible. Thereafter, Demi's hired additional employees for special purposes. Sean Belden, as mentioned, was one of these. Another was Mike Lee. Both of these were hired in November 1991, Lee about a week after Sean Belden. Employee Nick Etherton was hired later that year. Lee was hired as a temporary employee while Etherton remained permanently employed throughout the following year.

Initially, Sean Belden worked almost exclusively for Terry, cleaning up or doing maintenance work. Later, after the cleaning up was somewhat under control, he only worked for him for the first 3 hours or so, of the day, after which Wager would call for him to come down and work for him. While assisting Terry on a maintenance problem, if the job required him to work through lunch, Terry would notify the office that Sean had worked through lunch, and the secretary would make a note to that effect and sign Terry's initials. Sean was then paid. Terry did the same occasionally for other rank-and-file employees who apparently were assigned to help him. Sometimes Terry would sign the timecards of these employees, himself. There is no evidence that he continued this practice, however, beyond the week ending February 29, 1992.

Before Mike Lee was hired, De Magistris advised Terry that he would be hired, that he was good at general carpentry, and would be assigned to the maintenance department. Terry testified that he did not supervise Lee when he began working in maintenance but admitted that he did give instructions to him. Thus, he assigned Lee such projects as fixing windows, constructing support beams and railings, repairing doors, and raising roofs.

When Respondent hired Sean Belden and Mike Lee, it was in connection with an on-the-job training program agreement with the Private Industry Council, Inc. (fiMDBUfl*ERR17*fiMDNMflthe Coun ton, Montgomery, and Schoharie counties. In connection with these contracts, which were for 6 months, monthly evaluations of the trainees' progress were required by the Council. Terry Belden prepared and signed these evaluations as his brother's and Mike Lee's supervisor. The last such evaluation was signed April 6, 1992. The evaluations reflected only

¹⁰The cleanup period included 2 weeks before Demi's actually existed. During that period, De Magistris told Belden to begin the cleanup operation although it was still Burton Leather.

Terry's opinions and were not changed by De Magistris or anyone else.

Eventually the cleanup project was completed. There was less work for Sean to do then, in the maintenance department. Nevertheless, each morning he would report to Terry and would work for him between 6 and 9 a.m. until Wager arrived at the plant. During this time, Sean would help with lifting motors or tearing apart or building drums. He helped run the table saw and to repair the elevator. Terry taught Sean how to perform certain jobs on his own. He instructed Sean on how to stake, and to mark and notch, jobs required in the building of a drum. Thus, Terry's supervision of Sean continued beyond the cleaning up period. At 9 or 10 a.m., Wager would call Sean down to the wet department to horse skins out of the drum until that job was done.

In January 1992,¹¹ Sean began showing signs that he was reverting to the habits which had gotten him fired at Independent Leather. He was showing up tardy or not at all, and failing to call in and give notice as required by the rules. Both De Magistris and Terry were aware of the problem. On January 28, Sean was absent and failed to call in. Terry went to De Magistris' office where they both discussed the matter. They agreed that Sean be given a pink slip, that maybe that would straighten him out. De Magistris signed the disciplinary notice as an officer of the Company and Terry as supervisor.

Present at this meeting were employee Tony Valovic and the bookkeeper, Joan Volsteen. Valovic credibly testified that it was Terry who described the problem with Sean to De Magistris and recommended that he be given the pink slip. De Magistris then instructed Volsteen what to write on the pink slip, after which it was signed.

After signing the pink slip, Terry left De Magistris' office with the slip still lying on the desk. He testified that he did not know whether Sean ever received a copy of the pink slip. De Magistris testified that he gave a copy of the warning notice to Sean, presumably the following day, when he showed up for work at the Classic plant, a separate building, some distance away. Sean accepted the pink slip and promised to improve his attendance record.¹²

¹¹ Hereinafter all dates are in 1992 unless noted otherwise.

¹² The above described events concerning the disciplining of Sean Belden is based on the combined testimony of De Magistris, Terry Belden, and Tony Valovic. Sean Belden was not called to testify at all. Volsteen, though called to testify on other matters, was not examined on the matter of the pink slip.

Gregory Handy, by far, the General Counsel's most important witness in the entire case, testified concerning his presence at the disciplining of Sean Belden.

According to Handy, he saw Terry Belden walk into the men's dressing area and say, "Here Sean, I got a present for you." He then saw Terry physically hand the pink slip to Sean. Handy testified that, "[T]hey were making a big joke over it, that Sean said, 'How can you do this? Im your brother,' that Sean then wadded up the pink slip and threw it in a trash receptical. Terry just shrugged and walked out of the room. Wager was present and asked Terry how he could do such a thing to his brother."

None of the parties called any witnesses to support or attack Handy's description of this incident. I therefore find that De Magistris was telling the truth when he testified that he, not Terry, gave the pink slip to Sean, that Sean took the pink slip back to the dressing room where he showed it to other employees who, as Handy testified, joked about it. I do not believe Terry's testimony

On January 4, Respondent purchased a second plant, the Classic plant on Fulton Street. The plant was purchased with the idea of performing operations not performed at the original plant. At the time of its purchase, however, it was stripped and had to be put in shape to begin operations. Terry was put in charge of this job. He spent a certain amount of time at Classic, and when Sean was not working for Wager, he sometimes assisted Terry at Classic. After everything was set up at Classic, Sean went into production there. That was in March. Thereafter, Terry was alone in the maintenance department.

Although management witnesses, in their testimony, played down Belden's role as a member of management, the rank and file considered him to be the head of maintenance. On one occasion, one of the employees, jokingly asked Terry to horse a drum. Terry replied that he was on salary and was paid to be just the head of maintenance. He refused to help. When through with their assigned tasks, employees would go to Terry and ask if he had anything for them to do. Terry would then assign them various tasks such as cleaning up the yard or cutting up barrels. He identified himself to employees as a supervisor and his status was not questioned by them.

At least on one occasion, an employee asked Terry Belden, on a particularly hot day, if he could go home early. Terry gave his consent to the request without first seeking permission from higher management, and the employee left.

In July, the plant shut down for maintenance. A number of employees were kept working during this period, helping with maintenance work. Others took vacation. Prior to July 4, Terry took notes of repairs to be made during the shut-down and asked various employees whether they wished to work or not. He told them that they would be mixing concrete to put in the floor and if they did not want to do that, they should not come in. Thereafter, he took his list of projects and employees to De Magistris for approval.

The actual work to be done included the shutting down and repair of the boiler, the repair of machinery, greasing of drum motors, replacement of parts, and the filling of the numerous potholes in the floors with concrete. De Magistris was in and out of the plant throughout the week so Terry was in charge. He assigned the various tasks to the employees doing the maintenance work,¹³ and oversaw their performance. He "ran the show." He had keys to both plants as well as to the maintenance room where supplies, parts, and tools were kept. Terry was the only member of manage-

that he never talked to Sean about the pink slip and I do not believe Handy's testimony that he saw Terry hand the pink slip to his brother. Rather, I believe Handy embellished his description of the incident in the dressing room by stating that he saw Terry actually hand the pink slip to Sean either to support more strongly the Union's position that Terry is or was a supervisor, or simply because Handy is prone to exaggeration. The matter is important not so much in determining Terry's supervisory position but Handy's credibility, a key to the outcome of the entire case, since Handy was allegedly sole witness to a vast majority of the incidents giving rise to the allegations described in the complaint. Since the General Counsel's case relies, to a great extent, on Gregory Handy's uncorroborated testimony, much of this decision, unfortunately, is dedicated to an examination of his testimony and his credibility.

¹³ The testimony of the rank-and-file employees is credited over that of Terry Belden where there is conflict.

ment around the plant on a consistent basis during the week of shutdown.

August was the racing season and De Magistris was frequently away from the plant. Sheldon Jacobson was left in charge of certain personnel during this period. He was in charge of production. When the work for the day was finished he would tell the employees to go home or to see Terry to find out if he had anything for them to do to get their eight hours in. Terry would then decide if they would work or not.

From the above-described situation it is clear that Terry Belden is head of the maintenance department and that although he sometimes works alone, he frequently has employees assigned to him to help with the maintenance work or cleanup projects. At these times he is a supervisor and when working alone he is a salaried member of management. At no time is he a rank-and-file employee member of the unit. His salary is \$450 per week compared to \$6 per hour for rank-and-file employees. I conclude that his ballot should not be counted.

Freddy Beman

Michael De Magistris testified that Freddy Beman was not a supervisor but performed the same duties as rank-and-file employees such as hanging, staking, putting out, and dry drumming. As a leadman he has a little more responsibility to see that the work is being done but has no authority to hire, fire or discipline, according to De Magistris.

Beman had experience in the leather industry, having worked at Independent Leather, Burton Leather, and Johnstown Leather. After being hired by Respondent, shortly after January 1, he worked part time in the evenings on the staking and put-out machines. About this time, he advised employee Anthony Valovic, that De Magistris had promised him that once things "got up and running at Classic," he would be hired as the supervisor over there.

Classic went into operation January 4, but not into full operation until about several weeks later, after De Magistris had purchased and installed new machinery. Several employees were hired to perform the work at Classic. Others were transferred from the Briggs Street plant to the Classic plant. According to De Magistris, he sent Beman to Classic in early April to help hang, take down and dry drum. According to Greg Handy, however, De Magistris told him that if he were sent over to the dry floor at Classic to help out, he was to take orders from Beman. Handy also credibly testified concerning Beman giving directions to a number of employees in his department and sending them from the Buggs Street plant to auto stake or to perform various jobs in the dry floor area. Similarly, Beman, at Classic, would sometimes call the Briggs Street plant and request that an employee be sent over to help him.

Like De Magistris, Wager, and Terry Belden, Beman would occasionally make changes on employees' timecards and indicate his authority by initialing the changes. Although De Magistris testified that Belden and Beman had no authority to initial timecards and that he had, on March 4, posted a signup near the timeclock proscribing the practice, it is clear that the sign was directed at rank-and-file employees who were "writing in" time, not at Belden and Beman because they continued to change times, make notations on

timecards, and initial the timecards of employees working for them, long after the posting of the sign. The signing and initialing of employee timecards indicate that Belden and Beman had authority to police the hours of rank-and-file employees.

Employee Michael Ficili was sent over to work at Classic. Before he was sent there, Jacobson told him that Beman was in charge of the building and everything that went on over there, that he was supervisor.

When on piecework, Ficili received \$42 per day or \$210 per week. Beman, at first, received \$403, straight salary, then later was given a raise to \$433 per week.

Beman would meet with De Magistris each morning. De Magistris would tell Beman what had to be done that day and it was Beman's responsibility to see that it was done. In the process, Beman had the authority to direct employees to work overtime. He, on the other hand, was free to leave the plant at any time and go home. This, he did, on occasion, to De Magistris' annoyance when the day's work was left incomplete by Beman who was the only one in charge at the Classic plant.

Beman and Ficili did not get along well. There were arguments. On these occasions Beman would order Ficili out of the plant and tell him to go to the Briggs Street plant to work. Ficili would follow Beman's orders.

From the above set of factual circumstances, I conclude that, at all relevant times, specifically during the period between the filing of the petition and the election, Beman was a supervisor within the meaning of the Act and his ballot should not be counted.

Sheldon Jacobson

Sheldon Jacobson had been a friend or acquaintance of De Magistris for a long time. When he lost his job, he approached De Magistris to ask for work at Demi's. Two or three times a week, throughout January and February, he contacted De Magistris about employment. There were no openings, however.

Finally, on March 1, De Magistris contacted Jacobson to offer him the job of running the dry floor, an opening which had become available just the day before when he laid off Tony Valovic. Since Jacobson was unfamiliar with the work being done on the dry floor, it was going to be necessary first to train him in the various jobs being done there.

Jacobson reported for work March 2 and De Magistris immediately began showing him how to run the dry drums, hang skins, etc. De Magistris spent between 3 and 5 hours per day for the first few weeks, training Jacobson. In addition to being trained in the physical labor connected with the job, Jacobson was also given certain responsibilities. During the week ending March 21, De Magistris hired a new employee, Thomas Varin, to work on the dry floor. He introduced Varin to Jacobson and told him that Jacobson would be the one to tell him what to do, and he did so. Varin assumed that Jacobson was his boss. By March 21, Jacobson had begun, like Belden and De Magistris to check and initial the timecards of rank-and-file employees. De Magistris decided that he could pay Jacobson by the hour because he was taking Valovic's place and Valovic had been paid by the hour.

Physically, Jacobson was the only person dry drumming skins. After he removed the skins from the dry drum, he would follow De Magistris' production plan for the day and push the skins to the next processor, the autostaker, slocum staker, or whoever, and direct that employee as to what should next be done with the skins. Thus, Jacobson was responsible for guiding the skins through the processing in accordance with the requirements of the order.

Varin testified that both De Magistris and Jacobson assigned him overtime and Jacobson signed his timecard the one time he had a problem.

Employee Mike Ficili was hired during the week ending March 28. During his interview, De Magistris told him that he would be reporting the following Monday to Jacobson, the supervisor in the department in which he would be working.

That Monday, when Ficili reported to the Briggs Street plant, Jacobson sent him over to the Classic plant to work. Thereafter, however, he worked sometimes at Classic and sometimes at the Briggs Street plant. Jacobson would tell Ficili when he was needed at Classic. He was employed by Demi's throughout the summer until early September. In the hierarchy of management, Ficili placed De Magistris and Greenough at the top with Jacobson just below them, next in line.

At some point, it became clear that Ficili and Beman did not get along, so Ficili was permanently assigned to work at Briggs Street. There, Jacobson would tell him what to do, frequently changing his assignments in the course of a day's work.

One particularly hot day, Ficili wanted to take the afternoon off. He went to Jacobson to ask permission. Jacobson immediately granted the request without first consulting with higher management.

Ficili testified that he had occasion to work overtime. If there was just a little work to be done, Jacobson would ask if any of the employees wanted the available overtime. If there was a lot to do, he would make everyone stay until the work was finished. In either case, it was Jacobson who made the assignments.

Ficili credibly testified that there were occasions when he and other employees would forget to punch in, in the morning or after lunch. On these occasions, Ficili and the others would go to Jacobson and he would write in the proper time and initial the entry on the timecard.

On April 2, Varin worked at Classic. When he finished his tasks there he returned to the Briggs Street plant and asked Jacobson what he had to do next. Jacobson replied, "Nothing, you're going to be laid off. Its not permanent. You never know when you'll get recalled. Might be a week from now. Might be a couple of weeks from now." Varin punched out and was never recalled.

Employee Greg Handy testified that although he usually worked for Wager, when work was slow he was sometimes transferred to the dry floor. De Magistris told Handy that when he was on the dry floor, he was to take immediate orders from Jacobson concerning all job functions and to go to him with all problems. He referred to Jacobson as Handy's supervisor when he was on the dry floor.

Handy testified that subsequently he received assignments from Jacobson when working on the dry floor. He also ob-

served other employees receive their assignments from Jacobson.

On at least two occasions, Handy witnessed employees request time off from Jacobson. On these occasions, Jacobson granted their requests immediately, without first clearing it with higher management.¹⁴

In addition to assigning tasks to be performed within the dry floor area of the Briggs Street plant, Jacobson, upon occasion, assigned employees to jobs to be performed at the Classic plant. He moved employees from one job to another as priorities demanded, sometimes from another department to his own, without first obtaining permission from whom-ever was in charge of that department.

Jacobson, like De Magistris and Terry Belden, made changes on timecards and initialed them. De Magistris admitted that Jacobson had the authority to direct employees to work weekends.

After the April 27 election, both Beman and Jacobson were assigned additional duties of a supervisory nature, such as checking employees' production sheets against actual production and initialing them. These have not been considered in determining the supervisory status of Berman and Jacobson.

Having considered all of the above information relative to Jacobson's duties and responsibilities, I conclude that he is not a rank-and-file unit employee but a supervisor within the meaning of the Act. His ballot should not be counted.

The pattern is evident. Demi's employees were supervised on the wet floor by Wager, on the dry floor by Jacobson, in maintenance by Terry Belden, and at Classic by Beman. If De Magistris' testimony were credited, he would have been the sole supervisor for both plants and all departments except Wager's, with no intermediate help. I do not find this to be the case.

Anthony Valovic III and Thomas Varin

Anthony Valovic III

Valovic was an experienced leather worker. He worked at Independent Leather for 5 years, at Burton Leather for 2 years, then at Demi's Leather, transferring to Demi's when it purchased Burton. Valovic was a friend of Wager and they worked together at all three mills.

At Demi's, Valovic was a floor laborer. His duties required him to get to the plant between 4 and 5 a.m. He lived right across the street from the Briggs Street plant and had his own key to the plant. Upon arrival he would first check the leather hung the day before to make sure it was dry. If it was dry, he would turn off the heat and the fans. He would then take down the skins and load them into the dry drums. He would then put the doors on the drums and get them running. He would next get the wet skins and take them upstairs and hang them up to dry. During these early hours, the only other employee present in the plant was Ernie Bentley. Bentley worked in the basement and sometimes Valovic would go there to help him.

¹⁴ Employees Greg Handy and Allan McArthur testified that Jacobson granted the request of employee Kevin Ovitt for a change in his lunch hour. However, McArthur had not yet been employed by Respondent during the critical period and the timecards for this period and before, reflect no such change. I do not rely on their testimony.

According to the documentation in the record, in early January, Valovic punched in at about 4:30 a.m. During the second week, although he continued to punch in at 4:30 a.m., these times were crossed out and 5:30 a.m. was written in. Valovic credibly explained that each morning of that week, he punched in, as required, then found that the skins were not yet dry. He then went home to give the skins more time to dry, usually an extra hour. When De Magistris arrived at the plant, Valovic would tell him what had occurred and De Magistris would write in the time that Valovic had actually started work. Although Valovic was uncertain as to the reasons why the skins were not dry at 4:30 a.m., he opined that perhaps the boiler had gone off during the night, that there were too many skins to dry properly, or that they were hung too late the day before.

The following week, on Monday and Tuesday Valovic again reported in the usual time and, finding the skins still wet, went home, told De Magistris what had occurred and De Magistris changed the check-in times. De Magistris and Valovic, apparently on Tuesday, discussed the problem and De Magistris suggested that Valovic report to work later in the morning. The rest of the week, Valovic punched in around 6 a.m. He continued to do so through February 6. On Friday, February 7, he checked in at 4:34 a.m. There is no explanation in the record as to why Valovic went back to reporting in at the earlier time. Apparently, however, he found the skins still wet because he then checked out at 4:42 a.m., then back in at 5:56 a.m. The following day, and thereafter, Valovic reported in around 6 a.m. each day. His check-in times were not changed thereafter.¹⁵ I find that Valovic did not steal time and that his termination on February 29 had nothing to do with stealing time or the events of the previous January.

In mid-February, one of Respondent's employees contacted the Union. As a result, Richard Handy, a union official, and a neighbor and acquaintance, contacted Valovic and asked him how he felt about getting a union into the plant. Handy invited him to come over to his home on February 18 to discuss the matter. At noon, on that date, Valovic went to Handy's place which is located three blocks from the Classic plant on Pleasant Avenue, a main thoroughfare. He spoke with Handy in his driveway. As he was talking to Handy, Wager drove by, beeped his horn and waved. Wager was acquainted with Handy and knew who he was.

After seeing Valovic talking to Handy, Wager later approached Valovic at work and asked him what was going on. He said that he had heard that Valovic had been involved in union activity and had been speaking to Dick Handy. Valovic replied that he had, indeed, been speaking to Handy

¹⁵The above findings are based on Valovic's credited testimony and supporting documentation. De Magistris testified that during the week of January 11, Valovic checked in early, then went home every morning, thereby stealing time; that he or Wager spoke to Valovic every morning about his stealing time, that Valovic never explained why he was stealing time but continued to do so every morning in spite of the accusations, thus risking his job. De Magistris testified that nothing was done about it until February 29. I find De Magistris' testimony patently absurd. Clearly, when Valovic began to report in at 6 a.m. instead of 4:30 a.m., the skins were dry and there was no longer any reason for De Magistris to change Valovic's check-in time. The problem was solved, and Valovic continued as an employee.

about getting the Union into the plant and that some of the guys were in favor of it. Wager then said, "Mike's not going to like it," but then added, "I think you'd be better off with a union."

On or about February 21, De Magistris had a meeting with Wager and possibly with Greenough. After the meeting, Wager went into the breakroom where all of the employees had gathered. Wager sat down and said that they (fiMDBUfl*ERR17*fiMDN ment)fiMDBUfl*ERR17*fiMDNMfl had heard that there was some union talk that Mike was not happy with the talk that there would be a union coming in. He said that Mike did not want a union and that if the employees kept up the union talk, he would fire them all or would shut down the mill and start over, or would just get rid of them, one by one. Wager said that De Magistris just wanted the employees to give him more time to get financially sound so that he could eventually give them the benefits he had promised them.

On Friday, February 28, Valovic punched out at 2:48 p.m. He went to De Magistris' office to find out if he would be working the following day or Monday. De Magistris had Valovic wait for awhile, then told him that he was going to be put back on the put-out machine. When Valovic asked why, De Magistris replied that it was because Valovic was not "pushing the guys." When Valovic objected that he did not know that he was supposed to "push the guys," De Magistris said that he should have known, that he needed more production on the floor. De Magistris then said that he needed Valovic to be the number two put-out machine man, that he was going to get the second put-out machine fixed. He added that once he got the machine fixed, he would have Valovic working at both plants. He said that he would call Valovic back once work picked up.¹⁶

Valovic testified that he had never before been told that he was supposed to "push the men." The subject had never come up. At the time of his layoff he was working over 40 hours per week and credibly testified that he had never before been laid off by Demi's Leather. Documentation supports this testimony and reveals also that when Jacobson was hired the following Monday to take Valovic's place, he worked 50- to 60-hour weeks thereafter.

Valovic credibly testified that at no time did anyone from management ever mention theft of time to him. He stated that his work had never been criticized. After his termination on February 28, Valovic was never recalled.

De Magistris was present in the hearing room when Valovic described, in detail, the conversation he had with De Magistris on the afternoon of February 28. He denied that the conversation took place as Valovic had described it. I credit Valovic, however, and find the events of that day as described by De Magistris totally incredible.¹⁷ Although

¹⁶Greg Handy testified that he overheard the conversation between Valovic and De Magistris and supported Valovic's version of it. Record evidence indicates, however, that Handy did not work on Friday, February 28, and I do not rely on his testimony.

¹⁷De Magistris testified that he suspected that Valovic had been stealing time so that on the morning of his layoff, February 28, he came in early to catch Valovic. He stated that Valovic had punched in at 3 a.m. but was nowhere to be found. He went to his office and looked out the window at Valovic's home and eventually saw Valovic coming to the plant about 6 a.m. Examination of Valovic's timecards, however, reveals that he did not check in at 3 a.m. but rather, at about 6 a.m. just as he had done every day that week.

Due to Varin's lack of substantial union activity,²⁰ and the absence of evidence of company knowledge thereof, I find that Varin was permanently laid off and that his ballot should not be counted.

The Unfair Labor Practices

Cases 3-CA-17081, 3-CA-17149, and 3-CA-17350

The consolidated complaint alleges three discriminatory discharges. Valovic and Varin have already been discussed in connection with the challenges to their ballots. The third alleged discriminatee is Gregory Handy.

Handy had worked in the leather industry for a number of years, first at Gloversville Leather, then at Independent Leather, then at Burton Leather, and finally at Demi's. At the last three of these employers, he worked with Donnie Wager, a personal friend.

Greg Handy had been a union member when he worked at Independent Leather and knew both William Towne and Dick Handy for many years. He was never very active in the Union, however, and never held union office.

When Greg Handy moved from Independent to Burton to work again for Wager, Wager offered him fewer hours, 5 or 6 hours per day. Since Handy was not in good physical condition at the time, he welcomed the chance to work the 20- to 25-hour week rather than full time. Also, Handy testified, he preferred to earn less money so that he would not have to pay much income tax to the state and Federal Governments. He also had income from other sources which made him financially independent.

On November 5, 1991, Demi's took over the Burton plant. That day, about 9 a.m., the new management called a meeting of all employees. Greenough, De Magistris, and Wager addressed them. After introducing themselves, they advised the employees that none of them would be laid off, and that all would continue to receive the same wages and benefits which they had received from Burton. The speeches were followed by a question-and-answer period. One employee asked if there was a possibility of insurance. Greenough replied that it was a young company, that he did not know how much money it would make down the road, and therefore could not answer that question. He requested that employees give the Company a chance, adding that if it prospered, there probably would be benefits. The meeting lasted about 20 minutes.

According to Greg Handy, at this meeting, Greenough spoke about Burton's failure to give insurance, vacation, and other benefits to the employees. He stated that Demi's wanted to correct this situation by making these and other benefits available, including raises in pay. Handy testified that, at this point, he asked Greenough what his and Mike's feelings were towards getting a union in to represent the employees to see that these benefits were obtained in a reasonable businesslike manner, so that the employees would not have to wait for promises that would never be kept, as was the case with Burton. In reply, according to Handy, Greenough stated that neither he nor De Magistris was antiunion, as such, since

both had worked in union shops, but that there was no need for the union question to be brought up at that time. Greenough explained that Demi's had just taken over and was mortgaged to the hilt. He stated that if the employees would just give them 2 or 3 months, they would open up the books at that time and see what they could do towards getting the employees an hourly pay increase and other benefits such as insurance, investment plans, etc. Handy testified that when he broached the question of union representation, Greenough became verbally aggressive. He told Handy that he had been an owner of one or more small businesses in the past and that his employees found him to be generous with pay raises and benefits, with no need to bring up the question of union representation. Greenough concluded, according to Handy, that Handy was "out of line" in broaching the question of union representation at this time without giving the Company a 2- or 3-month period to become acclimated to its new position as owners of Demi's Leather.

I have found Handy's description of the introductory meeting held at 9 a.m. on November 5, 1991, quite credible, mostly because he was very specific. However, De Magistris, Greenough, Wager, and Terry Belden all denied that the subject of a union or union representation ever came up at this meeting. Moreover, there were approximately 10 rank-and-file employees present at this meeting, some of whom testified as the General Counsel's witnesses with regard to other matters. None of them were called to support Handy's testimony. I find, contrary to Handy's testimony, that the Union was not mentioned during the introductory meeting of November 5, 1991, and that Handy was not identified, at that time, as a union activist.

A short time after the 9 a.m. meeting, according to Handy, he returned to his work station in the color department. Wager and Greenough followed. Wager then told Handy that Greenough wanted to see him for a minute. Greenough then came over, shook Handy's hand, put his arm around his shoulder in a conciliatory manner and said he was sorry for "blowing his stack" over Handy's question during the introductory meeting. Greenough said that Wager had made him aware of Handy's work record at Independent Leather and that he was aware of Handy's work record at Burton Leather. He added that both he and Mike were satisfied with Handy's level of production and with Handy, as a worker, but felt that he should give them 2 or 3 months and stop the union idea until they had a chance to talk to the employees and show them that they were up front with what they had promised. Greenough promised that in January, management would at least take preliminary steps to follow through on its promises. Both Greenough and Wager categorically denied that the private meeting between Greenough and Handy, described immediately above, ever took place.

Inasmuch as I have found that the subject of the Union, never came up during the main meeting that morning, I cannot find any basis for the second meeting taking place shortly thereafter. I do not believe the meeting between Handy and Greenough, as described by Handy, ever took place that day.

Around Thanksgiving 1991, the first sign of dissatisfaction among Demi's employees came to light. Greg Handy complained to De Magistris that he had never gotten holiday pay from Burton because he was a part-time employee. He said that he thought he should get holiday pay. After consulting

²⁰ Varin signed a union card dated March 31. According to Dick Handy, Varin told him, when he signed the card, that he was in lay-off status. Since he was not laid off until April 2, the card may well have been back dated.

county. He added that if Handy did not change his attitude and help the other employees "become aware of" management's side, he would be "out the door", then Towne would have the perfect opportunity to find him another job. Greenough stated, according to Handy, that, not only would Handy no longer have a job at Demi's but he would not have a job in the county in any leather mill. Although at one point, Handy testified that this diatribe against Towne only occurred after a series of conversations with Greenough, at another point in his testimony, he stated that Greenough made the same statement 8 to 10 times during February and March.

Handy provided the Board with two affidavits during the investigation of these consolidated cases, one in June and one in September. In neither of his affidavits did he mention this series of conversations with Greenough.

Greenough stated emphatically that he did not meet with Greg Handy at any time during the months of February and March at the mill during normal working hours but did see him at work, perhaps five times. He denied that he ever had any meetings such as described in Handy's testimony.

According to Handy, during none of these meetings with Greenough was anyone present in the immediate vicinity although Wager, Bentley, and Sager were in the general area, within view, but out of earshot because of production noises.

Wager testified that he never saw Greenough talking to Handy in Handy's work area. Neither Bentley nor Sager were called by any of the parties to testify concerning this matter.

Handy was called back to work, after his December layoff on Monday, February 3. According to Handy, shortly after his return, he approached Wager and asked him whether there was any progress toward a meeting concerning possible benefits as promised in November. Wager replied that he had heard nothing but would ask De Magistris and/or Greenough what the current status was. Wager went upstairs, then returned in a few minutes. He informed Handy that De Magistris had said that both he and Greenough were broke, mortgaged to the hilt with unexpected expenses, and therefore unable to grant any benefits.

Handy testified that he approached Wager two or three additional times subsequently in February to ask about the promised meeting. At the last of these inquiries, Wager replied that De Magistris and Greenough wanted men to their own choosing, men that would work for rates of pay that they were offered. Handy replied that if the employees were not afforded the meeting promised, they might seek union representation. Wager replied that maybe a union was the best path.

During subsequent meetings with Wager, according to Handy, he told Wager at first only "that a union was viable", later that he was "in the process of organizing a union at Demi's," or that "we feel a union is needed" because of "the fact that Mike wasn't coming forward." On several occasions, in February and March, Handy testified, employees had come to him, and together they had decided that they had to obtain union representation, through an election, to protect their interests. He testified that he told this to Wager.²¹

²¹ In an affidavit signed and sworn to by Handy, he stated that there had been discussions among employees about unions but had,

With regard to Handy's testimony concerning his meetings or discussions with Wager, the latter stated that he had never had any discussions with Handy in February about the November meeting. He denied that Handy had asked him to arrange a meeting with De Magistris or Greenough or had ever complained that one had not been scheduled. He added that no employee at Demi's had ever registered such a complaint with him.

I find Handy's testimony concerning his alleged conversations with Wager in early February unworthy of belief. If Handy had been involved with other employees planning to organize a union because of De Magistris' failure to hold a meeting promised the previous November, he probably would have identified them to Wager or had them accompany him in his discussions with Wager in order to show strength in unity of purpose. He did neither. At the hearing, no witnesses were called to support his testimony to the effect that such activity was going on at the time. I credit Wager that no such conversations between him and Handy ever took place.

Greg Handy gave testimony concerning his participation in union activity at Demi's during February. He testified that Ernie Bentley and Steve Beck came to him and asked him to go along with them in trying to get a vote to organize a union shop. They asked him to help them formulate some ideas and "more or less take over leadership along with them in getting the union vote." Handy replied that he would contact other people to see if they were interested.

About the time of Handy's return to work, according to Handy, Valovic said that "he was interested in getting a union in there. And between us, I think, Tony more or less took it out of my hands. He says, 'I'll get ahold of Dick' or something like that or 'I'll start the necessary steps.'"

Greg Handy testified that after his initial discussions with Beck, Bentley, and Valovic, he would, during lunch, breaks, or on his own time, talk to other employees about the need for a union and about the benefits that he had enjoyed in the past as a union member. He admittedly did not distribute authorization cards or solicit signatures. He had no cards, literature, or other union materials in his possession. He did not attempt to form any kind of structured organization but contented himself with conversation with other employees.

According to Handy, during the period from his return to work in February until his layoff in April, a number of employees approached him to complain about Respondent's failing to increase their benefits and offering only promises and putoffs. These employees, Handy testified, were particularly interested in health insurance. In answer to their inquiries, he told them that he had previously worked in union shops and knew of the benefits enjoyed there. He mentioned health insurance, pension plans, and wage increases. These employees then asked Handy how they could obtain union representation. Handy told them that he was willing to step forward on their behalf and call Bill Towne to see what steps had to be taken to obtain union representation or, at least, an election. Handy identified the employees he had spoken to as including Beck, Bentley, Robbie Sager, John Razzano, Kevin Ovitt, and others. According to Handy, these alleged conversations took place in various places throughout the

at the time, no basis to conclude that management had learned of them.

mill. None of these employees, however, were called to testify concerning Handy's alleged conversations with them.

Handy testified that De Magistris walked by, many times, while he was having these conversations with the above-named employees. On one occasion, at noon, Handy, Bentley, and Ovitt were engaged in one such conversation when De Magistris asked them if they were punched out for lunch or on company time talking about union business. Each of the employees got his timecard and showed it to De Magistris to prove that he was on his own time. Neither Bentley nor Ovitt testified concerning this incident and Handy, in his affidavit, did not mention it. On the contrary, Handy, in his affidavit, stated that he had no basis to conclude that management knew about union activity at the plant. Bentley and Ovitt continued their employment with Respondent throughout the rest of the year.

On the other hand, Terry Belden, whom I have found to be a supervisor, testified that in March he became aware of union talk in the mill. He stated that he had heard that there was going to be a union vote and that different employees expressed different opinions on the subject. Although Belden admitted that he had participated in some of these discussions, he was not examined as to who else had participated in them. He did testify, however, that in March he heard discussions going on around the mill which were fairly open and in conversational tones. From these discussions, Belden concluded that employee McArthur was in favor of the Union but did not hear Steve Beck or Greg Handy say, one way or the other, whether they were in favor of the Union.

Employee Mike Ficili, who began working for Respondent in late March, confirmed that when he first started work, the employees were already discussing the need for insurance and more money and that everybody, from supervisors on down, was talking about the Union.

Employee John Razzano testified that he became aware of union talk at the mill just after he was hired which was March 18. According to Razzano, the union talk continued into April and May. He denied that Greg Handy ever approached him about the Union. Razzano signed a union card on March 30.

Handy testified that, in accordance with what he had told the other employees, he called Bill Towne twice, once in February and once in March. Once he called to ask if the employees had to sign cards to get union representation. Towne apparently replied affirmatively and added that Dick Handy takes care of that. Greg Handy passed on this information to the employees. Handy also testified to visiting the union hall on two occasions and telling Towne how the employees were being put off with regard to promises of benefit. Towne did not testify concerning any in-person, or telephone conversations with Handy at this time. He did mention, however, that Handy was one of several Demi employees who visited the union hall on a later occasion.

As noted, supra, De Magistris worked in the mill between 12 and 18 hours a day, horsing, hanging, dry drumming, and working on the staking machine. He worked on weekends as well, as did Greenough. De Magistris testified that if he and Greenough did not perform production work, he could not make payroll because he had no money.

Wager testified that in February some of the employees came to him and confided that they were not pleased with the fact that De Magistris and Greenough and their relations

were working weekends while they, as full-time employees, were not getting their 40 hours. Wager identified these employees as Todd Christiano, Tony _____, and Steve Beck who complained that it was not fair that De Magistris and Greenough were coming in weekends and taking their work. All three of these employees were angry.

In Wager's view, the anger of the employees over the lack of working time was causing too much tension among the employees, so about the third week of February, he called a meeting in the coffeeroom, during the morning break to set the people straight and calm them down.

About 8 or 10 employees attended this meeting. Wager testified that he brought up the subject of weekend work and their dissatisfaction with it. He told them that he thought that they had a good complaint and he was going to talk to De Magistris and Greenough about it any try to straighten things out so people would get their 40 hours. At this point, Steve Beck stated that maybe the employees should get a union in. According to Wager, he said that it was up to the guys, but as far as he was concerned, unions were good as far as getting benefits including wage increases but did not stick up for the good workers, only the bad workers. At that point, Handy, in agreement with Wager, brought up a grievance filed against a previous employer. Both were familiar with this grievance which the union mishandled and lost. At this meeting, Wager testified, Handy was against union. In addition to giving his opinion about unions, Wager stated that with only 3 months under its belt, he did not see how Respondent could even afford a union.

Handy testified about this meeting called by Wager in late February and his version of what was said, differs entirely from Wager's. According to Handy, Wager walked into the coffee room and dressing area and said to the 8 or 10 employees present that he had to talk with them. He immediately turned to Handy and said:

Greg, you've been after me about a meeting between the employees, including yourself and Mike, concerning benefits. Mike has heard some union talk around the shop, that maybe the union is the best way to go to get these things. You've just got to stop this. If you guys want a job, you want to protect your job security, your future here and try to get anything at all, you've got to shut your mouth about the union around Mike. He's in the office now blowing his stack, telling me that I have to come out here and tell you guys that if a union vote is affirmative, he will close the doors, lock the doors,²² was the exact words he used, terminate every part of a union body that remains in this place, namely, the workers that he knows support the union when he finds it out. And at the same time, if worse came to worst, worse case scenario, he would close the shop, entirely, change its name and go into another business to prevent the union being part of Demi Leather. Greg, you have previous experience with the union in a union shop, and Mike is saying to me, silence you, or your job and everybody that's associated with you in this union activity and union feelings go with you. And you

²² De Magistris testified that he never instructed Wager to make such a statement on his behalf, and if he had done so, and he doubted that, he had done so on his own.

don't want to lose 27 years just because you feel the union is the right way to go.

After Wager made this statement, Handy testified, everyone returned to work.

Clearly, Handy's and Wager's description of what was said at the meeting differs markedly. Nevertheless, despite the fact that there were 8 to 10 employees present during Wager's speech, some of whom were eventually to sign union authorization cards, a few weeks later, the General Counsel failed to call any of them to support Handy's testimony. Likewise, Respondent failed to call any of them to support Wager's testimony. Thus, the finder of fact is unnecessarily left with a one-on-one credibility decision to make.

I find, with regard to the content of this meeting, that Wager's description of it is more credible than Handy's. Surely, someone could have corroborated one version or the other. In the absence of any corroborative testimony, I find no violations.

According to Wager, later in the day, after his speech, he discussed the meeting held that morning with De Magistris. He told him that he had spoken with the guys and that they wanted to talk to De Magistris about him and Greenough working on weekends. He suggested that some way be found to get the guys 40 hours a week. De Magistris explained that they had just started in business and were trying to save some money. Wager testified that he told De Magistris that the subject of a union had been brought up at the meeting, but that he did not identify Steve Beck as the employee who had mentioned unions. Wager added that he would talk to the employees again.

De Magistris confirmed that Wager had reported to him, on this occasion, that the employees were upset about management performing the employees' work on weekends and had asked him to stop. He refused, stating that he and Greenough had to work or he could not make the payroll. When Wager informed him that employees were talking about getting a union in, this was the first time he had heard about union talk among the employees.

De Magistris testified that he was unaware of any friendship between Wager and Handy and denied that Wager had reported to him anything concerning Handy's interest in the Union. After Wager advised De Magistris about the employees' dissatisfaction with their hours and the union talk among the employees, De Magistris contacted Greenough by telephone and told him about it. Greenough showed concern by asking how much money was available for payroll. De Magistris denied telling Greenough to speak to Handy, explaining that he ran the plant, not Greenough and he, De Magistris, was not concerned about the Union.

According to Greg Handy, a few days after Wager's meeting with the employees, Handy had a conversation with Wager, during which Wager told him that De Magistris was "hot over the guys talking union organization" and knew that Handy was a union activist, the number one thorn in his side, the ring leader, and a "pain in the butt." Handy decided to confront De Magistris. He asked De Magistris why he was picking on him, making him the center of attention and giving him all the heat over his union activity and his thoughts about establishing a union shop. De Magistris replied that he did not want to get into a confrontation with Handy in the worker's area, that they should go into the of-

office. After closing the door behind him, De Magistris pounded his fist on the desk and said that if it had not been for Wager's influence and his coming to De Magistris on Handy's behalf, his respect for Wager and his need for Wager as a color person and plant supervisor, Handy would not be there; he would be gone. He added that Wager had gone to bat for Handy on one or two occasions in February and had saved his hide when De Magistris had told Wager that he was sick of union talk in the mill and was considering firing Handy.

Somehow the conversation moved into the area of increases in wages and benefits. On this subject, according to Handy, De Magistris made clear his position. He advised Handy that the only raises that would be given would be merit increases and those would be given only to those employees who cooperated with management in their everyday job functions. He added that the employees were all there to work for the benefit of Demi's Leather, to increase production and not to talk union or engage in union activity in the shop.

According to Handy, this discussion took place at noon with no one present. The secretaries were gone and De Magistris and Handy were alone.

De Magistris denied that he ever had any discussion with Handy alone in the office, much less the conversation Handy described. Further, he testified that his office is always busy, it's the center of activity, with customers coming in and going out, and employees coming in to match colors, perform other duties, or pick up their checks. He stated that one of the two secretaries was always in the office. Joan Volsteen, one of the secretaries, testified that she did not miss a day's work in February and was absent only one day in March, March 24. She denied that she was present during any meeting between Handy and De Magistris in the office.

Respondent argues that since the office always had someone present, there was never an opportunity for the conversation described by Handy to have taken place. In support of its position, Respondent notes that in his two affidavits, Handy did not mention his discussion with De Magistris. Handy admits that this is true but explains that he told the Board's investigator about this discussion but the investigator refused to include the information offered by Handy about it. Handy testified that the Board agent explained that he was like an investigating officer at a traffic accident, that the detective work would come later. The investigator, according to Handy, told him that he was only there to take a basic affidavit and keep it to one charge.

Concerning the use of the office, Wager testified in support of De Magistris. He stated that he would visit the office, perhaps 30 times per day and there would always be someone there, always one of the secretaries who never went out for lunch.

Handy testified that after he had his conversation with De Magistris, he immediately went back downstairs and informed Wager about it. Wager became angry. He slammed a hose that he was working with violently against a drum and said that because of De Magistris' lack of respect for his employees, in particular his treatment of Handy, he would no longer deliver messages to De Magistris concerning employees' union activity or from De Magistris to employees about his hiring, firing, and who he wants working in his establish-

ment. He added that De Magistris could do his own talking about union benefits and company benefits.

With regard to the De Magistris/Handy conversation described immediately above, I credit De Magistris that it never happened.

Bill Towne testified that he had contacts from Demi's employees on three or four occasions beginning when De Magistris first bought the plant. About the second week in March, he received a call from Dick Handy, his business manager, who advised him that he had been approached by some of Demi's employees who asked how they could join the Union. Towne told Handy to keep going, talk to them and proceed. Toward the end of March, Dick Handy called Towne a second time about Demi's employees indicating interest in unionization. Once again, Towne told Handy to talk to them.

Between mid-March and the end of the month, Towne met with certain employees of Demi's Leather. Most of them were unsolicited visits to the union hall, to his office. Towne also received telephone inquiries from some of the same individuals. In all, between 8 and 11 of Demi's employees contacted Towne, either by telephone or in person, during this period. Greg Handy and Steve Beck were among them.

In the meanwhile, Dick Handy had also been contacted on several occasions by Respondent's employees who inquired as to when he was going to organize them. About March 25 or 26, he received two lists of Respondent's employees together with their addresses and phone numbers. These lists were supplied by Bentley and Beck. Greg Handy specifically denied that he had provided any employee lists to the Union. Gregory Handy testified that he had no contact with Dick Handy until the end of March when he signed a union card proffered to him by Dick Handy.

Towne testified that he did not advise Respondent's management, prior to filing the petition, that the Union was in the process of organizing Demi's employees. However, De Magistris learned of the organizing campaign, in late March, from other sources.

On March 30, Dick Handy, using the lists of employees provided by Bentley and Beck, visited several of Respondent's employees and asked them if it were true that they were interested in joining the Union. He asked if they would be willing to sign a card. Several of the employees answered affirmatively so Handy, later that day, visited the homes of those employees and obtained their signatures on union cards.

Dick Handy called other individuals besides those who agreed to sign cards. He contacted Jacobson on March 30 and asked him if he would be interested in signing a union card. The following day, March 31, Jacobson reported this to De Magistris who made no comment.²³

On March 31, Dick Handy gave the signed union cards to Towne. On April 1, Towne filed the petition for an election.

The petition was delivered to Respondent on April 2. There was a great deal of testimony concerning precisely what time of day it was delivered because of other events occurring the same day, possibly related to the delivery. I

²³ De Magistris testified that this conversation occurred on April 5 or 6. I credit Jacobson as to the date of the conversation and the fact that it was Dick Handy rather than Bill Towne who asked him to sign a card.

find that Varin was terminated before the petition was delivered but that De Magistris had learned on March 31 from Jacobson, and perhaps before, that a union organizing campaign was in progress. In any case, however, there is no evidence that De Magistris suspected Varin of being a union activist.

According to Wager, De Magistris was not happy when he received the petition. De Magistris, on the other hand, testified that he did not care one way or another about a union representing his employees because a contract would have to be negotiated and he could not give what he did not have. Despite his denials of concern, however, upon receipt of the petition, De Magistris called Greenough and told him about it the same day it was received. He told Greenough that he had given the petition to his accountant, who promised to take care of it.

Greg Handy testified that he had a conversation with Greenough between 9:10 and 9:30 a.m. on April 2, similar to the several previous conversations described earlier. This conversation took place prior to the delivery of the petition. On this occasion, according to Handy, Greenough stated that he had just come from a general meeting of the workers that were there and had told them that they still were exhibiting a certain hesitancy by still questioning his and De Magistris' sincerity in regard to benefits they had proposed to offer in November. Greenough continued, stating that due to unforeseen circumstances beyond their control, they were prevented from giving the employees wage increases and other benefits such as health insurance. He said that he got the feeling from employees at the meeting that he was not getting the message across to them that they did not need a union, and that their benefits would eventually be equal to or better than a union shop could give. Handy stated that Greenough then put his arm around his shoulder and said that he had talked to Handy before on numerous occasions about talking to his co-workers and telling them where management was coming from. He explained that because Handy was a straight shooter and had a good rapport with his fellow employees, he would be the best one to represent management's interest by telling the other employees that management's way was the right way and that the union was a losing proposition. Greenough, according to Handy, then stated that if he did not do as he was asked and show some success, in a short period of time, his job at Demi's was in immediate jeopardy as was any future chances of employment.

According to Handy, he replied to Greenough that he did not want any part of the lies, promises, or half-truths suggested by management at the November meeting and during the prior one-on-one conversations between Greenough and himself. He added that, frankly, he wished that Greenough would take all those suggestions and "put them where the sun doesn't shine." He said that management should do something that shows up in black and white because the men were giving the Company a good hard day's work. He explained that he was taking that position because he felt that the only way to get something concrete was to stay there and fight the injustice that had preceded and was still going on; that if he did not stay, the rest of the people did not quite have that fighting urge to hold on.

Greenough testified that he did not have occasion to be at the mill on April 2, that he was working all that day for Niagara Mohawk on various projects located within 3 to 8

miles of Demi's plant, along with his foreman, Robert Daley and other people. To support his testimony, Respondent offered his timesheet for that day which indicated that Greenough had worked from 7:30 a.m. until 4 p.m. for Niagara Mohawk.

The alleged April 2 meeting between Greenough and Handy presents a head-on credibility problem. First of all, Handy testified that the conversation took place between 9:10 and 9:30 a.m. and that he reported in late. Handy's timecard indicates that he did, in fact, clock in late at 9:38 a.m. Next, Greenough was alleged to have said that he had just had a meeting with Respondent's employees. Another check of timecards reveals that Respondent employed 19 workers as of April 2 and that all of them reported for work that day before Handy clocked in. A dozen employees clocked in substantially before 7:30 a.m. which made it possible for Greenough to hold a meeting with Demi's employees and still be on time for work that morning at Niagara Mohawk. Of the 17 employees who were clocked in before Handy, seven were card signers. Assuming that there was a meeting of employees addressed by Greenough on the morning of April 2, why did not the General Counsel call a single witness to support Handy's testimony that Greenough was there.

On the other hand, although the records submitted by Respondent indicate that Greenough was on the job for Niagara Mohawk, from 7:30 a.m. to 4 p.m. working for Daley, they do not prove that Greenough was not given time off by Daley to visit Demi's plant to talk to Handy, since he missed the early morning meeting. The record contains no explanation as to why Daley was not called to support Greenough's testimony.

As was the case with regard to several earlier incidents, Handy was cross-examined concerning his May 14 affidavit which in part covered his alleged April 2 conversation with Greenough. Specifically, the question asked was why the affidavit contained no mention of Greenough's threats. Handy's explanation was that the Board agent only wrote what he wanted to write and not what Handy wanted to say. He stated that he complained to Towne about this problem. Towne did not testify with regard to Handy's claim. Handy admitted that the affidavits supplied to the Board contained no mention of any threats made by Greenough to him. Needless to say, the Board agent did not testify.

With regard to the allegation concerning Greenough's April 2 threats directed at Handy, I find that Greenough did not threaten Handy. I find this to be the case because Greenough claimed he was not at Demi's on April 2, while Handy testified that he was not only there, but held a meeting with a dozen or so employees; the General Counsel could have called witnesses to support Handy's testimony that Greenough was there but failed to do so; and Handy failed to cover Greenough's threats in his affidavit and incredibly blamed the Board agent for this failure.

After his April 2 conversation with Greenough, Handy testified, he told Bentley and Beck about Greenough's threats and later heard Tony [Christiano] mention it to Wager. None of these individuals were called as witnesses to show that Handy was complaining about threats from Greenough on or about April 2, and to prove that he did not concoct the story later in preparation for trial.

On Friday, April 3, Handy worked his usual number of hours with nothing unusual occurring. He worked until 3:24 p.m. for a total of 24-1/2 hours for the week. He asked when he should next report for work and Wager told him 9:30 a.m., Monday.

On April 4, 5, and 6, according to De Magistris, a number of employees came to him and voluntarily advised him that they had been contacted by the Union and had or had not signed cards. De Magistris named employees George Hamel, Stacey Jordon, and Trudy Gainer as individuals who had volunteered such information. Indeed, Hamel and Jordon had signed cards while Gainer had not. If, in fact, Hamel and Jordon had admitted to De Magistris that they had signed cards, it would tend to prove that Respondent held no animus toward prounion employees since both continued to work for the Company for months thereafter. However, Respondent failed to call either of these employees to testify in support of De Magistris' testimony. On the other hand, the General Counsel did not call them to deny that De Magistris' testimony was true. I credit De Magistris.

Also, on April 3, De Magistris received a call from his accountant who requested a meeting with him at the accountant's office to introduce him to a lawyer. At about 5 p.m., the accountant, the lawyer, Bill Wallens, De Magistris, and Greenough met. The petition was discussed and, at Wallens' request, a list of employees was faxed to Wallens, at the accountant's office. Wallens advised De Magistris and Greenough to go about their business normally and not to say anything to their employees, that he would take care of everything. Wallens eventually prepared the excelsior list. As a result of Wallens' advice, De Magistris instructed Wager not to undertake conversations with the employees on his behalf.

On or about April 5 or 6, according to De Magistris, other employees reported to him that they had been contacted by the Union to sign cards. Tony Christiano told De Magistris that he had been contacted by Dick Handy and asked to sign a card, but had refused to do so because he had known De Magistris for years and wanted to give him a break. Christiano was not called to testify. Although it is more likely that Christiano was called on March 30 and had his conversation with De Magistris before the petition was filed, the General Counsel did not call him to testify concerning the timing of the conversation.

According to De Magistris, also about April 5 or 6, maybe before, John Razzano told him that the Union had contacted him and requested that he sign a card but that he had refused. Razzano had, in fact, signed a card on March 30. Although Razzano was available at the hearing and testified on other matters, none of the parties called him concerning when this conversation took place or what was said during the discussion. De Magistris testified that whenever he was approached by employees concerning the signing of union cards he would tell them that it was their right to sign a card and they could not be fired for it.

Wager testified that when he and Handy worked at Independent Leather and Burton Leather, Handy worked only when needed because he did not really need the money or the job. Sometimes he would work 10 hours per day, sometimes just 3 or 4 hours per day. When Demi Leather purchased Burton Leather, Handy continued to work on an as-needed basis.

If Wager knew that there would be work available, he would tell Handy before he left for the day, otherwise he would call him about 8 or 8:30 a.m. and tell him to come in or not to come in that day. Thus, when Handy was sent home on April 3, Wager was not sure, before he left, whether or not he would need Handy the following Monday. After checking the production records, early Monday morning, however, Wager determined that there was too little work to have Handy come to work, so about 8 a.m., Monday morning, he called Handy to tell him he was not to report to work.

Greg Handy testified that he received the call from Wager about 8:30 a.m. and that he told him that he was being laid off. Wager then told Handy that De Magistris had said that the reason for the layoff was that he wanted to cut back on payroll, but off the record, the real reason was that Handy was the number one union activist; that De Magistris had been burning his eardrums every day to get Handy "the hell out of there before he has everybody in mass revolt against me and Barry." Wager went on to tell Handy not to lose heart, that when work picked up, he would need him because he was the only dependable man he had that he could trust to get the work done on time. He told Handy to keep in touch.

Thereafter, Handy phoned Wager at least half a dozen times concerning the outlook for work. He also went to the mill once or twice to talk to Wager in person about work. According to Handy, Wager told him, on each occasion, that he could use Handy immediately, but that De Magistris would not let him recall him because of his union activity. He told Handy that he would just have to get along without him or use a replacement.

On April 14, the parties met and signed a consent agreement. On the same day the Union was furnished with an *Excelsior* list. Prior to that date, the Union had received its own lists from the Demi's employees to which Towne had added names of other employees as they came to light. One of these was the name of Nick Etherton, which did not appear on the *Excelsior* list. According to company records, Etherton was already an employee of Demi's as of April 12, the eligibility date which was part of the consent agreement, and was eligible to vote. But Towne did not receive the information that Etherton was an employee until after he received the eligibility list and so never got a chance to talk to him. Nor was he able to send literature to him, since his address was not on the list. Etherton never showed up at the election to cast his ballot. Other names of employees not included on the eligibility list and later added to it by Towne were Gregory Handy, Robert Sager, Anthony Valovic, and Stephen Beck, all four, card signers, whom Towne knew about prior to receiving the *Excelsior* list. Towne told the Board agent that the *Excelsior* list was incomplete, but did not tell anyone from the Respondent's management. Likewise, Respondent did not advise the Union that its list was incomplete. Under these circumstances, I find that Respondent has failed to substantially comply with the *Excelsior* rule.

Michael Ficili testified that on April 24, Greenough visited the plant sometime between 5 and 7 p.m. Ficili had come in to get his check. No one else was present. Greenough pulled Ficili into the office and asked him what he knew about the Union. Ficili denied knowing anything about the Union be-

cause he was new. In fact, he had heard union talk, but was afraid of getting involved.

Greenough then told Ficili that the Union just collected dues and did not do anything for the employees. He said that he and De Magistris just needed more time because they were just forming a business. He added that things would get better, that later he would get insurance and some kind of CD plan for the employees.

On April 27, the day of the election, before the polls opened, the parties went over the eligibility list and stipulated to the addition of the names of four employees: Steve Beck, Nick Etherton, Greg Handy, and Robert Sager. During the election, the challenges discussed, *supra*, occurred.

Wager testified that until April 27 he had no idea that Handy was involved in union activities and was surprised that he acted as the Union's observer at the polls. Prior to that day, according to Wager, Handy had always talked negatively about the Union and Wager assumed that Handy, as a part-time employee would have nothing to gain from unionization.

Handy testified that, at the time of the election, just before ballots were cast, De Magistris came out and told the company observer, Joan Volsteen, to challenge Varin on grounds that he had been permanently laid off. She subsequently did so. Shortly after the polls closed, De Magistris came out of his office and proceeded to the polling area. Volsteen called him over and asked why he had not told her before that Varin had been permanently laid off with no chance of recall. She added that he had previously told her that Varin had been on layoff just until work picked up. De Magistris rejoined that he had told her to challenge Varin's vote on grounds of permanent layoff, and asked if she had done what she had been instructed to do. She replied that she had. Volsteen was not examined with regard to this incident.

With regard to this incident, I find it inconclusive as to its affect on the issue of Varin's status and do not rely on it.

Following the election of April 27, which resulted in an 8 to 8 tie, Petitioner, on May 4, filed timely objections based on alleged threats and promises and the submission of a substantially incomplete *Excelsior* list. The objections did not, of course, name specific employees nor describe incidents on which the objections were allegedly based.

In the first half of May, one Saturday afternoon, according to Wager, Greg Handy visited his home and asked him to sign an NLRB form indicating when Respondent would recall him. Wager explained that he could not give a specific date, but that he would recall Handy when work picked up.

According to Handy, he visited Wager on the evening of Tuesday, May 19. He asked Wager to get a direct answer from De Magistris as soon as he could, the next day if possible, as to his work status and future employment at Demi's Leather. Was he on temporary layoff subject to recall?; was he permanently laid off with no chance of recall?; or was he dismissed?. Handy stated that if Wager did not get an answer within the next 48 hours, he would file an unfair labor practice charge with the NLRB. Wager replied that De Magistris was out of Town and would be back the following day at which time he would talk to him.

On May 8, the original charge in Case 3-CA-17081 was filed. This charge alleged that since on or about February 15, Respondent, through Wager, speaking for Greenough and De

Magistris, threatened assembled employees that if they did not abandon their support for the Union and if the Union won the election, their hours would be cut, they would receive no raises, bonuses, holidays or other benefits, and the Company would close or relocate its factory and employees would have to look for new jobs; and on or about April 2, Barry Greenough promised future benefits to encourage employees to vote against the Union and threatened loss of benefits if they voted for the Union.

This charge was based on the February Wager speech as described by Handy in his testimony. Other than Gregory Handy, no one offered any testimony to support this charge. Similarly, only Handy offered testimony to support the allegation concerning the April 2 incident. Handy's name did not appear on the May 8 charge. About May 18, Wager found that available work had increased substantially and that it continued to increase on May 19, so after advising De Magistris of his intentions, Wager called Handy on May 20 at 8 a.m. and asked him if he could start back to work at 10 a.m. Handy said he could and clocked in at 10:04 a.m. Upon his arrival, Wager, according to Handy, took him aside and told him that the only way he could keep his job was to stay down in the color department and not go upstairs to the dry department and talk to those employees about union activities because De Magistris and Greenough have their own men who relay everything that Handy says about the Union back to them. Wager denied that this alleged conversation ever took place and stated that he did not discuss union activities with Handy at any time after his recall on May 20. I credit Wager's denial. The only evidence that Greg Handy was heavily involved in union activity was his own self-serving testimony, already discredited herein. I see no basis for finding that management would single out Handy for all of its attention and direct none of it toward other more active employees.

The same day that Handy returned to work, May 20, the Union filed an amended charge in Case 3-CA-17081. The amended charge added allegations of violations of Section 8(a)(1) and (2) of the National Labor Relations Act, as amended, based on the testimony of Varin, and Handy and Section 8(b)(1) of the Act, as amended, as alleged in the charge. The appearance of the names of the three alleged discriminatees in the May 20 charge, should have made it clear to management that it would not be in the interest of Respondent to direct the Union to discontinue their representation of them if they were being represented before the Board by the Union.

About the time that Handy was being recalled, the Union, on May 19, sent a letter to Respondent announcing that it represented a majority of its employees and demanding recognition. On May 22, De Magistris replied to the demand letter, refusing recognition. According to Handy, that day Greenough was again at the plant. Greenough had taken the day off from Niagara Mohawk. He told Handy that he was frustrated and mad that he had been unable to convince Handy to drop his union activities and that from that point forward, he would be susceptible to immediate dismissal if either he or De Magistris heard him mention union activity, plans for a union, vote or anything concerning such. Handy testified further that throughout the period of May and June, Greenough would come back and tell him that his and Magistris' way was the only way; that the negative way was to take a union position with his fellow employees; that he

had been talking to Valovic, Sager, Bentley, and Beck; and that he was on the verge of dismissal.

By this time, of course, the election had been over for weeks and unless the May 19 demand letter from the Union had prompted Greenough's threat, there would be no reason for it. None of the employees mentioned during Handy's testimony were called by the General Counsel to support Handy's testimony concerning his alleged postelection union activity. With regard to this incident, I do not credit Handy's testimony.

Approximately a month after the election, one day during lunch hour, according to Greg Handy, he happened to meet De Magistris at the Mc Donald's restaurant on Comry Avenue in Johnstown. He struck up a conversation by asking if De Magistris was happy the way the union vote went. De Magistris replied affirmatively and added that Handy had not succeeded with his plans with unionization at his shop. Handy countered that in another year's time, he would try again, maybe with more success. De Magistris, at this point, stated that he had swayed two union votes, Steve Beck's and Ernie Bentley's. He told Handy that he had threatened Beck with reduced hours, with termination of his job, and with blackballing him throughout Fulton County, thus keeping him from obtaining future employment. He also told Handy that he had threatened Ernie Bentley with termination of his insurance coverage.

Handy testified that De Magistris then told him that anyone voting for the Union would suffer immediate termination or permanent layoff with no chance of recall and that he and Greenough would do everything in their power to see that Handy never worked again in another mill in Fulton County. Handy described De Magistris, at this point in the conversation, as having a livid, red face, swearing and referring to Handy and others like him, as a bunch of union pigs.

De Magistris emphatically denied that he ever met Handy at the Johnstown McDonald's during the period in question or had a conversation with him similar to the one that Handy described. He testified at length on the subject, stating that from May 27 through the end of June, he was at Saratoga every day between the hours of 10 a.m. and 1:30 p.m., taking care of his widowed sister-in-law's racehorse and trying to obtain a new trainer for the horse. In De Magistris' absence, he left Wager in charge of the plant.

To support Mike De Magistris' testimony, Respondent called his sister-in-law to testify. She supported him in everything except for the time they would return from Saratoga, which she testified was between 2 and 5 p.m. On this point, I credit De Magistris.

Joan Volsteen testified that during the critical period, De Magistris would leave the office at 10 a.m. and that she did not know where he had gone. Later in the day, she testified, she might see him again. Jacobson testified that through May and June, as far as he knew, De Magistris was at the plant every day, all day.

On cross-examination, Handy was asked whether the McDonald's incident was described in either of the affidavits which he supplied to the Board. Handy admitted that it was not. He explained that he mentioned the incident to the Board agent who took his affidavit, but that the agent "cut him off" and refused to include it. Handy testified further that he complained to Towne about the agent's reluctance to include this incident in his statement. Neither the Board

leged refusal to bargain from May 15 back to March 31 and added additional 8 (fiMDBUfi*ERR17*fiMDNMfla)fiMDBUfi*ERR17*fiMDNMfla

On July 9, the Union filed a second amended charge in Case 3-CA-17149. This amended charge added additional 8 (fiMDBUfi*ERR17*fiMDNMfla)fiMDBUfi*ERR17*fiMDNMfla

On July 13, the region issued an order consolidating cases, amended consolidated complaint and notice of hearing.

On July 22, the Union wrote another letter to each of Demi's employees enclosing the most recent complaint issued by the Region, drawing the attention of the employees to the request for a bargaining order contained therein. It also announced a meeting to be held at the union hall at 6:30 p.m., July 28.

The Respondent either takes the position or implies that since the election was already over, as of April 27, Respondent had no reason to commit the violations attributed to it thereafter. However, the record indicates that new charges were filed after April 27, a complaint had issued thereafter and the Union was actively engaged in campaigning thereafter, seeking support from Respondent's employees for possible future elections. For this reason, I find that Respondent had good reason to engage in the violative acts alleged but do not, at this point, find that it necessarily did so. In other words, I do not find that the fact that the election had already been conducted is dispositive of the issue of whether or not 8 (fiMDBUfi*ERR17*fiMDNMfla)fiMDBUfi*ERR17*fiMDNMfla

As of the week ending July 4, Respondent had 24 employees. During the week ending July 11, Respondent had closed down production while Terry Belden worked with about nine employees refurbishing and making repairs to the plant. The plant went back into production the week of July 18 and the complement of employees increased to 25. Handy was among those recalled after vacation/renovation. The number of hours worked by returning employees, including Handy, was high but not as high as in June. Handy's hours were higher than he averaged before his vacation. During the week ending July 25, the number of employees remained at 25 and the total and average number of hours of employment increased. Handy's number of hours remained relatively high.

During the week ending August 1, Respondent started the week with 25 workers. Total hours of available work, however, dropped from the previous week's 1047.75 to 764.75 so that the average number of hours worked per employee decreased from almost 42 to about 30-1/2. During that week, eight employees were laid off, some temporarily, some permanently. The week ending August 8, three more were laid off. Of the 11 employees laid off, 3 had signed cards while 8 had not. Of the 17 or so employees who were not laid off, 4 were card signers.

De Magistris testified that the layoffs in July were occasioned by a loss of customers and available work. Records tend to support his testimony. He also testified that layoffs and recalls are basically in accordance with seniority for full-time regular employees with part-time employees laid off first and recalled last. Handy will be eligible for recall after all full-time employees have been recalled.

In July, sometime before the meeting at the union hall, scheduled for July 28, a number of Demi's employees asked Towne if they could get started drawing up demands or proposals in preparation for negotiations. Towne agreed that this was a good idea.

In mid-July, according to the testimony of Alan McArthur, they discussed the Union. Handy and McArthur had become friends shortly after McArthur was hired at Demi's and McArthur's plan to bring demands from the Union. At the mid-July meeting at McArthur's home, they put together the list of contract demands which had been discussed with Towne earlier. All three had some input with regard to the document's content. Jacobson explained that he thought that he could benefit from a union contract even though he could not participate because he was a supervisor. Handy asked McArthur if he would be part of the negotiations committee if the Union came in and McArthur agreed. Jacobson generally denied participating in any meeting where a list of demands was discussed. He specifically denied that he ever saw the document which had been prepared at McArthur's home. I do not credit Jacobson, but find that he did, in fact, participate in the meeting.

The day after the list of demands was put together, McArthur testified, he took the list to work and passed it around the dry floor to see if there was anyone who could think of any additions. After showing the document to all of the dry floor employees²⁵ including Jordon, Hamel, Flint, Ficili, and Ovitt, McArthur then went up to the hanging room. Several employees came up to him and asked to see the document so they might offer suggestions. At this point, according to McArthur, Terry Belden came up to him and asked to see the list and McArthur showed it to him.²⁶ McArthur testified that Jacobson knew that he had the list and told him to be quiet because he did not want De Magistris to know that he had helped to write it. As noted earlier, Jacobson denied ever having seen the list prior to the hearing.

McArthur testified that in addition to Belden and Jacobson, De Magistris also knew of the list of demands that McArthur was showing around. According to McArthur, while he was showing the list to Mike Ficili, he caught De Magistris standing on the floor below, listening and glancing up through the gaps between the floor boards on which McArthur was standing, to see what was going on. After showing the document to the employees on the dry floor and in the hanging room, McArthur gave it to Handy to show to the employees on the wet floor.

De Magistris testified that he had never seen the list of demands prior to the hearing and specifically denied the loft incident as described by McArthur.

Ficili testified that he was shown the list of demands by McArthur while in the loft and that the employees intended to give the list to Towne. He did not mention De Magistris in his testimony.

With regard to McArthur's circulation of the list of demands, I find that Jacobson knew about the list but would not have told De Magistris of his involvement, that Belden was truthful in stating that he had never seen it prior to the hearing and that De Magistris had never seen it either.

McArthur testified that he circulated the document secretly and kept it folded in his pocket when not actually

²⁵ Razzano denied ever having seen the document and denied that McArthur ever discussed its contents with him.

²⁶ Belden testified that he had never seen the document prior to the hearing and never discussed anything like it with either McArthur or Handy.

showing it to someone. Granted, arguendo, that his testimony is true, he would immediately, upon seeing De Magistris, have folded the list and put it back in his pocket. If he did not do this, De Magistris, standing 10 to 15 feet away and below him, would have had to read the content of the document through the back of the paper to the front, thus receiving a mirror image which he would have had to read and comprehend almost instantaneously. I find that this did not occur, that De Magistris knew nothing about this document, and that it had nothing to do with subsequent events.

Greg Handy testified that after receiving the list of demands back from McArthur, he showed it to several wet floor employees. According to Handy, he also showed the document to Valovic who had stopped by during his lunch hour to talk with Wager.²⁷ After Handy testified that Wager saw the document, he later denied it. Although Handy testified that he showed the document to Bentley, the day it was passed around, July 14, 15, or 16, wage records indicate that Bentley did not work at all these days.

The day after the list of demands was circulated around the plant, Greg Handy called McArthur and told him that he had given the list to Towne and that there would be a meeting called to discuss the demands. Towne testified that he had, indeed, received the document from Handy and that the meeting was scheduled for July 28.

On Monday, July 27, Handy reported for work just before 10 a.m. Wager was on vacation. In a short time Bentley, who does Wager's job when Wager is not there, came over to Handy and asked him if he would mind taking a layoff. Handy replied that he did not mind if it was absolutely necessary. He asked Bentley if he would be called back and Bentley replied that he did not know. Bentley punched Handy out shortly after noon. Handy was not recalled.

According to Bentley, De Magistris came down to the coloring department that morning and asked Bentley, who was in charge, if he needed any guys to horse. Bentley replied that he had too many guys already. De Magistris then told him that if he wanted to lay somebody off, to go ahead and do it. Bentley went to Handy and asked if he wanted to take a layoff, mentioning Saratoga. Handy agreed to take a voluntary layoff. Bentley explained that he laid off Handy because he was overstaffed for the amount of work to be done, Handy was part time and historically was laid off before full-time employees, and Handy always wanted a layoff and would probably not object, particularly during the racing season.

Handy was not the only employee laid off on July 27. Six other employees were laid off that day, one, 2 days later, and three the following week. All of the regular full-time employees brought over from Burton Leather were kept. Of those hired since the purchase, some were kept, others laid off.

Only four employees attended the Union's meeting of July 28, Greg Handy, McArthur, Flint, and Ficili. Handy and McArthur were on layoff that day while Flint and Ficili were still employed and continued to be employed thereafter.

Handy testified that after his layoff, he would, upon occasion, happen to meet Wager. On each occasion, he would ask

how the work was going at the mill and when he could anticipate returning. Each time, Handy testified, Wager would reply that Handy should forget about it, that De Magistris had terminated him and was not about to call him back. Wager would say that things had reached the point where he could no longer help Handy, that he could not take Handy's side or support him. Wager, on the other hand, testified that since Handy's layoff, De Magistris has told Wager to recall Handy if he needed him, in effect, denying Handy's testimony concerning recall. I credit Wager.

According to McArthur, he received a call from Jacobson about 2 weeks after his layoff to see if there was going to be a card game. McArthur asked Jacobson how work was over at the mill. Jacobson replied that work had picked up and he was trying to get De Magistris to bring him and Handy back, but De Magistris had said that there was no way he was going to let them come back because they were too involved with the Union.

Jacobson admitted having seen McArthur in August both at the plant and on the street. Once McArthur asked to borrow money. At other times, they did not talk to each other.

After the layoffs of late July and early August, work was sometimes slow at the plant. Employee complement was down to 12 by the week ending August 15, down from 25 during the week ending August 1. The number of workers employed never got back to 25 at any time for the rest of the year.

Of the unit employees working as of August 15, all were full-time employees, unlike Handy, and all had more seniority than McArthur. Although certain new employees were hired after Handy and McArthur were laid off, De Magistris testified credibly concerning the circumstances surrounding their hiring and the reasons why Handy and McArthur were not recalled instead of Respondent hiring new employees. Thus, in some cases, the new hires were specialists doing work that neither Handy nor McArthur could perform. In other cases, De Magistris hired certain people at the behest of customers or to take the place of employees on social security who had worked their limit and who intended to return at a later time.

Taking into consideration the decreased total complement of employees, 2 weeks after McArthur's discharge, as compared to the number employed as of the week ending August 1, and De Magistris' credited testimony as to the reasons for the new hires, I find that Jacobson did not make the statements attributed to him by McArthur, and no violation occurred as alleged.

Throughout September, production continued low. Worker complement was between 13 and 15 and average hours were below 40. At least one employee took a voluntary layoff and obtained employment elsewhere. Three others were given forced layoffs. Business continued to be slow through the end of the year.

On September 16, the charge in Case 3-CA-17350 was filed. It alleged that Respondent refused to recall and reemploy Handy and McArthur because of their membership in and activities on behalf of the Union. I find, however, that Respondent failed to recall Handy and McArthur due to economic considerations. Handy was a part-time employee who was not due for recall until all full-time employees were recalled and McArthur did not have enough seniority to be re-

²⁷ As noted earlier, Valovic had been fired the previous February and was apparently working for another company. The record is unclear on this point.

tomers in, and that was done before the new nonrecall policy was implemented. He did not need a new policy to continue what he had already been doing. Obviously, De Magistris converted the temporary layoffs to permanent layoffs so that he would not longer be obligated to recall employees such as Handy and McArthur who had given testimony against Respondent in the earlier cases. This action, I find to be in violation of Section 8(f)(1) of the NLRA.

The fact that other employees in lay-off status were also adversely affected by the charge in policy is of no significance. Clearly, Respondent could not apply the rule solely against Handy and McArthur because the discriminatory motivation would be too obvious. The rule had to be generally applied to mask the intent. Besides, De Magistris testified that if Respondent felt the need to rehire anyone who had been previously permanently laid off, it could do so. It was free to pick and choose.

With regard to the 8(f)(1) of the NLRA, that after Gregory Handy received his copy of the notice from Respondent, shortly after April 13, 1993, he brought it to the Union and showed it to Towne. The Union had known nothing about the letter. Respondent had not notified the Union of Respondent's intention to change its policy on recall. The change clearly was unilateral in nature and a violation of Section 8(f)(1) of the NLRA. Respondent existed an obligation for Respondent to bargain with the Union. I find that the obligation to bargain did exist. The Union represented a majority of Respondent's employees as of March 31, and Respondent's unlawful activity thereafter clearly had a tendency to undermine that majority; so much so that I find a *Gissel*³⁰ remedy warranted.

When the Union, in June, first began advising unit employees that charges had been filed and that the Board had issued complaints containing allegations that Respondent had discriminated against Handy and others, these unit employees became aware that a line had been drawn between the discriminatees and the Union on one side and Respondent on the other. Similarly, all were aware that Handy and McArthur had been on layoff since July and when Respondent, through its letter of April 13, 1993, converted their temporary layoffs to permanent layoffs, the message must have been clear that anyone who allied himself with the Union against Respondent would likely suffer a similar fate. The effects of Respondent's unlawful conduct, on April 13, 1993, and before, cannot, in my opinion, be erased sufficiently to ensure a fair rerun election. I therefore recommend that a bargaining order issue.³¹

Summary

3-RC-9861

The Challenges

I have found that the challenges to the ballots of Terry Belden, Freddy Beman, and Sheldon Jacobson should be sustained on grounds that they are supervisors under the Act. Similarly, I have found that the challenge to the ballot of

²⁹ *Gary Enterprises*, 300 NLRB 1111 (1990). Respondent, not having advanced any other credible reason for its initiation of the new rule, has not met its *Wright Line* burden.

³⁰ *NLRB v. Gissel Packing Co.* 395 U.S. 595 (1969).

³¹ *Gissel*, supra.

Thomas Varin should be sustained on grounds that he was lawfully permanently laid off.

I have found that the challenge to the ballot of Anthony Valovic III should be overruled and that since it is sufficient to affect the results of the election, it should be counted.

If a majority of the valid votes counted, including the ballot of Anthony Valovic III, is cast for the Petitioner, it is recommended that the Union be certified.

Objections

I have found that Respondent has failed to substantially comply with the *Excelsior* rule and that the omissions thereon warrant the direction of a new election.³²

I have also found that the following conduct, occurring as it did during the period of time between the filing of the petition and the election, is objectionable and likewise warrants the direction of a new election. Greenough's interrogation of Ficili as to what he knew about the Union and his promise to him that things would get better, that he would get insurance and some kind of CD plan if Ficili would give Respondent more time. This conversation occurred on April 24.

In light of the above-described objectionable conduct, I recommend that if the counting of Valovic's ballot results in a majority of votes being cast against the Union, then a bargaining order should issue (see discussion, infra). The Board should determine that a bargaining order is not warranted, the election should be set aside and a new election conducted.

The Unfair Labor Practices

Cases 3-CA-17081, 3-CA-17149, 3-CA-17350, and 3-CA-17789

I have found that Respondent violated Section 8(a)(1) of the NLRA. Wager, in February, interrogating Valovic and giving him the impression that the union activity of Respondent's employees was under surveillance; by Wager, on February 21, again giving employees the impression that their union activity was under surveillance and threatening them with discharge and plant closure if they continued to engage in union activity.

I have further found that Respondent violated Section 8(a)(2) of the NLRA. Respondent's employment of Anthony Valovic III because of his union activities.

I have also found that Respondent violated Section 8(a)(3) of the NLRA. Respondent laid off Alan McArthur and Gregory Handy because they testified at unfair labor practice proceedings before an administrative law judge in previous cases and otherwise engaged in concerted protected, union activities.

Finally, I have found that a *Gissel* remedy is warranted, and that the Union became the collective-bargaining representative of the employees in the appropriate unit described, supra, as of March 31. Consequently, I have also found that Respondent's April 13, 1993 unilateral institution of the practice of eliminating employee recall from layoffs after a period equal to the lesser of service with Respondent

or 6 months, is in violation of Section 8(a)(1) of the NLRA.

³² *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

³³ *Excelsior*, supra.

CONCLUSIONS OF LAW

1. Respondent, Demi's Leather Corp., is an employer engaged in commerce within the meaning of Section 2 of the Act, and

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

3. By interrogating employees about their union activities, giving the impression that their union activities were under surveillance, threatening them with discharge or plant closure if their union activities continued, and promising them benefits if they ceased engaging in union activities, Respondent violated Section 8 of the Act.

4. By terminating employee Anthony Valovic III because of his union activities, Respondent violated Section 8 of the Act and

5. By permanently laying off employees Alan McArthur and Gregory Handy because they engaged in union activities and because they testified at an unfair labor practice hearing before an administrative law judge of the National Labor Relations Board in Cases 3-RC-9861, 3-CA-17081, 3-CA-17149, and 3-CA-17350, Respondent violated Section 8 of the Act.

6. By unilaterally instituting a rule eliminating employees rights to recall from layoffs after a period equal to the lesser of service with Respondent or 6 months, without prior notice to the Union and without first affording the Union the opportunity to bargain with Respondent, Respondent violated Section 8 of the Act.

7. All full-time and regular part-time production and maintenance employees employed by the Employer at its Johnstown, New York location; excluding all office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 of the Act.

8. Since March 31, 1992, a majority of employees of Respondent in the aforesaid unit has designated or selected the Union as its representative for purposes of collective bargaining.

9. By refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the aforesaid unit, Respondent has violated Section 8 of the Act.

10. The challenges to the ballots of Terry Belden, Freddy Beman, Shelden Jacobson, and Thomas Varin are valid and must be sustained.

11. The challenge to the ballot of Anthony Valovic III is invalid and must be overruled.

12. Respondent's failure to substantially comply with the *Excelsior* rule warrants the direction of a new election.

13. Respondent's objectionable conduct, coextensive with its unfair labor practices, occurring during the period between the filing of the petition and the election, warrants the direction of a new election.

14. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8 of the Act,

of the Act, I shall and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, I have found that employee Valovic was terminated because he engaged in union activities in violation of Section 8 of the Act.

Respondent were permanently laid off because they engaged in union activities and gave testimony at a Labor Board hearing, in violation of Section 8 of the Act. I shall also recommend that Respondent be ordered to offer these employees immediate and full reinstatement to their former jobs, with backpay computed from the date of discharge to the date they would have been laid off, to substantially equivalent positions, without

longer exist, to substantially equivalent positions, without making the Act whole for any loss of pay suffered as a result of the discrimination against them with backpay computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isi*. I shall also recommend that Respondent be required to post an appropriate notice.

It shall be further ordered that the Respondent be ordered to remove from its records any references to the discharge of Anthony Valovic III and to provide him with written notice of such removal and the fact that his discharge will not be used as a basis for further personnel actions against him.

Having found that Respondent unilaterally instituted its new recall rule in violation of Section 8 of the Act, I shall recommend and make McArthur and Handy whole for any loss of pay suffered as a result of its implementation, in accordance with the above-described prescription.

Respondent refused to recognize and bargain with the Union in violation of Section 8 of the Act. I shall recommend that it be required to recognize and bargain, upon request, with the Union, and to embody any understanding reached into a signed agreement.

[Recommended Order omitted from publication.]

Alfred M. Narek, Esq., for the General Counsel; Michael P. Mullen, Esq., for the Respondent; P.C. Koemer and Feathers, P.C., of Albany, New York, for the Respondent; William Pozefsky, Esq., of Albany, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. On April 12, 1994, I issued a decision in the above-captioned matter in which it was found that the Respondent had engaged in objectionable conduct and had committed unfair labor practices in violation of Section 8 of the Act. I shall recommend that Respondent be ordered to post an appropriate notice, and a recommended Order.

On April 13, 1995, the Board issued an Order Remanding, consisting of four numbered paragraphs, each paragraph concerned with a separate procedural legal issue. In paragraph one, the Board remanded the Respondent's petition for enforcement of its

with the instructions contained in the remand, I shall address each of the paragraphs separately and in numerical order.¹

The Remand

Paragraph 1 of the remand states:

1. The Respondent excepts to the judge's conclusion that Plant Superintendent Donald Wager violated Section 8

The judge, at page 15 [11]² of his decision, finds that Wager, at a February 21, 1992 meeting, gave employees the impression that their union activity was under surveillance and threatened them with discharge and plant closure if they continued their union activity. This finding seems to be based on employee Anthony Valovic's testimony. The judge, at page 25 [16] of his decision, discusses Wager's and employee Handy's testimony concerning the same meeting. At this point, the judge, incorrectly stating that there was no "corroborative testimony," credits Wager's version over Handy's and finds no violation.

We find that the judge has made internally inconsistent findings regarding the February 21 meeting—i.e., crediting testimony that Wager made at the meeting, but, later, crediting Wager and finding that he made no unlawful statements at the meeting. Moreover, when he credits Wager, the judge bases his finding on the failure of any witness to corroborate Handy's testimony—although the record shows that Valovic testified similarly to the same incident.

Because we cannot reconcile the judge's findings, we shall remand this proceeding for the judge to explain or reconsider his credibility findings and resolution of this

The Meeting of February 21, 1992

Testimony

With regard to the meeting in question, Valovic offered the following testimony:

Q. Now, directing your attention to on or about February 21, 1992, did you have occasion to hear remarks made by Mr. Wager?

A. Yes. It was right around break time he had just been in a meeting in the office with Mike De Magistris, and I would imagine Barry was there, too.

A. Donny came into the break room, said I need to talk to you guys. Just about everybody that was working there was present at the time. He sat down, and he said, we heard that there's some union talk going on. He said that Mike wasn't happy with the talk that there was union going to be coming. He didn't want the Union. That if we kept up with union talk, that he

¹Throughout this Supplemental Decision, references to the transcript are designated by "Tr." followed by the page number and references to the exhibits of counsel for the General Counsel and the Respondent are designated by "G.C. Exh." and "R. Exh.," respectively, followed by the exhibit number. References to the original decision are designated "JD" followed by the page number.

²See also JD 44 [26-27].

was—he would fire us all or shut the mill down and start over or just, you know, get rid of us one by one. He just wanted us to give him more time to get financially sound, to get him the chance to give the benefits that he promised. [Tr. 128-129.]

Wager testified with regard to the subject here under consideration that he had a meeting with the employees probably that he called the meeting because of tension in the mill brought about by the fact that the owners of the Company, De Magistris and Greenough and some of their relations were coming in on the weekends, and working Saturdays and Sundays doing the work ordinarily done by Respondent's employees. This resulted in the rank-and-file employees not getting their full 40 hours of work per week and a great deal of dissatisfaction. By calling the meeting, Wager hoped to "set the people straight . . . and just calm them down."

Wager testified that he invited several employees whom he "really knew," including Valovic and Handy, to the 9 a.m. meeting in the breakroom. Wager, he first discussed with the employees present, the complaint and promised to speak to the owners and "straighten things out so people would get their hours."

At this point, according to Wager, employee Steve Beck suggested that maybe the employees "should get a union in here" and he, Wager, replied,

I just said, you know, its up to you guys. I go, this is America and if you want a union, you want a union. If you don't, you don't, but as far as I'm concerned, unions are good as far as getting benefits and, you know, things like that, but—even pay increases, but I said as far as sticking up for good workers, they don't. They stick up for the bad workers. [Tr. 1143.]

Wager explained that in discussing unions at this meeting, he had Local 1712 in mind, a local with which he had some connection at a previous place of employment. He mentioned a case involving an employee named Ronnie Hart who had worked for Independent when both he and Handy were working there. Hart, according to Wager, was written up because of some incident that had occurred and was given a pink slip. Apparently, a grievance was filed but was mishandled by the union representative and Hart lost his case. why he felt unions were ineffectual, Wager testified that both he and Handy were in agreement that the Union did not operate effectively at Independent. He stated that Handy demonstrated at this meeting that he, himself, was against unions by pointing out, in agreement with Wager, that the Union "didn't even stick up for Ronnie."

On cross-examination, Wager was asked if during the period of tension immediately before the meeting was called, the subject of changes and whether the desire for increased benefits was a part of the tension that caused him to call the meeting. Wager denied that anyone asked increased benefits prior to the meeting or that the desire for

increased benefits contributed to the tension which gave rise to his calling the meeting. He stated that he did not think that anyone brought up the subject of increased benefits at the meeting. I credit this position of Wager's testimony.

Wager testified that the meeting lasted 15 minutes and that Valovic left halfway through to unload a truck.

Handy offered the following testimony:

Q. Directing your attention to again another date towards the end of February, did you hear remarks made by Mr. Wager?

A. Yes, I did.

Q. Where was this?

A. The men's coffee room and dressing room.

Q. What time?

A. Approximately 9 a.m.

Q. Was anyone else present?

A. About eight to ten employees present, other than myself. Among them, Steve Beck, Ernie Bentley, Tony Valovic. It's about all I can put actually names on faces. We were in the midst of our morning coffee break, just shooting the breeze.

Donny walked in, guys, I've got to talk with you. He says, Greg, you've been after me about a meeting between the employees, including yourself and Mike, concerning benefits. Mike has heard some union talk around the shop, that maybe the Union is the best way to go to get these things. You've just got to stop this. If you guys want a job, you want to protect your job security, your future here and try to get anything at all, you've got to shut your mouth about the Union around Mike. He's in the office now blowing his stack, telling me that I have to come out here and tell you guys that if a union vote is affirmative, he will close the doors, lock the doors, was the exact words he used, terminate every part of a union body that remains in this place, namely, the workers that he knows support the union when he finds it out. And at the same time, if worst came to worst, worst-case scenario, he would close the shop, entirely, change its name and go into another business to prevent the union being part of Demi Leather. And he indicated that Donny told me at the time, he says, Greg, you have previous experience with the union in a union shop, and Mike is saying to me, silence you, or your job and everybody that's associated with you in this union activity and union feelings go with you. And you don't want to lose 27 years just because the union is the right way to go.

And he went back downstairs, and we finished our break. In fact, I don't think we had any break left. [Tr. 336-338.]

.....

Q. Prior to these remarks by Mr. Wager, what if any, discussion concerning a union had you observed in the Plant?

A. I had not observed union activity as such. Different—various employees, Mr. Steve Beck, Mr. Ernie Bentley, to name two prominent people, had come to me and asked me to go along with them in supporting—trying to get a union vote and organize a union shop. And to formulate some ideas and more or less take over

leadership along with them in getting the Union vote obtained. [Tr. 339.]

Findings

With regard to the meeting of February 21, 1992, I made the following findings:

On or about February 21, De Magistris had a meeting with Wager and possibly with Greenough. After the meeting, Wager went into the break room where all of the employees had gathered. Wager sat down and said that they (fMDBUfl*ERR17*fMDNMflmanagement)fMDBUfl*ERR17*fMDNMfl union talk going on, that Mike was not happy with the talk that there would be a union coming in. He said that Mike did not want a union and that if the employees kept up the Union talk, he would fire them all or would shut down the mill and start over, or would just get rid of them one by one. Wager said that De Magistris just wanted the employees to give him more time to get financially sound so that he could eventually give them the benefits he had promised them. [JD 15 [11].]

A comparison of my findings (fMDBUfl*ERR17*fMDNMflJD 15 [11])fMDBUfl*ERR17*fMDNMfl testimony (fMDBUfl*ERR17*fMDNMflTr. 128-129)fMDBUfl*ERR17*fMDNMfl Valovic's testimony to conclude that Wager engaged in the 8(fMDBUfl*ERR17*fMDNMfla)fMDBUfl*ERR17*fMDNMfl(fMDBUfl*ERR17*fMDNMfl) union talk in both is virtually identical.

The reasons I chose to credit Valovic's testimony are several. First of all, as stated in my original decision (fMDBUfl*ERR17*fMDNMfl[6])fMDBUfl*ERR17*fMDNMfl, my findings of fact were based, among other things, on my observation of the demeanor of the witnesses including that of Anthony Valovic who gave me no reason to doubt his veracity.

Secondly, the subject matter of "union talk" was a likely subject for Wager to have discussed at the meeting because as I stated in my original decision:

Valovic testified that while still employed at Demi's, he had openly discussed with other employees, Steve Beck and Greg Handy in particular, the benefits of unionization. These discussions were based on his membership in the Union at the Independent Leather Company and took place openly, right on the floor at Demi's. Valovic credibly testified that he tried through such conversations to organize the employees at the mill. I find that it was just such conversations which gave rise to Wager's meeting with the employees, described above, during which he threatened them with discharge if they continued their union talk. [JD 16 [12].]

Thirdly, Wager never testified concerning the alleged 8(fMDBUfl*ERR17*fMDNMfla)fMDBUfl*ERR17*fMDNMfl(fMDBUfl*ERR17*fMDNMfl) union talk on the stand to describe what had occurred at the meeting and although he testified as to some of what he and others present did say, he was not asked to deny and did not deny making the 8(fMDBUfl*ERR17*fMDNMfla)fMDBUfl*ERR17*fMDNMfl(fMDBUfl*ERR17*fMDNMfl) union talk. I find that had Wager been asked, he could not have honestly denied and therefore would have admitted the statements attributed to him by Valovic.

The record is clear that Wager did not deny Valovic's account of what was said by him at the February 21 meeting. However, neither did Valovic deny Wager's description of

the meeting. Indeed, the two witnesses could have been describing different meetings but in the absence of evidence to the contrary, I find that there was just one meeting and that the testimony of both Valovic and Wager was accurate, as far as it went, and should be regarded as supplementary rather than contradictory, contrary, or even complementary.

The Remand-Analysis

The first relevant sentence of numbered paragraph 1 of the remand states:

The judge, at page 15 [11] of his decision, finds that Wager, at a February 21, 1992 meeting, gave employees the impression that their union activity was under surveillance and threatened them with discharge and plant closure if they continued their union activity. The finding seems to be based on employee Anthony Valovic's testimony.

It is true that I made the findings based on Valovic's testimony were included in my conclusions of law. The only question is, why did it only "seem" to the Board that my findings and conclusions were based on Valovic's testimony when the language of both was virtually identical. It should have been obvious.

The Remand continues:

The judge, at page 25 [16-17] of his decision, discusses Wager's and employee Handy's testimony concerning the same meeting.

This is true. On the same page, however, I quoted all of Handy's testimony verbatim in order to indicate to the reader of the decision that it had not been overlooked but had been considered. Handy's testimony concerning the February 21 meeting was also included in its entirety in order to reveal as clearly as possible that it contained testimony which was both consistent and inconsistent with the testimony of other witnesses.

After carefully analyzing Handy's testimony, I decided not to rely on it for the purpose of corroborating Valovic's testimony because it was flawed. Inasmuch as I had already determined that Valovic's testimony was credible, that Wager never denied making the statements attributed to him by Valovic, and the statements were clearly violative of the Act, I use Handy's very questionable testimony to support Valovic. There was no reason to saddle Valovic's testimony with the disinformation, hyperbole, and anachronisms contained in the testimony of Handy about the February 21 meeting. To do so would unnecessarily cast doubt on Valovic's testimony because of inconsistencies made apparent by a comparison of the testimony of these two witnesses.

In support of my determination that Handy's testimony should not be used to support Valovic's version because of its inherent unreliability, I will analyze Handy's testimony here and point out its flaws:³

³See fn. 12 for my original evaluation of Handy's testimony in general.

Handy testified that after Wager walked into the room and told the 8 or 10 employees present that he had to talk with them he immediately turned to Handy and said:

Greg, you've been after me about a meeting between the employees, including yourself and Mike, concerning benefits.

This description of the opening of the meeting could be significant evidence if credited, particularly in proving the allegation concerning the discriminatory termination of Handy. If credited, it would indicate that Handy had been pressing Wager for a meeting with De Magistris to obtain increased benefits for the employees, that Wager was acknowledging having been the target of such pressure and that the meeting had been called as a result of Handy's efforts to address the subject of increased benefits.

Inasmuch as this portion of Handy's testimony is of significance in proving Handy's case of discriminatorily motivated termination, it should have been thoroughly investigated. A thorough initial investigation of the case should have included interviews of each of the individuals present at the meeting by the field examiner or attorney assigned to the case with the specific question asked, "Did Wager make this statement?"⁴ If the information contained in this piece of Handy's testimony did not come to the attention of counsel for the General Counsel until he was assigned the case for trial, it was incumbent on him to conduct an investigation himself or through assistance asking the above question of each of the individuals present at the meeting.

I have no reason to believe that the Region did not conduct a thorough, competent, and professional investigation in order to find some support for the portion of Handy's testimony here under discussion. Unfortunately, once again,⁵ not one of the 8-10 employees present corroborated Handy's testimony that Wager made the statement. Not even Valovic, an alleged 8-point, though he had much to gain by doing so.

Without corroboration, that leaves Handy's accusation standing alone against Wager's denial. Whereas Handy's statement indicates through implication that Wager called the meeting at Handy's behest to discuss promised increased benefits, Wager's testimony was that the meeting was called to discuss employee tension brought about by dissatisfaction with the fact that management was doing the employee's work on weekends.

Inasmuch as Wager did not deny making the statements that I have found violative of Section 8, there was no necessary reason for calling the meeting in the first place was of little consequence to Wager or to the Respondent. On the other hand, if Handy could show that the meeting at which the 8-point activities, it would support his own case.

Further, if as Handy implied, the meeting was arranged to discuss benefits, why was De Magistris not invited since he, not Wager, was the only one who had the authority to grant increased benefits.

⁴I conducted and supervised such investigations as a trial attorney and supervising attorney in the Regions from 1959 to 1975. They numbered in the thousands.

⁵See JD 7, fn. 12.

I find that the statement that Handy attributed to Wager, i.e.:

Greg, you've been after me about a meeting between the employees, including yourself and Mike, concerning benefits.

was more disinformation injected into the record for the purpose of impressing upon the administrative law judge, the Board and everyone else that he was a key figure throughout the union campaign. The injection of this disinformation was not just to support his case as an alleged discriminatee but to draw attention to himself and enhance his role in an ongoing campaign of self-aggrandizement.

According to Handy's directly quoted testimony (fiMDBUfl*ERR17*fiMDNMfJD 16)fiMDBUfl*ERR17*fiMDNMfJD 16) Wager continued:

Mike has heard some union talk around the shop, that maybe the Union is the best way to go to get these things. You've just got to stop this. If you guys want a job, you want to protect your job security, your future here and try to get anything at all, you've got to shut your mouth about the union around Mike.

A comparison of this portion of Handy's testimony with that of Valovic shows certain similarities, namely that both attribute to Wager's statements that De Magistris was aware that there had been union talk going on and that he was unhappy about it. However, whereas Valovic's testimony is factual, concise, and credible, Handy's reads like a stream of consciousness.

Handy continued (fiMDBUfl*ERR17*fiMDNMfJD 16)fiMDBUfl*ERR17*fiMDNMfJD 16) Wager said:

He's in the office now blowing his stack, telling me that I have to come out here and tell you guys that if a union vote is affirmative, he will close the doors, lock the doors, was the exact words used, terminate every part of a union body when he finds out. And at the same time, if worst came to worst, a worst-case scenario, he would close the shop, entirely, change its name and go into another business to prevent the Union being part of Demi Leather.

With regard to Handy's reference to De Magistris blowing his stack and telling Wager to go out and threaten the employees, I found initially that the statement was not credible because it was not supported by any of the 8 or 10 employees present nor by Valovic who made no reference to it. Valovic certainly would have been helped with his own discriminatory discharge case by attesting to the truth of this portion of Handy's testimony but did not do so. I find he did not do so because the statement was never made.

Wager denied that he was instructed by De Magistris or anyone else to call the meeting (fiMDBUfl*ERR17*fiMDNMfJD 16)fiMDBUfl*ERR17*fiMDNMfJD 16) and De Magistris denied instructing Wager to make threatening statements on his behalf. (fiMDBUfl*ERR17*fiMDNMfJD 16.)fiMDBUfl*ERR17*fiMDNMfJD 16) In light of Wager's credited denial, Handy's reference to De Magistris' part in setting up the meeting was another flight of fancy on Handy's part introduced testimonially as disinformation for the purpose of supporting his own case and the cause he espoused.

Although the threats attributed to Wager by Valovic and Handy are quite similar and, at first blush, appear to be the

basis for corroboration, there are glaring inconsistencies in the testimony of each that rule out mutual corroboration. Thus, whereas Valovic testified as to threats involving plant closure and other dire consequences if the employees kept up with the union talk, Handy testified to similar threats if a union vote were affirmative.

Since union talk was going on as of February 21 and before and since management was aware of such talk, it is indeed credible that such threats as Valovic described might well follow. And I have found that they did. However, as of February 21 not a single employee of Respondent had even signed a union card. The first cards were signed on March 30, the petition was filed April 1 and the consent agreement providing for an election was not signed until April 14. I concluded that the threat described by Handy to those the plant in the event of an affirmative union vote was anachronistic to the February 21 meeting and should not be relied upon as corroborative of Valovic's testimony.

Handy's testimony concerning the meeting concluded with Wager allegedly saying:

Greg, you have previous experience with the Union in a union shop, and Mike is saying to me, silence you, or your job and everybody that's associated with you in this union activity and union feelings go with you. And you don't want to lose 27 years just because you feel the Union is the right way to go.

Once again, I find that Handy's uncorroborated rambling account of this threat personally targeting him as the leader of the union activity was designed to support the allegation of ER 17's MNM testimony that Wager said up out of whole cloth with no basis in fact.

Paragraph 1 of the remand continues:

At this point, the judge, incorrectly stating that there was no "corroborative testimony," credits Wager's version over Handy's and finds no violation.

Keeping in mind that the findings of fact concerning the meeting of February 21 (fiMDBUfl*ERR17*fiMDNMfJD 11)fiMDBUfl*ERR17*fiMDNMfJD 11) credited testimony of Valovic (fiMDBUfl*ERR17*fiMDNMfJD 128-129)fiMDBUfl*ERR17*fiMDNMfJD 128-129) conclusions of law (fiMDBUfl*ERR17*fiMDNMfJD 27)fiMDBUfl*ERR17*fiMDNMfJD 27) appear anywhere on page 16 of my original decision, the Board's apparent application of the corroboration discussion to his testimony is in error. I did not "incorrectly state that there was no corroborative testimony" with regard to the meeting of February 21. Rather, I correctly stated that no one was called by the General Counsel to support Handy's testimony over Wager's testimony where there was a conflict between these two witnesses and no one was called by Respondent to support Wager's testimony over Handy's testimony where there was a conflict. I stand by my statement (fiMDBUfl*ERR17*fiMDNMfJD 16)fiMDBUfl*ERR17*fiMDNMfJD 16) and De Magistris' testimonial admissions unnecessarily left me with a one-on-one credibility decision to make. I made that credibility decision of where there was a conflict in their testimony and for reasons discussed at length above, credited Wager over Handy.

In the third part of numbered paragraph 1 the remand states:

We find that the judge has made internally inconsistent findings regarding the February 21 meeting—i.e.,

3. The Respondent excepts to the judge's finding that, on April 24, the Respondent's co-owner and agent, Barry Greenough, interrogated employee Michael Ficili about union activity and promised him that things would get better in the future.

Ficili testified that he worked on April 24 and the conversation occurred when he went to the office to pick up his paycheck. In crediting Ficili, the judge does not acknowledge that the Respondent's testimony and documentary evidence conflicts with Ficili's testimony. The Respondent submitted documentary evidence indicating that Ficili did not work on Friday, April 24, or any other day that week. Moreover, Greenough's testimony, which, although not a specific denial, could be considered a denial that he interrogated Ficili or made promises. We shall therefore remand this proceeding for the judge to address the conflicting evidence and to reconsider his credibility finding.

The Events of April 24, 1992

Testimony

When I saw and heard Michael Ficili testify, I was impressed with his demeanor as a witness, his straightforward delivery and his attempt to keep the record straight. Indeed, when counsel for the General Counsel inadvertently and mistakenly supplied April 17, 1992 as the date of his conversation with Greenough, which is the subject of numbered paragraph 3 of the remand, Ficili took pains to correct the record to state that the conversation occurred on the Friday before the election which was April 24. Nothing has occurred between the time I heard Ficili testify over 2 years ago and the present to diminish my appreciation of his credibility. I have not seen Ficili since he was on the stand and inasmuch as I doubt that any of the Board's members or their staff have ever met him, I would hope that they would rely on my credibility findings at least to the extent that they are based on outward manifestations.

I also based my credibility findings on the content of Ficili's testimony. He described his conversation with Greenough in great detail and with particularity and attention to the subject matter discussed. Thus, Ficili described how he happened to be on the premises and how the conversation between Greenough and himself had arisen. He explained that he had a payroll check coming and had come to Respondent's facility for the express purpose of picking up this check. He had not made any arrangements in advance and intended to pick up the check from anyone who happened to be there. He testified, most convincingly, that he considered waiting until Monday to go to the plant to get his check but "needed the money." (fiMDBUfl*ERR17*fiMDNMflTr. 258, 269.)fiMDBUfl*ERR17*fiMDNMfl This testimony, of significant for two reasons. First, Ficili implicitly, if not explicitly, stated that he did not work for Respondent that day and was not even at the plant earlier that day, otherwise he would have gone to the office and picked up his check during business hours. Second, he stated that he had a perfectly credible reason for visiting the plant that evening, i.e., Respondent owed him a check, he needed the money so he came to the plant to get it. This testimony establishes the basis upon which the meeting between Greenough and Ficili could have and did, in fact, take place at the time it did. Ficili had just gotten off work at his second employer (fiMDBUfl*ERR17*fiMDNMflTr. 269.)fiMDBUfl*ERR17*fiMDNMfl

Respondent)fiMDBUfl*ERR17*fiMDNMfl (fiMDBUfl*ERR17*fiMDNMflTr. 269.)fiMDBUfl*ERR17*fiMDNMfl his daytime employer, Niagara Mohawk at 4 p.m. (fiMDBUfl*ERR17*fiMDNMflTr. 269.)fiMDBUfl*ERR17*fiMDNMfl 60)fiMDBUfl*ERR17*fiMDNMfl and had come over to Respondent's plant from

When Ficili arrived at the plant it was after 5 p.m. but before 7 p.m. The office staff had apparently left for the day and Greenough was the only person there from whom Ficili could request his check. (fiMDBUfl*ERR17*fiMDNMflTr. 269.)fiMDBUfl*ERR17*fiMDNMfl into the office to get his check. (fiMDBUfl*ERR17*fiMDNMflTr. 258.)fiMDBUfl*ERR17*fiMDNMfl

According to Ficili's credited testimony, Greenough just started talking. He wanted to know if Ficili had heard anything about the Union or knew of any employees who were trying to start the Union. Ficili replied in the negative and added that he did not know anybody so involved. Greenough then asked Ficili if he knew what the Union does for employees. Ficili replied that he did not, then explained that he was new to the subject. Ficili testified that he answered Greenough's questions the way he did because he was aware of what was going on but "was scared." (fiMDBUfl*ERR17*fiMDNMflTr. 258.)fiMDBUfl*ERR17*fiMDNMfl

Inasmuch as it was then Friday evening and the election was scheduled for the following Monday morning, it is understandable why Greenough would take this opportunity to discuss unionization and its consequences with Ficili. He told Ficili that employees who join a union must pay union dues but then the Union does not do anything for them and is not there when the employees need them. (fiMDBUfl*ERR17*fiMDNMflTr. 258, 270.)fiMDBUfl*ERR17*fiMDNMfl

Greenough also told Ficili that he and De Magistris needed more time and promised that things would work out and would get better. He said that they were just in the process of forming the business and that they would take care of insurance for the employees and similar matters later. Explaining further, Greenough advised Ficili that what he wanted to do was to get some kind of money market, a CD plan, or something like it, to which everybody would initially contribute, then later withdraw money. Ficili admitted that he did not fully understand what Greenough was talking about, but then again did not really care. (fiMDBUfl*ERR17*fiMDNMflTr. 258, 270.)fiMDBUfl*ERR17*fiMDNMfl

Ficili testified that the meeting with Greenough lasted between 45 minutes and an hour and that although he and Greenough were alone in the office while the conversation was going on there were people outside the office. In one of those marvelous instances where the addition of a non-essential detail to testimony can flesh out a description of an event to make it credible, Ficili noted that while his conversation with Greenough was going on, Greenough's son was just outside the office, waiting to get his jacket out of the office. (fiMDBUfl*ERR17*fiMDNMflTr. 268.)fiMDBUfl*ERR17*fiMDNMfl

Greenough also testified concerning the events of April 24. (fiMDBUfl*ERR17*fiMDNMflTr. 1061-1063, 1067-1068, 1097-1100.)fiMDBUfl*ERR17*fiMDNMfl testimony concerned matters not in dispute such as his work- (fiMDBUfl*ERR17*fiMDNMflTr. 1062, R. Exh. 60, Tr. 1097-1100.)fiMDBUfl*ERR17*fiMDNMfl These hours, Greenough testified that between 7:30 a.m. and 11 a.m. he worked in the office of Mohawk doing paperwork because of inclement weather. At 11 a.m. Greenough and his supervisor left the office to work on station valves and other equipment in the Gloversville area. (fiMDBUfl*ERR17*fiMDNMflTr. 1062, Tr. 1097-1100.)fiMDBUfl*ERR17*fiMDNMfl All of Greenough's testimony the events of April 24 followed the conclusion of Ficili's testimony on the subject. Yet, whereas Ficili pinpointed the time of his conversation with Greenough as occurring in the (fiMDBUfl*ERR17*fiMDNMflTr. 269.)fiMDBUfl*ERR17*fiMDNMfl 7 p.m. most of Greenough's testi-

Thus, when the question of whether Ficili had worked that day was asked, it had already been established through direct examination and earlier cross-examination that Ficili had come to the Plant to get a payroll check which Respondent owed him. The cross-examination centered around why Ficili was there to pick up his check at that particular time, i.e., after hours:

Q. Who were you picking the check up from?

A. Anybody that was there. At the time, it was Barry.

Q. Was this a payroll check?

A. Yes.

Q. Do you recall what time of day?

A. Late afternoon.

Q. Do you have any recollection of approximately what time?

A. Before 7 and after 5, that's all I can say.

Q. Had you been instructed to come to the office to pick up the check?

A. No. I was going to wait until Monday, but I needed the money.

Q. What day is pay day?

A. Friday.

Then:

Q. Had you worked that day?

A. Yes.

Clearly, the line of questioning had nothing to do with Ficili working for Respondent that day. Respondent's attorney conducting the cross-examination knew full well that Ficili had not worked for Respondent for over 2 weeks. He had the records. De Magistris, sitting next to Counsel for Respondent, at the same table 10 feet from the witness, Ficili, who was testifying, knew it. Ficili, himself, knew it. Of course Ficili did not look De Magistris straight in the eye and lie by stating he had worked for Respondent that day. Moreover, Ficili had already testified that he had come down to the plant to get his paycheck, thus implicitly indicating he had not been working there for Respondent that day. Had he been at Respondent's facility earlier that day, either to work, or for any reason, he could have picked up his check during business hours and saved himself the after-hours trip.

It seems clear that when Respondent's counsel asked Ficili, "Had you worked that day?," he was asking Ficili if he had worked that day for another employer. When Ficili replied that he had, indeed, worked that day, it established a reason for his showing up at Respondent's facility after business hours, at a time when Greenough could have been and, in fact, was there. If Ficili had replied that he had not been working that day, Respondent's counsel may well have pursued the line of questioning by asking why he had not come to the plant earlier to pick up his check during business hours, hoping thereby, perhaps, to get Ficili to admit that he had come earlier in the day at a time when Greenough could account for his whereabouts. At any rate, when Ficili replied that he had been working that day, Respondent's counsel, satisfied with the answer as to why he did not come to get his check until after 5 p.m., quietly moved on to a new, though related line of questioning. There was no outburst, no accusation that Ficili was lying about working that day for

Respondent. That fiction was not invented until long after the close of the hearing.

The third sentence of numbered paragraph 3 states:

In crediting Ficili, the judge does not acknowledge that the Respondent's testimony and documentary evidence conflicts with Ficili's testimony.

With regard to this statement, I agree that in my original decision, I found Ficili's description of the events of April 24, 1992 convincing and credible. (fiMDBUfl*ERR17*fiMDNMflJD 20.)fiMDE during the conversation between Greenough and Ficili on that date, Greenough did make the statements attributed to him by Ficili and that they were both objectionable and violative of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR17*fiMDNM

With regard to the portion of the statement that says the judge does not acknowledge that the Respondent's testimony conflicts with Ficili's testimony, I have, in this Supplemental Decision, quoted all of the relevant testimony presented by Respondent. That consists of three statements by Greenough: one that he could not recall what he was doing on April 24, 1992 (fiMDBUfl*ERR17*fiMDNMflTr. 1061)fiMDBUfl*ERR17*fiMDNMfl, a s not at the Demi mill on April 24, 1992 (fiMDBUfl*ERR17*fiMDNMflTr. 10 third statement to the effect that he could not recall if he was at the Demi mill the evening of April 24, 1992. If these are the conflicts in testimony to which the Remand refers, I hasten to acknowledge their existence. If, on the other hand, the Board is referring to one or more of the questions and answers listed above, which reflects Respondent's counsel's examination of Greenough wherein Greenough testified that he could not recall anything at all, I hereby acknowledge the existence of these conflicts as well.

With regard to the portion of the statement that states that the judge does not acknowledge that the Respondent's documentary evidence conflicts with Ficili's testimony, I did not, indeed, acknowledge any conflict between Respondent's documentary evidence and Ficili's testimony, and still do not because there is none. Ficili testified that he worked that day, meaning for an employer other than Respondent, and Respondent's documentary evidence clearly indicates that Ficili had not worked for Respondent since Friday, April 11, 1992, for 2 hours. No conflict exists.

Ficili's work history indicates that he was a hard worker and worked whenever he could. Of the 24 weeks that he was actively on Respondent's payroll, (fiMDBUfl*ERR17*fiMDNMflweeks ending through September 5, 1992)fiMDBUfl*ERR17*fiMDNMfl, Ficili worked over those weeks. When other employees took vacation in July, Ficili worked. (fiMDBUfl*ERR17*fiMDNMflTr. 294.)fiMDBUfl*ERR17*fiMDNber when Ficili could not get sufficient hours with Respondent (fiMDBUfl*ERR17*fiMDNMflsee time cards)fiMDBUfl*ERR17*fiMDNMfl could go to work for another employer with whom he had already obtained another job. (fiMDBUfl*ERR17*fiMDNMflTr. 265.)fiMDBUfl Ficili was laid off for over two weeks, it is in keeping with his work ethic, that he should find interim employment. The fact that he found interim employment in September does not necessarily prove he did so the previous April while in lay-off status, but does support the record in such a finding.

Though I refuse to acknowledge any conflict between Ficili's testimony and Respondent's documentary evidence, I do acknowledge a conflict between the Board's findings of fact with regard to the incident of April 24 and my own. Inasmuch as I have found, and explained why I have found,

my reading of the record more accurate than that of the Board's staff, I shall continue to maintain my position with regard to this matter. If my explanation is sufficient to convince the Board that my findings of fact are accurate and support my conclusions of law, I urge the Board to affirm my decision and adopt my recommended Order. If, on the other hand, the Board concludes that my findings of fact and conclusions of law are in error, it, of course, has the authority to reverse my decision in whole or in part. I urge it to do so, if that is its will. However, as I am satisfied that my credibility findings are well supported by the record and that there is no conflicting evidence to warrant reconsideration of them, I shall maintain my position with regard to each of them.

Paragraph 4 of the Remand states:

4. In light of the unlawful activity he found, the judge concluded that a *Gissel* bargaining order was appropriate. Given the above reasons for remanding this proceeding, we shall further instruct the judge to elabo-

rate in his supplemental decision why a bargaining order is necessary to remedy the effects of the unlawful conduct he finds.

Inasmuch as I have opted to explain the reasons for the findings of fact, conclusions of law, and credibility findings contained in my original decision and maintain my position with regard to each, rather than make changes in them, as suggested in the Remand; and inasmuch as the *Gissel* remedy I recommended was based on my original findings of fact and conclusions of law which remain unchanged, I find no reason for further elaboration on the reasons given in the original decision why a *Gissel* remedy is appropriate. For the specific reasons stated in the original decision, I find a *Gissel* remedy is warranted.

Based on the above explanation, it is hereby requested that the findings of fact, including my credibility findings, and the conclusions of law contained in my original decision be adopted and the decision be affirmed.

Dated, Washington, D.C. May 9, 1995